

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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NETCHOICE, LLC, DBA NETCHOICE,	)	
ET AL.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 22-555
	)	
KEN PAXTON, ATTORNEY GENERAL	)	
	)	
OF TEXAS,	)	
	)	
Respondent.	)	

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Pages: 1 through 93  
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NETCHOICE, LLC, DBA NETCHOICE, )

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Petitioners, )

v. ) No. 22-555

KEN PAXTON, ATTORNEY GENERAL )

OF TEXAS, )

Respondent. )

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Washington, D.C.

Monday, February 26, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:29 p.m.

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9 behalf of the Respondent.

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P R O C E E D I N G S

(12:29 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 22-555, NetChoice versus Paxton.

Mr. Clement.

(Laughter.)

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

I don't want to proceed as if I wasn't here for the first argument --

(Laughter.)

MR. CLEMENT: -- so let me focus on what's different about Texas. One thing, fortunately, that's different -- that's different about Texas is its definition of "social media platforms" excludes websites. So we can just put that Gmail issue to one side for when we're talking about Texas.

The other thing it excludes, of course, is websites that are primarily focused on news, sports, and entertainment. In the First Amendment business, we call that

1 content-based discrimination, and that's just  
2 one of the many reasons that this statute is,  
3 dare I say it, facially unconstitutional.

4           The other thing that's different is,  
5 in some respects, this statute operates more  
6 simply because it forbids my clients from  
7 engaging in viewpoint discrimination. Now we're  
8 used to thinking that viewpoint discrimination  
9 is a bad thing and that governments shouldn't do  
10 it. And, of course, when governments do it, it  
11 is a bad thing.

12           But, when editors or speakers engage  
13 in viewpoint discrimination, that is their First  
14 Amendment right. It is also absolutely vital to  
15 the operation of these websites because, if you  
16 have to be viewpoint-neutral, that means that if  
17 you have materials that are involved in suicide  
18 prevention, you also have to have materials that  
19 advocate suicide promotion. Or, if you have  
20 materials on your site that are pro-Semitic,  
21 then you have to let on materials onto your site  
22 that are anti-Semitic. And that is a formula  
23 for making these websites very unpopular to both  
24 users and advertisers. So it is absolutely  
25 vital.

1           The other thing that makes Texas a  
2 little different is, at least in passing the  
3 law, Texas was even more explicit in relying on  
4 the common carrier analogy, as if simply  
5 labeling websites common carriers makes the  
6 First Amendment problems go away.

7           And that is fundamentally wrong for  
8 two basic reasons. One, these companies don't  
9 operate actually as common carriers. They all  
10 have terms of use that exclude varying degrees  
11 of content. And, second, Texas can't simply  
12 convert them into public common carriers by its  
13 say-so.

14           I welcome the Court's questions.

15           CHIEF JUSTICE ROBERTS: Mr. Clement,  
16 if these laws go into effect, what -- how would  
17 your clients -- what steps would they take to  
18 comply?

19           MR. CLEMENT: So, I mean, you know,  
20 one thing that they would --

21           CHIEF JUSTICE ROBERTS: Including --  
22 I'm sorry -- just in -- in particular,  
23 addressing the situation of compliance in Texas  
24 and Florida as opposed to nationwide.

25           MR. CLEMENT: Sure. So, I mean, you

1 know, one of the things that they would  
2 contemplate at least, you know, with respect to  
3 Texas in the first instance, is there some way  
4 to just withdraw from the market in Texas and  
5 Florida. And, of course, Texas had that in mind  
6 in the statute and specifically said by -- we  
7 essentially have to do business in Texas, and we  
8 can't discriminate against users based on their  
9 geographic location in Texas.

10 So, if we lose this, including, you  
11 know, the idea that we can be forced to engage  
12 in expressive activity in Texas, then I think we  
13 would fundamentally have to change the way that  
14 we provide our service in order to engage in  
15 view -- in order to provide anything like the  
16 service that we want to, while not engaging in  
17 viewpoint discrimination, we'd basically have to  
18 eliminate certain areas of speech entirely.

19 So we just couldn't talk about suicide  
20 prevention anymore because we're not going to  
21 talk about suicide promotion. I guess we  
22 couldn't have pro-Semitic speech because we're  
23 not going to have anti-Semitic speech. So we'd  
24 have to figure out some way to try to engage in  
25 even more content moderation or editorial



1 discretion to try to get us to a level where  
2 we're more benign and somehow we -- we don't run  
3 afoul of Texas's law.

