No. 21-51178

In the United States Court of Appeals
for the
Fifth Circuit

NetChoice, L.L.C., a 501(c)(6) District of Columbia organization doing business as NetChoice; Computer & Communications Industry Association, a 501(c)(6) non-stock Virginia Corporation doing business as CCIA,
Plaintiffs-Appellees,

v.

Ken Paxton,
in his official capacity as Attorney General of Texas,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
Civil Action No. 1:21-cv-00840-RP

AMICI CURIAE
CENTER FOR RENEWING AMERICA, INC. &
THE CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT OF IDENTITY AND INTEREST AND CORPORATE DISCLOSURES, AND

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26.1, 29 and 32 and this Court's local rules, *Amici* provide this Statement of Identity and Interest and Corporate Disclosure, and Supplemental Certificate of Interested Persons.

All parties have consented to the filing of this brief. No party's counsel authored any portion of this brief, and no person other than *amici* made a monetary contribution to its preparation and submission. This brief is being filed within 7 days after March 2, 2022, the date of filing of Defendant-Appellant's principal brief.

Pursuant to Local Rule 28.2.1, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. *Amicus Curiae* Center for Renewing America, Inc.
2. *Amicus Curiae* The Claremont Institute's Center for Constitutional Jurisprudence.

Amicus Curiae Center for Renewing America, Inc. is a non-profit corporation organized exclusively for charitable, religious, educational, and scientific purposes under section 501(c)(3) of the Internal Revenue Code. Center for Renewing America, Inc. has no parent corporation, and there is no publicly held corporation

that owns 10% or more of its stock (Rule 26.1). The Center for Renewing America, Inc. works to renew a consensus of America as a nation under God with unique interests worthy of defending that flow from its people, institutions, and history, where individuals' enjoyment of freedom is predicated on just laws and healthy communities. It expresses its views on behalf of Texans, and all Americans, who seek to further these interests on social media platforms without discrimination or unequal treatment.

Amicus Curiae Center for Constitutional Jurisprudence is a project of The Claremont Institute, a non-profit educational foundation which has no parent companies, subsidiaries, or affiliates that have issued shares to the public (Rule 26.1). The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The Center has previously appeared as *amicus curiae* in related litigation addressing issues concerning common carrier status and the ability of states to further free speech protections.

The Center for Renewing America and Center for Constitutional Jurisprudence argue that the Big Tech platforms limit access to this square, frequently discriminating against certain viewpoints. This discrimination's damage to the public square is indisputably consequential. For example, due to Big Tech's

viewpoint discrimination, many voters did not learn about the Hunter Biden laptop story during the 2020 presidential campaign. Information about the origins of the COVID pandemic was limited at the height of public debates about the virus, and vital discussions about effective treatments among clinicians were stifled. The viewpoints of those who believe in the importance of biological sex in deciding who is a man or a woman, as well as those who dare question the supposed climate science consensus, are routinely suppressed by the tech giants.

Respectfully submitted,

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Because Plaintiffs have a minimal likelihood to succeed on the merits, the preliminary injunction cannot be sustained.

The First Amendment applies differently to speakers than to hosts or conduits of speech. While government forcing a person or group to speak or identify with a particular message raises First Amendment concerns, the Constitution allows government to regulate the terms under which entities host or transmit others' speech.

For centuries, courts have required common carriers and actors in industries affected with the public interest to treat customers without discrimination. *See* 13 AM. JUR. 2D *Carriers* § 250 (February 2020 update). As recent examples, the Supreme Court upheld carriage requirements on cable systems in *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 668 (1994), and upheld requirements that privately owned shopping centers allow free speech on their premises in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980). HB 20's protection of Texans against social media's viewpoint discrimination falls within this general rule, which encompasses regulation of businesses that host or transmit messages.