4 And then, on the disclosure  
5 provisions, the record here reflects that --  
6 that, you know, YouTube would have to basically  
7 increase its disclosure and appeal process  
8 basically a hundred-fold in order to comply with  
9 Texas law.

10 I mean, I'm happy to talk more about  
11 the common carrier issue because I do think it's  
12 a central part of their defense. There was an  
13 allusion earlier about somehow Section 230  
14 treats -- treats my clients, the websites, as  
15 common carriers. To the contrary, Congress  
16 specifically -- and this is 47 U.S.C. 223  
17 subsection (6), which we cite in our briefs --  
18 it specifically is a congressional provision in  
19 the same Act of Congress that says that  
20 interactive computer services should not be  
21 treated as common carriers.

22 And I think, more broadly, the whole  
23 thrust of 230 is don't just be a common carrier.  
24 Don't just put through all of this material. We  
25 don't want that. We want you to exercise

1 editorial discretion in order to keep some of  
2 the worst of the worst off the site. Now --  
3 JUSTICE GORSUCH: It does that,  
4 though, only with respect -- all that's true,  
5 and I -- I acknowledge all that, but it also  
6 says that's true only if it's not your speech.  
7 And that seems to be in tension a bit with your  
8 suggestion that everything is your speech. And  
9 I think Justice Barrett pointed out an  
10 interesting feature of that, which is these  
11 algorithms arrange, sort, promote certain --  
12 certain posts by users and not others.

13 And is that not your -- not yours --  
14 but your clients' speech?

15 MR. CLEMENT: So I don't think it's  
16 our speech in the way that Section 230 talks  
17 about the speech. And I think, for these  
18 purposes, you have to distinguish between the  
19 speech that is the editorial function and the  
20 underlying user's speech.

21 JUSTICE GORSUCH: I understand that,  
22 and I didn't mean to suggest otherwise. But  
23 there is some editorial speech, your term, going  
24 on, right?

25 MR. CLEMENT: I -- I -- I think that's

1 right. And I --

2 JUSTICE GORSUCH: And so the -- the  
3 carrier would be liable for its editorial  
4 speech?

5 MR. CLEMENT: I don't think so. I  
6 mean, you know, I did actually reread the brief  
7 that I filed at least in the Gonzalez case, and  
8 I think that you could make a strong argument  
9 based on the text of that statute that that kind  
10 of editorial sort of functioning is not -- is  
11 not something that causes you to lose your 230  
12 protection.

13 JUSTICE GORSUCH: So it's speech for  
14 purposes of the First Amendment, your speech,  
15 your editorial control, but when we get to  
16 Section 230, your submission is that that isn't  
17 your speech?

18 MR. CLEMENT: Yes, as a matter of  
19 statutory construction because, otherwise,  
20 Section 230 ends up being self-defeating  
21 because, again, the whole point of Section 230  
22 was to promote that editorial discretion.

23 And this Court -- you know, this Court  
24 wrestled with these issues. They're hard  
25 issues. And I certainly applaud the instinct

1 that you shouldn't resolve them here, but I  
2 don't think just by recognizing that my clients  
3 are engaged in editorial discretion when they  
4 make those decisions about what's going to  
5 ultimately go to the individualized screen that  
6 a user is going to see when they tap into their  
7 -- their website or their application, I don't  
8 think that's the kind of speech that is --  
9 you're talking about in the 230 context.

10           And if you did, I think you would  
11 defeat the fundamental purpose of 230 because  
12 they wanted you, they wanted my clients and  
13 others, to exercise that editorial discretion to  
14 keep the bad material out.

15           JUSTICE GORSUCH: With respect to  
16 other people's speech. So it seems like we have  
17 speech and then we have speech.

18           MR. CLEMENT: You -- you -- you can't  
19 -- you literally -- and this is -- again, I'm  
20 happy to argue that case right now if we want  
21 to, but you can't have Section 230 --

22           JUSTICE GORSUCH: Well, no, it's --  
23 it's a really hard question for us, and it's  
24 perfectly relevant here and very important  
25 because, of course, 230 preempts things, and we

1 don't know how much of this law it preempts.

2 MR. CLEMENT: Absolutely. But this  
3 law is unconstitutional in all its applications  
4 and certainly in its -- it has no plainly  
5 legitimate sweep. So you don't have to reach  
6 the 230 question directly here.

7 And I would simply say that when  
8 you're reading those statutory terms in 230, you  
9 wouldn't sweep in editorial discretion because,  
10 if you do, you will defeat the fundamental  
11 purpose of Section 230 --

12 JUSTICE GORSUCH: What -- what do we  
13 do about --

14 MR. CLEMENT: -- which is to empower  
15 editorial discretion.

16 JUSTICE GORSUCH: Well, I just wanted  
17 to raise with you the question I raised with the  
18 -- with the Solicitor General, who offered a  
19 thoughtful response.

20 But many of your clients' terms of  
21 service, while reserving some editorial  
22 discretion -- and I think about most of them as  
23 -- as -- as speaking about the things covered by  
24 230, obscenity, et cetera -- go out of their way  
25 to promise an open forum to all members of the

1 public and go out of their way to say we don't  
2 endorse what other people say on this site and  
3 go out of their way to say all views shall  
4 flourish.

5 Now that's not true for all of your  
6 clients, but it's true for some of them and many  
7 of them. What do we do about that?

8 MR. CLEMENT: So I would say that, you  
9 know, it's true of some of my clients and some  
10 more than others, and I think all of those terms  
11 of service, as the General said, go on to say,  
12 and there are certain things, though, that are  
13 out of bounds.

14 And I do think it's -- it's -- it's  
15 just a factually true thing that my clients in  
16 the main, as long as you kind of stay within the  
17 lines, they actually do want to promote a -- an  
18 open dialogue and a fair dialogue.

19 And if you look at the Center For  
20 Growth and Opportunity brief, it shows you that  
21 actually, some conservative voices have really  
22 flourished on these websites. Ben Shapiro and  
23 Daily Wire are killing it on Facebook. And that  
24 shows you that, you know, we do want a broad  
25 discussion, but there's some stuff that is just,

1 you know, out of the lines.

2 And I don't think it's as simple to  
3 say, well, that's just the 230 stuff because,  
4 again, we had a debate about what "otherwise  
5 objectionable" means, but I also think that my  
6 clients are getting a lot of pressure to be  
7 particularly careful about things that are  
8 damaging to youths, and I think, in that  
9 context, they want to sort of err on the side of  
10 keeping some bad material off. But --

11 JUSTICE GORSUCH: Well, you've  
12 mentioned that a few times. Let me just press  
13 the other way, though.

14 Doesn't it also hold that on your  
15 view, part of the editorial discretion of a  
16 platform would be that it could use algorithms  
17 designed specifically to try to attract teens to  
18 addiction or suicide, depression, those kinds of  
19 things as well, that would be part of their  
20 editorial discretion too?

21 MR. CLEMENT: So a website -- I don't  
22 think my clients because my clients are working  
23 hard --

24 JUSTICE GORSUCH: I'm not -- I don't  
25 -- I don't mean to cast aspersions on anyone,

1 but I think it's a natural consequence of your  
2 -- your position, isn't it?

3 MR. CLEMENT: There -- there would be  
4 protected First Amendment activity with that  
5 very different website with a business model  
6 that I don't think would stay in business very  
7 long. And it is possible, you know, as the --  
8 as the United States has pointed out in its  
9 brief, that if you have a different concern and  
10 you identify a different government interest,  
11 that maybe the government might be able to do  
12 something, particularly if it does it in a  
13 content-neutral way to address some of those  
14 concerns.

15 But, to get back to something Justice  
16 Kavanaugh pointed out before, I mean, I actually  
17 think that both Texas and Florida have been  
18 pretty aggressive about their government  
19 interest here being something that is not just  
20 not a legitimate interest in the First Amendment  
21 context but is affirmatively prohibited, which  
22 is the idea that we're going to level the  
23 playing -- we're going to amplify some voices  
24 in -- we're going to make certain -- put burdens  
25 on private parties so that some voices can be



1 louder than others or some people can get a  
2 boost from what they're getting in the  
3 marketplace of ideas.

4 And the only place this Court has ever  
5 allowed that was in Turner. And, I mean,  
6 Justice Kavanaugh, you pointed out that one of  
7 the key things there was content neutral. But I  
8 actually think the critical thing in Turner is  
9 that bottleneck or chokehold on the content that  
10 went into individual houses.

11 And I think that's what made what was  
12 otherwise an impermissible government interest a  
13 legitimate government interest in that narrow  
14 context. And maybe you could say the same  
15 thing -- I mean, I don't know if Red Lion is  
16 still good law -- but that's the same idea that  
17 there's like a scarcity rationale. But there's  
18 no scarcity rationale on the Internet, and this  
19 Court -- this Court said that in 1997 in the  
20 Reno case, where --

21 JUSTICE KAGAN: Mr. -- I'm sorry.

22 MR. CLEMENT: No, no.

23 JUSTICE KAGAN: Can I ask you about a  
24 distinction between two possible kinds of  
25 applications of the Texas law?