In ruling HB 20 unconstitutional, the lower court erred by relying on exceptions to this general rule. In *Hurley* and *Tornillo*, the Supreme Court stated that strict scrutiny may apply when a law requires an entity to host others' speech

in a way that forces that entity to express others' speech as its own message, as in a parade or newspaper. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557 (1995); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). But when cable systems carry television channels, law schools host employment recruiters, or telephone or telegraph companies transmit speech, they are not putting forth their own messages. The same is true of social media firms carrying billions of their users' communications. No observer sees at one time platforms' discriminatory acts of censorship in violation of HB 20, and if someone could, these acts would be meaningless without social media's speech about them. The First Amendment protects the speech, not the discrimination. *See Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47 (2006).

In rejecting Texas's classification of social media as common carriers, without analysis or citation to relevant authority, the lower court ignores two centuries of precedent. The court invents a criterion for common carrier status that excludes firms claiming to "exercis[e] editorial discretion." (Op. at 11). Just as common carrier authority allows imposition of non-discrimination requirements on telephones and the so-called network neutrality internet regulations, so it allows HB's 20 milder non-discrimination requirements.

In rejecting HB 20's disclosure requirements, the lower court failed to mention *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the

controlling Supreme Court precedent, under which HB 20's disclosure requirement is constitutional. Instead, the court relied on off-point non-precedential cases.

I. HB 20's Prohibition Against Viewpoint Discrimination Comports with the First Amendment

HB 20 bans discrimination in hosting Internet content, just as myriad state and federal laws prohibit discrimination in public accommodations, employment, education, and voting—and common carrier laws require telephones to serve all customers. HB 20's requirements are valid against First Amendment challenge, as are other anti-discrimination laws. *See Roberts v. United States Jaycees*, 468 U.S. 609, 628–629 (1984) (rejecting First Amendment challenge to civil rights' laws nondiscrimination requirement); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rejecting law firm's First Amendment challenge to sex discrimination law's prohibitions in its partnership decisions); *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam) (rejecting business owner's First Amendment challenge to the Civil Rights Act's bar on racial discrimination in public accommodations); *United States Telecom Ass'n v. F.C.C.*, 855 F.3d 381, 388 (D.C. Cir. 2017) (Srinivasan, C.J., Tatel, C.J., conc. order denying *en banc* review) (rejecting First Amendment challenge to network neutrality rules). As a general matter, "[r]equiring someone to host another person's speech is often a perfectly legitimate thing for the Government to do." *Agency for Int'l Dev. v. Alliance for*

Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2098 (2020) (Breyer, J., dissenting, joined by Ginsburg & Sotomayor, JJ.).

The Supreme Court case most directly on-point, *W. Union Tel. Co. v. James*, 162 U.S. 650 (1896), upheld a Georgia law requiring nondiscrimination in the delivery of electronic messages, requiring telegraph companies to deliver messages with "impartiality and good faith." 162 U.S. 650, 662 (1896). HB 20 updates this principle to social media's hosting decisions.

A hundred years later, the Supreme Court still recognizes different rules for speaking as opposed to hosting or transmitting speech, but has added some new precedent. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47 (2006). HB 20 is also constitutional under this newer precedent.

Just as when *James* was decided, states have a deep interest in ensuring that citizens of all viewpoints have the ability to participate in basic aspects of citizenship, including via dominant, privately-held communications networks. As our country experiences intensifying intellectual and partisan polarization, this interest only grows stronger. "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps

to ensure that private interests not restrict . . . the free flow of information and ideas." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 657 (1994).

Dominant social media platforms implicate this governmental interest. Social media and the Internet are "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017). As the leading First Amendment scholar Eugene Volokh states, "If social media are 'the modern public square,' the law may constitutionally treat them. . . the way physical public squares can be treated." Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 418 (2021).

A. The First Amendment Only Prohibits Anti-Discrimination Laws that Force Platforms to Carry Speech as Their "Own Message"

The First Amendment applies differently to laws that regulate speakers, as opposed to entities that host or transmit speech. It is not true in all contexts "that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." Volokh, 1 J. Free Speech L. at 415. For instance, in *Turner* the Supreme Court upheld the Federal Communications Commission's (FCC's) cable must-carry regulations under intermediate scrutiny, while common carriers' anti-discrimination obligations receive review approximating rational basis. Similarly, law schools are obligated to host military employers when opening their campuses to recruiters, as *Rumsfeld* established.