1           So one is the application that  
2 prevents you from keeping out certain speech  
3 that you want to keep out. You said  
4 anti-Semitic speech. It could be any of a  
5 number of things.

6           As I understand it, the Texas law  
7 also -- prevents you also from doing something  
8 else, which is suppose you wanted to prevent  
9 anti-Semites from posting anything, you know,  
10 you want -- you just wanted to -- to say that  
11 they're a class of people we're not even going  
12 to let them post cat videos.

13           Should we think about that set of  
14 applications differently?

15           MR. CLEMENT: I don't think you should  
16 think of it radically differently. I mean, it's  
17 a different application, but I think it's the  
18 same idea, which is there are some speakers --  
19 and I think this is going to be, you know, very  
20 few -- but there are some speakers where they  
21 are so associated with a particular viewpoint  
22 that there -- it informs essentially all of  
23 their speech.

24           And it also affects the speech of  
25 other people in the forum. If you have a white

1       supremacist on your speech forum and they're  
2       posting there, it's going to cause a lot of  
3       other people to say: What is that person doing?  
4       What's going on here? Why are all the dog  
5       photos white?

6                I mean, it's going to fundamentally  
7       change the dynamic on the website. And I think  
8       a website that's trying to promote a particular  
9       discussion has a First Amendment right to  
10      exclude those people. And in practice, this is,  
11      you know, what -- what is used to exclude sort  
12      of, you know, sexual predators, which is  
13      something, again, that the government can't do,  
14      Packingham, but -- but Facebook does.

15               And there are certain other people  
16      with, you know, just very distinct viewpoints,  
17      where it's in a sense we know -- we know the  
18      viewpoint, the viewpoint is problematic, even if  
19      the particular post is not.

20               JUSTICE BARRETT: But, Mr. Clement --

21               JUSTICE ALITO: Mr. --

22               JUSTICE BARRETT: -- I just wanted to  
23      follow up on that because it seems to me that  
24      Justice Kagan's question kind of gets to the  
25      distinction in 303 Creative between turning

1 people away and the speech that you have.

2           And so, if you think about it as  
3 silencing someone who you let on your platform,  
4 then that seems more like speech or content  
5 moderation to the extreme, for example, but I  
6 assume that the implication of your answer to  
7 Justice Kagan is that you could tell the  
8 anti-Semite we're not open for business to you,  
9 right?

10           MR. CLEMENT: You can tell that person  
11 that our speech forum is not open to you. And I  
12 think that's what makes it different, that Texas  
13 is focused really on these speech-oriented  
14 platforms.

15           And so I think, if you're in the  
16 business of speech and you have somebody -- and,  
17 again, this is not sort of other prohibited  
18 statuses. This is viewpoint. And so you are a  
19 notorious anti-Semite, we do not want you to  
20 participate in this conversation.

21           JUSTICE BARRETT: Religion then, like  
22 --

23           MR. CLEMENT: Sure. And -- and I want  
24 to have a Catholic website. I can keep off  
25 somebody who's a notorious Protestant. I mean,

1 I want to -- I want to preserve --

2 (Laughter.)

3 MR. CLEMENT: -- I want to preserve  
4 the nature of the discussion on my forum. And  
5 it's a private forum. And the government can't  
6 tell me as a private party let the Protestant  
7 into the Catholic party. I don't think so.

8 JUSTICE ALITO: Mr. Clement, can I ask  
9 you about Section 2? I don't think anything has  
10 been said about it so far.

11 So you say that Section 2's  
12 individualized explanation requirements violate  
13 the First Amendment because they impose a  
14 massive burden, right? That's your argument?

15 I mean, I -- it seems to me that the  
16 European Union has imposed exactly the same --  
17 pretty much the same individualized explanation  
18 requirement on anybody who operates there that  
19 Texas has imposed. And I'm not saying that  
20 whatever the European Union says is okay is  
21 constitutional here, but just on the practical  
22 question of whether it's too much of a burden,  
23 if it's not too much of a burden for your  
24 clients to do it in Europe, how can it be too  
25 much of a burden for them to do it here?

1           MR. CLEMENT: So, as I understand the  
2 requirements, they are different. They are  
3 materially different. This, you know, the --  
4 and -- and in a sense, the European Union  
5 provision has sort of a built-in kind of, you  
6 know, reasonably practical provision right into  
7 what you have to do. You only have to do what's  
8 reasonably practical.

9           This is an absolute requirement to  
10 respond to every -- you know, every takedown,  
11 and that's over a billion takedowns of comments  
12 in a quarter for YouTube. And then there's also  
13 this appeal process, which I don't think is  
14 coextensive with the process in Europe.

15           So just as a practical matter, I think  
16 this is more burdensome. But, as you said, the  
17 First Amendment does not apply in Europe. And I  
18 think that having this kind of disclosure  
19 requirement on what is really an editorial  
20 discretion decision is potentially, I mean,  
21 hugely problematic.

22           I mean, if you took this and said, you  
23 know, The New York Times, you have to -- you  
24 have to tell us why you rejected my -- my  
25 wedding announcement, I mean, they only take

1 like 10 percent of the wedding announcements,  
2 you have to tell me. Even if you automize that  
3 and sort of said, you know -- you know, well,  
4 one, if, you know, you weren't rich enough; two,  
5 if you weren't connected enough in New York  
6 social circles; and -- and three, we just didn't  
7 like the way you looked. Even if you followed  
8 that, it would --

9 JUSTICE ALITO: I mean, your client --  
10 some of -- some of your clients are humongous.  
11 And if you want to say this is unduly  
12 burdensome, didn't you have some obligation in  
13 the district court to try to -- is it enough for  
14 you to just say: This is a huge burden, so  
15 knock this out? Didn't you have to provide  
16 something to show how much -- what resources  
17 would be required --

18 MR. CLEMENT: We did. There's a --

19 JUSTICE ALITO: -- and why that would  
20 be too much for these -- for these megaliths?

21 MR. CLEMENT: I mean, we -- we -- we  
22 did. There's more of a record in the Texas case  
23 than in the Florida case. Our -- you know, the  
24 witness for YouTube in their declaration  
25 specifically said this would be a hundred times

1 more burdensome than their current process.

2 And so there is a record on this. It  
3 is incredibly burdensome.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Thomas, anything further?

6 Justice Alito?

7 JUSTICE ALITO: The -- the 230  
8 argument is intriguing to me, and it's -- the  
9 distinctions that you're drawing somehow to some  
10 degree escape me. So is it your position that  
11 you are exercising editorial discretion as to  
12 everything -- let's take YouTube -- as to every  
13 video that is placed on YouTube, you have  
14 exercised editorial discretion that you want  
15 that on YouTube?

16 MR. CLEMENT: I would say that we have  
17 exercised some editorial discretion to not sort  
18 of eliminate that from the site entirely. And  
19 as to an individual user, we've used what are  
20 typically in many cases neutral algorithms, but  
21 some of them are not neutral.

22 And even in Taamneh, the briefs I  
23 think made quite clear that, you know, although  
24 that at a certain point some of the algorithms  
25 were neutral as between rice pilaf and



1 terrorism, there were other efforts to  
2 affirmatively get terrorist stuff off of those  
3 sites. And so --

4 JUSTICE ALITO: Well, I mean, if you  
5 were a newspaper and you published the content  
6 that appears in every single one of the videos  
7 on YouTube that you -- you allow to be included,  
8 you would be liable potentially for the content  
9 of that material. And -- and I don't understand  
10 the rationale for 230 if it wasn't that you  
11 can't be held responsible for that because this  
12 is really not your message.

13 Either it's your message or it's not  
14 your message. I don't understand how it can be  
15 both. It's your -- it's your message when you  
16 want to escape state regulation, but it's not  
17 your message when you want to escape liability  
18 under state tort law.

19 MR. CLEMENT: So I don't really think  
20 we're being inconsistent, and what I would -- I  
21 would try to draw the analogy just to a good  
22 old-fashioned anthology. If I put together an  
23 anthology of 20 short stories, everybody  
24 understands that the underlying short stories  
25 are still the product of the -- of the

1 individual author, but as the anthologist, as  
2 the editor of this compilation, who decided  
3 which 20 got in, which ones didn't, I'm  
4 responsible for those editorial discussions,  
5 those decisions. Those are both protected First  
6 Amendment decisions. You can distinguish  
7 between the underlying material and the  
8 editorial decisions.

9           Now, at common law, the publisher was  
10 responsible for both, and so they were still  
11 liable for what the -- the republishing the  
12 authors' work. And that's precisely what  
13 Congress wanted to get rid of in 230, and they  
14 wanted to essentially give our clients an  
15 incentive to weed out of the anthologies the  
16 stuff that was harmful for children and  
17 problematic.

18           And that's why I don't think it works  
19 to say, oh, well, then that's your speech, so  
20 you're liable under 230, because it's that  
21 editorial control, the weeding out the bad  
22 stuff, that was the whole point of 230, to  
23 empower that.