The Supreme Court has recognized that when public accommodation and common carriage laws require an entity to communicate a particular message *as its own*, such laws may violate the Constitution. In *Tornillo,* the Supreme Court ruled the First Amendment prohibits a state law from requiring a newspaper editorial page to carry opinions pieces with which it did not necessarily agree, *see Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974), and in *Hurley* the Court ruled the First Amendment prohibits a law that has the "effect of declaring the sponsors' [or host's] speech itself to be the public accommodation." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

Yet HB 20 stands outside this First Amendment prohibition. For non-discrimination regulation to cross the First Amendment line, it must lead users to view each individual message on a communications platform, as well as the platform in its entirety, as the platform's "own message." *Rumsfeld*, 547 U.S. at 63. The Supreme Court explains that *Hurley* and *Tornillo* "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." (emphasis added). *Rumsfeld,* 547 U.S. at 63.

In *Hurley,* a parade viewer would consider the expression of each member of the parade, as well as the parade *in toto*, as expressions of the organizers because they are like a "composer" that "selects the expressive units of the parade from potential participants" to an element that "comports with what merits celebration on

that day." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995). Similarly, op-ed page editors may not agree with each opinion piece they run, but each one receives at least some form of implicit editorial endorsement resulting from a careful and exacting selection process. Each carefully-selected op-ed represents the editors' expression, as does the page as a whole.

In contrast, social media content moderation does not produce its "own message," *Rumsfeld*, 547 U.S. at 63, just as a telephone or telegraph network does not. Rather, people use social media to send and receive messages from their friends and family. Ordinary users neither care about nor detect social media's censorship of private conversations. As evidence submitted to the lower court demonstrates, Motion to Dismiss at 8–9, *NetChoice v. Paxton*, 2021 WL 5755120 (W.D. Tex. Dec. 1, 2021) (No. 1:21-cv-00840-RP) 2021 WL 5937118, social media is for all practical purposes a passive conduit. Even if a platform has a censorship policy, individual messages are not understood to represent the judgment or expression of platform owners.

Neither can it be said that social media as a whole "expresses" a message. As the Supreme Court has found, when law schools "expres[s] their disagreement with the military by treating military recruiters differently. . . these actions were expressive only because the law schools accompanied their conduct with speech explaining it." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66,

(2006). "An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id.* And these actions are not entitled to First Amendment protection. *Id.*

In the same way, when internet social media firms "express" their disagreement with certain viewpoints by treating them differently, these actions are only expressive because the platforms accompany their conduct with speech explaining the conduct. Just as no one viewer sees all recruiters interviewing all candidates, so no one user of social media sees the censoring of individuals or covert management of media traffic, which is in effect invisible. These editorial decisions only have meaning in light of other speech, i.e., social media's statements about its actions.

The contention that social media's discriminatory censorship *itself* constitutes a message is not only inconsistent with *Rumsfeld* and *Turner*, but would also upend civil rights and common carriage law. The lower court is "convinced that social media platforms. . . curate both users and content to convey a message about the type of community the platform seeks to foster and, as such, exercise editorial discretion over their platform's content." (Op. 16) Following the court's reasoning, if FedEx were to refuse to deliver packages to a particular racial group, or a

restaurant were to refuse to serve members of a particular religion, their discrimination too would "convey a message about the type of community" they seek to create. But the First Amendment does not protect acts of discrimination. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rejecting law firm's First Amendment challenge to sex discrimination law's prohibitions in its partnership decisions); *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 n.5 (1968) (*per curiam*) (rejecting business owner's First Amendment challenge to the Civil Rights Act's bar on racial discrimination in public accommodations).

B. Distinguishing Between Platform's Hosting Speech and Expressing Its Own Message

The Supreme Court draws a line between an entity hosting speech and expressing its "own message," *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 63 (2006). Given the importance of maintaining the public square in our ever more polarized society, prohibiting discrimination on dominant social media platforms is a vital government interest. Courts have a duty to act, rather than claim any action involving speech is "expression." For the relevant speech to express the platform's own message, each expression, as well as the platform as a whole, must be reasonably comprehensible and attributable to the social media platform.

To aid in distinguishing between passive hosting and active expression, the Supreme Court has pointed to several factors, treated below in detail: (1) whether

there is thorough pre-publication review, not passive transmission; (2) whether viewpoint discrimination expresses any meaning in and of itself; and (3) whether statements by platform users are reasonably attributable to the platform.

Once this line is drawn, HB 20 satisfies either intermediate or rational basis scrutiny, which applies to content-neutral regulation of entities that host speech. And, under the rules announced in *Pruneyard, Turner*, and *Rumsfeld,* let alone the hundreds of years of common carrier law, HB 20 survives First Amendment scrutiny.

1. Social Media Platforms do not Perform Thorough Pre-Publication Review, but rather Act as Passive Conduits

When the hosting entity has ample time and resources to conduct careful pre-publication review, the First Amendment will protect its editorial decision from regulation. In *Tornillo*, for instance, the Court observed that "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper. . . constitute the exercise of editorial control and judgment." 418 U.S. at 258. The editors are intimately involved with each editorial selected and "compose," to use the word in *Hurley*, a coherent message out of individual ones.

A newspaper, given its capacity limitations, *by necessity* exercises powerful editorial control over its content. In contrast, a social media firm is a conduit. It

rarely edits, and its practically-infinite bandwidth makes it unlike a space-constrained newspaper. Non-discrimination requirements therefore do not burden the platform's *own* speech.

In *Hurley*, the Court described the deliberation and control parade organizers exercised when permitting a group to march in the St. Patrick's Day Parade. "Rather like a composer, the [parade organizer] selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day." 515 U.S. at 574.

On the other hand, social media firms cannot claim to exercise the control of "composers." Their minimal editorial control renders their platforms passive conduits. Users compose messages with no editorial control in well over 99% of the cases. Motion to Dismiss at 8–9, *NetChoice v. Paxton*, 2021 WL 5755120 (W.D. Tex. Dec. 1, 2021) (No. 1:21-cv-00840-RP) 2021 WL 5937118.

Without this editorial control, social media platforms do not compose coherent or comprehensible messages from the billions of individual messages they carry. Rather, they exercise even less editorial control than in *Turner.* In *Turner,* the Supreme Court described cable as mostly a "conduit," and its description applies to the hosting/transmission functions of a social media platform. "Once the cable operator has selected the programming sources, the cable system functions, in

essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers." 512 U.S. at 629.

Finally, with respect to access control, social media is closely analogous to a "shopping center [which] by choice of its owner is not limited to [its] personal use. It is instead a business establishment that is open to the public to come and go as they please." *PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980*). Similarly, social media is "open to the public" in that it makes invitations to the public to enter. Anyone can open an account, and there is no editorial pre-selection of publishers.

2. Platforms' Viewpoint Discrimination Conveys no Meaning or Expression in and of Itself

The billions of messages social media networks carry are largely private conversations. A user or observer would not understand the messages to represent social networks' editorial judgment. Moreover, an observer would not perceive thousands of largely invisible discriminatory acts of censorship or promotion as conveying social media's "own message." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 63 (2006).

In *Rumsfeld*, the Court explained that discrimination against military recruiters at law schools fails to form a coherent message capable of First Amendment protection. "[L]aw schools 'expressed' their disagreement with the military by treating military recruiters differently from other recruiters. But these

actions were expressive only because the law schools accompanied their conduct with speech explaining it…. An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military." *Id.* at 66 (2006).

Similarly, the social media's discriminatory acts of censorship and promotion express nothing in and of themselves. As in *Rumsfeld,* these acts only convey meaning in light of social media platforms' speech *about* their own acts, such as the speech in their own postings and tweets. The First Amendment protects their speech, not their acts.