24           JUSTICE ALITO: Well, I don't know how  
25 you could be -- how a publisher could be liable

1 for -- well, I -- I take that back for fiction,  
2 but, certainly, if it was -- I mean, if you --  
3 back in the day when some written material was  
4 considered to be obscene, you put together an  
5 anthology that included obscene material, you  
6 could be sued.

7 Today, if you put together an  
8 anthology of essays, non-fiction writing, and  
9 there's defamation in there, then the publisher  
10 could be sued. Even a publisher --

11 MR. CLEMENT: I agree, I mean --

12 JUSTICE ALITO: Well, we exercised  
13 editorial discretion. That doesn't shield you  
14 from liability.

15 MR. CLEMENT: Not at common law, and  
16 that's why Congress had to come in with 230.  
17 But what Congress did is it looked at the common  
18 law and it said, oh, this is problematic,  
19 because the only way you can avoid liability at  
20 common law is if you act as a conduit and let  
21 everything out. And once you start keeping out  
22 a little bit of porn, then you're responsible  
23 for the porn that slips through. And that's not  
24 practical on the Internet, and that's why we  
25 have 230.

1 JUSTICE ALITO: All right. I don't  
2 want to -- I -- I don't want to belabor the  
3 point. Let me just say something about the  
4 analogies that both sides draw to the issues  
5 that were presented in prior cases.

6 So you say this is just like a  
7 newspaper basically. It's like the Miami  
8 Herald. And the states say no, this is like  
9 Western Union. It's like a telegraph company.

10 And I -- I think -- I look at this and  
11 I say it's really not like either of those.  
12 It's worlds away from -- from both of those.  
13 It's nothing like a newspaper. A newspaper has  
14 space limitations. No matter how powerful it  
15 is, it doesn't necessarily have the same power  
16 as -- as some of your clients. But put that  
17 aside.

18 Newspapers overtly send messages.  
19 They typically have an editorial. They may have  
20 an editorial 365 days a year or more than one.  
21 But that's not the situation with even the most  
22 prominent of your clients. So I don't know how  
23 we could decide this case by saying -- by  
24 jumping to one side or the other of this case  
25 law.

1                   MR. CLEMENT: Well, Justice Alito, let  
2 me offer two thoughts. One, this isn't the  
3 first time you're wrestling with the Internet.  
4 You wrestled with it in Reno. You wrestled with  
5 it last term in 303 Creative. And I think the  
6 gist of those cases is this is more like the  
7 newspaper or the parade organizer than it is  
8 like a common carrier.

9                   And then, as to the cases, whether you  
10 think that this is different from a newspaper, I  
11 mean, the arguments that you're pointing to to  
12 say this is different are the arguments that  
13 those cases wrestled with and said didn't  
14 matter.

15                   So I know you know this, but in  
16 Tornillo, it -- you know, there was all this  
17 language about it being a monopolist, and that  
18 was in the context of a local political election  
19 where, if you couldn't get into the Miami  
20 Herald, like, where else were you going to go?  
21 And yet this Court said that didn't matter. And  
22 the -- the -- also, in Tornillo, this Court  
23 said, yes, space constraints, there are some,  
24 but our decision doesn't turn on that. And  
25 then, in Hurley, there's a lot of language in

1 the -- in the Court's opinion that says, you  
2 know, this is not like much of a message and  
3 they let some people show up even if they get  
4 there, like, the day of, and the only thing  
5 they're doing is, like, excluding this group.

6 But, of course, the exclusion was the  
7 message that they were sending, and it's the  
8 message the state was trying to prohibit. And  
9 that's kind of the same thing here, which is --

10 JUSTICE ALITO: I mean, if your -- if  
11 -- let's say YouTube were a newspaper, how much  
12 would it weigh?

13 (Laughter.)

14 MR. CLEMENT: Well, I mean, it would  
15 -- it would -- it would weigh an enormous  
16 amount, which is why, in order to make it  
17 useful, there's actually more editorial  
18 discretion going on in these cases than any of  
19 -- other case that you've had before you,  
20 because, you know, people tend to focus on the  
21 -- on the users that get knocked off entirely  
22 and end up on the cutting room floor, but both  
23 these statutes also regulate the way that these  
24 social websites -- they -- they sort of get you  
25 down to something that's actually usable to an

1 individual user.

2           And, in fact, if you tried to treat  
3 these entities like a true common carrier, so  
4 first in, first out, just order of, you'd open  
5 up one of these websites and it would be  
6 gobbledy-gook. Half the stuff wouldn't even be  
7 in a language you understood. And even if you  
8 controlled for that, you'd get all this garbage  
9 you didn't want.