The Supreme Court rejected open access and non-discrimination requirements in *Tornillo* and *Hurley* precisely because a newspaper's op-ed page and the St. Patrick's Day parade offered a coherent, carefully-curated message. The *Hurley* Court found that "[p]arades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." 515 U.S. at 568, *citing* S. DAVIS, PARADES AND POWER: STREET THEATRE IN NINETEENTH–CENTURY PHILADELPHIA (1986). Because a parade *is* the speech of organizers, the organizers "define who can be a social actor and what subjects are available." *Id.* The Court explained, "once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute

had the effect of declaring the sponsors' speech itself to be the public accommodation." *Id.* at 573.

3. User Messages are not Attributable to the Platforms

The South Boston Allied War Veterans Council ("Veterans Council"), an unincorporated nonprofit association of individuals elected from various South Boston veterans' groups, organizes the St. Patrick's Day Parade. As the Supreme Court found and according to its 990s to this day, the Council's primary mission is "to organize the annual St. Patrick's Day Parade in South Boston." U.S. DEPT. OF THE TREASURY, INTERNAL REVENUE SERV., FORM 990, ALLIED WAR VETERANS COUNCIL OF SOUTH BOSTON (2016), https://apps.irs.gov/pub/epostcard/cor/043470309_201612_990EO_20180419152646 97.pdf.

The Veterans Council's *raison d'être* was the parade. Each marching organization had the Council's imprimatur, and the Veterans Council combined them into its own message. As the Supreme Court explained, "[s]ince every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of *their* parade." *Hurley*, 515 U.S. at 572-573. In contrast, no one would ever say that individual posts or tweets hosted by social media firms are *their* posts, as opposed to users'.

In *Tornillo*, Miami Herald's op-ed could be identified with its editors' judgment. The Supreme Court stated that "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and the treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." 418 U.S. at 258. Editors may not agree with every op-ed they publish but do judge each piece worthy of readers' attention.

Commenting on *Tornillo* and *Hurley,* the Supreme Court in *Rumsfeld* said that "the compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's *own message* was affected by the speech it was forced to accommodate." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 63 (2006) (emphasis added). Here, social media firm's *own message* cannot be said to be affected by requiring firms to refrain from discrimination. They may tweet or post as much as they'd like. Most social networks have their own individual accounts, which post content representing the companies on the platform. *See, e.g.,* https://twitter.com/twitter; https://www.facebook.com/Meta/; https://www.youtube.com/google

Similarly, in *Turner*, the television stations' speech was not attributed to the hosting cable systems. "Given cable's long history of serving as a conduit for

broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Turner*, 512 U.S. at 655. In *Pruneyard,* the Court stated that the "views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner [the shopping center]." 447 U.S. at 87.

In contrast, when it comes to social media, there is no attribution of carried messages as the platform's own speech. Facebook and Twitter vociferously defend their right to carry (liability free under section 230) content that encourages terrorism, sexual assault, and harassment, as well as messages from the world's most infamous dictators and tyrants. Defending itself against claims for aiding and abetting terrorism, Facebook urges that "CDA protects neutral platforms like Facebook from suit over content posted by third parties" . . . even in its "provision of accounts and services to HAMAS." Brief, *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019) (No. 19-859), 2018 WL 4944738 at 3, 18. While most would attribute an op-ed selection to its editors and a parade to its organizers, Facebook and Twitter expect that people do not attribute to them the speech of terrorists or advocates of child pornography.

The social media platforms are Lewis Carroll's proverbial Humpty-Dumpty, exclaiming that a statement is theirs when they say it is theirs. They claim content

moderation, but not terrorism. Whether or not the social media firms sincerely believe this distinction does not matter. The relevant question is whether the cacophony of voices they host creates a coherent message attributable to them. The answer is no.