10           JUSTICE ALITO: All right. Thank you.

11           JUSTICE SOTOMAYOR: I'd like to go  
12 back to the individualized explanation  
13 requirement. And please remind me, what did the  
14 district court do here? Did it grant you an  
15 injunction here?

16           MR. CLEMENT: It did.

17           JUSTICE SOTOMAYOR: And it was the  
18 circuit court who didn't?

19           MR. CLEMENT: Yeah.

20           JUSTICE SOTOMAYOR: So it was a  
21 district court who looked at the amount of  
22 material you submitted. And I know your  
23 declaration, YouTube said it would be a burden,  
24 a hundred times more than it does now.

25           I -- I don't know what the

1 quantification of that -- whether that was  
2 quantified or not. Was it? What a hundred  
3 percent more, a hundred percent --

4 MR. CLEMENT: A hundred percent --

5 JUSTICE SOTOMAYOR: -- more costly, a  
6 hundred percent more what?

7 MR. CLEMENT: A hundred percent more  
8 of its current effort, its current sort of, you  
9 know, efforts --

10 JUSTICE SOTOMAYOR: Yeah.

11 MR. CLEMENT: -- that are dedicated to  
12 --

13 JUSTICE SOTOMAYOR: But we -- we still  
14 don't know what the cost of that is and what --

15 MR. CLEMENT: Yeah. I mean --

16 JUSTICE SOTOMAYOR: There's a lot of  
17 unknowns. But this was a facial challenge with  
18 respect to that. And Texas seems to say you  
19 don't need to do much. You just need to have  
20 the computer spit out one through 10 reasons.  
21 And if you have a few individualized ones, you  
22 could just explain those individualized.

23 What do we do with that dispute?

24 MR. CLEMENT: So, first of all --

25 JUSTICE SOTOMAYOR: Because it is a



1 facial challenge.

2 MR. CLEMENT: It -- it -- it is a  
3 facial challenge. It is a preliminary  
4 injunction. We've obviously been over some of  
5 that. There -- here, there was -- you know,  
6 there wasn't just declarations. There were  
7 depositions taken. There was a record that was  
8 put together on all of this. And Texas was  
9 taking a slightly different view of what the  
10 burdens of the -- of Section 2 were there.

11 And so I think, on -- on that, if you  
12 just look at the record that was before the  
13 district court, you should affirm the district  
14 court's preliminary injunction.

15 What I would say, though, is I also  
16 think that even -- even what they say on page 44  
17 of their red brief is that, you know, you can do  
18 this in a relatively less burdensome way as long  
19 as your editorial policies are sufficiently  
20 specific and particularized.

21 And what -- what they're basically  
22 saying is, you know, you could change your  
23 editorial policies a little bit to make it  
24 easier to comply with this disclosure  
25 obligation. And that seems just a lot easier.

1 JUSTICE SOTOMAYOR: That begs the  
2 question, right?

3 MR. CLEMENT: Yeah. Exactly.

4 JUSTICE SOTOMAYOR: Because they're  
5 affecting -- okay.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?  
7 Justice Gorsuch?  
8 Justice Kavanaugh?

9 JUSTICE JACKSON: I just have --

10 CHIEF JUSTICE ROBERTS: Justice  
11 Jackson?

12 JUSTICE JACKSON: -- I just have a  
13 quick question.

14 So part of the dynamic that I think is  
15 going on in these cases is the fact that this  
16 regulation is enacted by the sort of  
17 democratically elected representatives of a  
18 state, and I suppose that if the state's  
19 regulation of these platforms gets too  
20 burdensome, then, presumably, the platforms can  
21 say forget it, we're not going to operate in  
22 your state. And then the citizens of the state  
23 would have the chance to determine if that's  
24 what they really wanted. That's sort of how I'm  
25 looking at this at a -- at a meta level.

1           So what caught my attention was your  
2 response to the Chief Justice when you suggested  
3 that your client couldn't withdraw from the  
4 State of Texas because you read the provision  
5 related to censorship and geography as ensuring  
6 that you don't do so. I had not read that  
7 provision in that way, so can you say more about  
8 why that's your interpretation?