C. HB 20 Satisfies First Amendment Scrutiny

The *Turner* opinions upheld the Federal Communications Commission's (FCC's) so-called must-carry regulations that required cable systems to set aside a portion of their channels for local over-the-air broadcasters. At the time of the decisions, the mid-1990s, the FCC-mandated set-aside was not trivial. With the average cable system offering around fifty channels, carriage of the local broadcasters—as well as the other public interest, education, and government programming, likely reflected between 10–20% of systems' programming content. The Court upheld the FCC's mandates on grounds that also demonstrate HB 20's constitutionality.

Like the must-carry rules, HB 20 is a content-neutral regulation of speech because it "impose[s] burdens and confer[s] benefits without reference to the content of speech." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643 (1994). HB 20 is not designed to favor or disadvantage speech of any particular content. Rather, as in *Turner,* it is "meant . . . preserve access" in a nondiscriminatory way to "diverse viewpoints." *Id.* at 646.

HB 20 furthers a substantial government interest. Like *Turner*, HB 20 curbs the "potential for abuse of this private power over a central avenue of communication." The "First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Id.* at 657.

Similarly, HB 20 follows the "basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 192 (1997), quoting *Turner,* 512 U.S., at 663–64.

Applying intermediate scrutiny, a statute is upheld if it "further[s] an important or substantial governmental interest unrelated to the suppression of free speech, provided the incidental restrictions did not burden substantially more speech than is necessary.'" *Id.* at 186.

1. The *Turner* Must-Carry Regulations and HB 20 Further the Same Substantial Governmental interest, and HB 20 is More Narrowly Tailored

The interest HB 20 addresses is nearly identical to that which the FCC must-carry regulations in *Turner* furthered. There, the Court reaffirmed the principle that "it has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" *Turner,* 512 U.S., at 663–664. In the same

way, HB 20 advances Texas's interest in "free and unobstructed use of public forums and of the information conduits." (Op. 27).

HB 20 is more narrowly tailored than the must-carry regulations. "[T]he essence of narrow tailoring" is "focus[ing] on the source of the evils the [Government] seeks to eliminate [without] significantly restricting a substantial quantity of speech that does not create the same evils." *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2758 n.7 (1989). In *Turner,* the cable system had to relinquish a large portion of its channel lineup to regulatory command. But, given the bandwidth of social media companies, HB 20 does not restrict the social media firms' ability to speak. Just as in *Rumsfeld,* the platforms remain "free under the statute to express whatever views they may have." 547 U.S. at 60. .

2. HB 20 Imposes upon First Amendment Interests to a much Lesser Degree than the FCC Regulations at Issue in *Turner*

A cable system exercises "editorial discretion over which stations or programs to include in its repertoire." *Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622*, 636 *(1994*). But "[o]nce the cable operator has selected the programming sources, the cable system functions . . . as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers." *Id.* at 629.

Cable systems exercise more editorial discretion over their television channels than social media firms exercise over their billions of accounts. In the 1990s, cable systems typically had thirty to sixty channels, and deciding which

networks to carry constituted a major editorial decision. But social media firms let anyone produce content. Their services are offered generally to the public: anyone can open an account, with *no* prior approval.

In *Turner,* the Court ruled that the FCC set-aside regulations burdened the First Amendment rights of cable systems "in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining." *Id.* at 636–37.

HB 20 impinges upon social media companies to a much lesser degree. First, unlike a cable system, social media lacks editorial discretion as to "select[ing] the programming sources." *Id.* at 629. Instead, they make general offers to the public to open accounts, and exercise *no* editorial selection over account creation. Second, HB 20 does not "limit the number of channels. . . for social media to compete on." Rather, social media's effectively-infinite bandwidth renders it immune from editorial decision-making; it can always add content. Unlike the state law in *Tornillo,* which "compelled. . . cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print," social media "is not subject to the finite technological limitations of time." 418 U.S. at 256–57. And, given how few messages the social

media companies review or censor, HB 20 would have a non-recognizable impact upon social media's functioning, even as conduit.

II. Texas May Lawfully Regulate Social Media Platforms as Common Carriers

HB 20 is also consistent with the First Amendment because the platforms are common carriers subject to "special regulations" on account of the public function they perform. *United States Telecom Ass'n v. F.C.C.*, 825 F.3d 674, 741 (D.C. Cir. 2016).[1]. With common carriers, there is an "absence of any First Amendment concern" for government anti-discrimination mandates. *Id.* Common carrier law addresses situations where there are reasons to have a concentrated market, but open access is necessary. *See generally*, Christopher Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. Free Speech L. 463, 467 (2021).

"Common carriers have long been subject to nondiscrimination and equal access obligations akin to those imposed by the rules without raising any First Amendment question." *U.S. Telecom Ass'n v. F.C.C*, 825 F.3d 674, 740 (D.C. Cir. 2016). *See also*, *F.C.C. v. League of Women Voters of California,* 468 U.S. 364, 378 (1984) (noting that broadcasters had First Amendment rights against compelled

[1] *US Telecom* ultimately ruled against First Amendment protections for common carriers and did not discuss the status of social media. At most, it noted that a "curated" Internet experience, which differs from the openness promised by major social networks, theoretically "*might* then qualify as a First Amendment" speaker other circumstances. *U.S. Telecom Ass'n v .F.C.C.*, 825 F.3d 674 (D.C. Cir. 2016).

speech, "unlike common carriers."); *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C*, 518 U.S. 727, 739 (1996) (plurality opinion) (noting that compelled speech interest of cable operators was "relatively weak because [they] act less like editors, such as newspapers or television broadcasters, than like common carriers.).

The expert opinion submitted in the District Court by the nation's leading scholar of common carrier law and history shows that, just as courts recognized states' power in the 19th century to categorize the then-cutting-edge telegraphs and telephones as common carriers, so may Texas now regulate social media platforms, which have equivalent economic, political, and social importance. Expert Witness Report of Adam Candeub at 3, *NetChoice v. Paxton*, 2021 WL 5755120 (W.D. Tex. Dec. 1, 2021) (No. 1:21-cv-00840-RP); *see also* Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391, 402 (2020).

The lower court ignored this controlling body of law and simply asserted: "This Court starts from the premise that social media platforms are not common carriers." (Op. 15). The Court then stated that it "has found that the covered social media platforms are not common carriers." *Id.* at 27. The lower court justified its "finding" with no precedent, but with a quotation from *U.S. Telecom Ass'n. Id.* at 15 (citing *U.S. Telecom Ass'n v. F.C.C.*, 825 F.3d 674, 742 (D.C. Cir. 2016)). The

case, in fact, supports HB 20 since it upheld common carriage designation of internet service providers, which, before the FCC's network neutrality order, did discriminate in the transmission of speech. *United States Telecom Ass'n v. F.C.C.*, 825 F.3d 674, 739 (D.C. Cir. 2016).

Throughout the centuries, courts have defined common carriers in numerous ways. The expert opinion summarized this law into five tests: (1) whether a firm exercises market power, (2) whether an industry is "affected with the public interest," (3) whether the entity regulated is part of the transportation or communications industry, (4) whether the industry receives countervailing benefits from the government, or (5) whether the firm holds itself out as providing service to all. Expert Witness Report of Adam Candeub at 3, *NetChoice v. Paxton*, 2021 WL 5755120 (W.D. Tex. Dec. 1, 2021) (No. 1:21-cv-00840-RP); Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391, 396–397, 402, 405 (2020).

Rather than discuss these tests, the lower court made up a new test, never seen before in centuries of common carrier law. Its new test asks whether entities "engage in substantial editorial discretion" and therefore are entitled to complete First Amendment protection, or are common carriers that act as "passive conduits." (Op. 12). While common carriers do not routinely "make individualized decisions, in particular cases, whether and on what terms to deal," *Nat'l Assn' of Reg.*

Util.Comm'rs v. F.C.C., 525 F.2d 630, 641 (D.C. Cir. 1976), that is because they make the same offers with the same terms and conditions to all. A common carrier could, consistent with established law, provide users with individualized experiences, provided the contractual offer was the same.

Further, using "engage in editorial discretion" as a test for common carrier status makes no sense. The question is not whether a platform, in fact, exercises discretion but whether it *can* operate without discrimination. A telephone company could exercise editorial discretion, "curat[ing] both users and content to convey a message about the type of community the platform seeks to foster." It could kick off members of a certain race or religious viewpoint—and that would certainly convey a message. But common carrier law prevents it from doing so.

Demonstrating this point, the F.C.C. in 2015 imposed common carrier requirements for Internet service providers, even though they were at the time "discriminating among content providers or prioritizing one provider's or its own content over others." *Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601 (2015). The FCC "chose to reclassify [Internet service] as a telecommunications service" subject to common carrier non-discrimination requirements. *United States Telecom Ass'n v. F.C.C.*, 825 F.3d 674, 707 (D.C. Cir. 2016). This reclassification "impose[d] per se common carrier obligations by requiring broadband providers to offer indiscriminate service to edge providers."

Id. The reclassification withstood First Amendment challenge. Courts routinely apply common carrier and similar non-discrimination requirement to firms that discriminated prior to the regulation. *See State v. Atl. Coast Line R. Co.*, 52 Fla. 646, 659–60 (1906).

Lastly, the Supreme Court already has rejected the argument that hypothetical editorial power renders a firm outside of common carrier authority. "[I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies; such an approach would not suffer from the defect of preferring one speaker to another." *Turner Broad. Sys., Inc. v.* F.C.C, 512 U.S. 622, 684 (1994) (O'Conner, J., concurring). If the Supreme Court can uphold legislation declaring a cable system a common carrier without First Amendment concern, then the State of Texas can safely declare a social media firm to be likewise a common carrier.

III. Texas May Lawfully Impose Disclosure Requirements

The Supreme Court has long recognized that state and federal governments may require factual disclosure of commercial product information without raising any First Amendment concern. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651–653 (1985). HB 20's disclosure provisions present no constitutional concerns. Contrary to the lower court claims, strict scrutiny is not appropriate, for "[t]he right of a commercial speaker not to divulge accurate information regarding

his services is not such a fundamental right." *Zauderer*, 417 U.S. at 651 n.14. First Amendment rights are not ordinarily implicated by compelled commercial disclosure. *Riley v. Nat'l Fed'n of the Blind of N.C.,* 487 U.S. 781, 796 n. 9 (1988). Rather, the Supreme Court has stated that regulations which require disclosure of "factual and uncontroversial" commercial information are subject to "more lenient review" than intermediate scrutiny applicable to commercial speech. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001) (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650, 651 (1985)).

The lower court ignored these standards. Rather, it relied on a decision from outside the Fifth Circuit involving disclosure for political speech, *Washington Post v. McManus*, 944 F.3d 506, 514 (4th Cir. 2019), as well as *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018), a case that overturned state law requiring pregnancy clinics to provide notice about abortion services even if the clinics opposed abortion. The Supreme Court in *Becerra* distinguished its holding from the *Zauderer* standard because the required abortion notice was not limited to "purely factual and uncontroversial information about the terms under which. . . services will be available." *Id.* at 2372. In short, the district court ignored controlling precedent.

IV. Conclusion

The First Amendment applies differently to speakers than to hosts or conduits of speech. Because social media hosts speech, its regulation by HB 20 falls under the *Pruneyard, Turner*, and *Rumsfeld* standards. This precedent allows imposition of the reasonable anti-discrimination rules found in HB 20. In addition, HB 20 may impose on social media common carrier obligations which courts have upheld for centuries against constitutional objections.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2022, an electronic copy of the foregoing *amicus curiae* brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF filing system and that service will be accomplished using the appellate CM/ECF system.

/s/ Andrei D. Popovici

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this filing was prepared in proportionally spaced typeface using Microsoft Word in 14-point font. This filing complies with the type-volume limitation of Rule 32(g) because it contains **6089** words, excluding the parts exempted under Rule 32(f).

/s/ Andrei D. Popovici