9           MR. CLEMENT: Sure. I think that's  
10 the obvious interpretation of that provision,  
11 particularly when it talks about -- you know,  
12 this isn't -- this isn't like, you know, don't  
13 -- don't discriminate against Texans or Texans  
14 wherever they are. The fact that it's  
15 particularly preventing us from discriminating  
16 on somebody with a geographic location in Texas  
17 is basically telling us that we can't try to  
18 geofence our service and try to essentially, you  
19 know, explain to the people -- you know,  
20 sometimes, like, if you get -- like, your cable  
21 service has a dispute with a provider and you  
22 can't get your football game and they tell you,  
23 if you're hacked off about this, you know, call  
24 this number and complain.

25           We can't do that in response to this

1 law. And I think the legislators in Texas were  
2 able to tell their constituents, don't worry,  
3 you know, if you like your website, you can keep  
4 it. We're not going to threaten -- they  
5 can't -- they can't pull out of here based on  
6 the way that we're regulating them.

7 JUSTICE JACKSON: So, even if we could  
8 read it a different way, you're saying this  
9 necessarily -- I mean, I guess this dovetails  
10 with my concern about us not having sort of  
11 state interpretations or an application here to  
12 really understand, because I could read this  
13 differently.

14 It seems to me it's fitting into the  
15 whole set of things you're not allowed to do.  
16 You can't censor people on the basis of the  
17 viewpoint of the user. You can't censor them  
18 based -- on the basis of the viewpoint that is  
19 being expressed and you can't censor them based  
20 on their location in your state or another part  
21 of the state.

22 And so I guess I don't necessarily see  
23 that in the same way. I mean, you can't just  
24 automatically do that, I guess. I don't know.

25 MR. CLEMENT: It -- it -- it -- it

1 seems to me quite clear that it's designed  
2 essentially as a poison pill or somebody  
3 described it as the Hotel California provision,  
4 that you can -- you can -- you can't leave Texas  
5 even if you want to try to do that as a way of  
6 showing that this is an impermissible way of  
7 regulating our expressive activities.

8           And, you know, so -- so I -- I do  
9 think that is the right reading. I do think the  
10 fact that it's geographical location in Texas is  
11 kind of a clue to that. So this is not  
12 something where, you know, if you're a -- you  
13 know, if you're a Texas fan, you're protected no  
14 matter where you go in America. This really is  
15 designed to sort of say that you can't do the  
16 kind of geofencing that you might otherwise do  
17 to comply with an idiosyncratic state law.

18           I should mention just for the sake of  
19 completeness that, you know, in the lower  
20 courts, not part of the preliminary injunction,  
21 there are dormant commerce clause challenges to  
22 these provisions and the way that this is just  
23 kind of one state trying to regulate everybody  
24 and so that's part of the case that will be  
25 there.

1 JUSTICE JACKSON: But it's not here  
2 yet?

3 MR. CLEMENT: But it's not here.

4 JUSTICE JACKSON: All right.

5 MR. CLEMENT: All that's here is a  
6 preliminary injunction that runs to my clients.  
7 So, I mean, you know, this -- this statute has a  
8 smaller universe of people, but if there's  
9 somebody else out there who, you know, isn't one  
10 of my clients, who isn't covered by this  
11 preliminary injunction, the statute could take  
12 effect as to those people, and the same is true  
13 in Florida.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 General Prelogar?

18 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR  
19 FOR THE UNITED STATES, AS AMICUS CURIAE,  
20 SUPPORTING THE PETITIONERS

21 GENERAL PRELOGAR: Mr. Chief Justice,  
22 and may it please the Court:

23 I want to pick up with the question  
24 that Justice Alito asked in the seriatim round  
25 to my friend about the idea that the social

1 media platforms don't perfectly fit into either  
2 analogy or paradigm here, and I want to  
3 acknowledge the force of that intuition.

4           They obviously operate at a massive  
5 scale that goes beyond any particular parade or  
6 beyond any particular newspaper. I think the  
7 right thing to do with that intuition is to  
8 recognize that it's not like you can just exempt  
9 them from the First Amendment.

10           They are obviously creating something  
11 that's inherently expressive in taking all of  
12 this quantity of speech on their websites and  
13 curating it and making selectivity decisions and  
14 compiling it into a product that users are going  
15 to consume.

16           So the First Amendment applies, but I  
17 think that those kinds of concerns about how the  
18 social media platforms and how they look  
19 somewhat different from the other kinds of  
20 expressive products this Court has reviewed in  
21 prior cases can come in to the question of  
22 whether the First Amendment is satisfied with  
23 respect to any particular regulation.

24           Now, here, we think it's not satisfied  
25 because of the way that Texas has designed this

1 law. I'd urge the Court to rule narrowly. It's  
2 not necessary here to try to figure out how the  
3 First Amendment applies to new technology in  
4 general or to every possible website or the  
5 Internet in particular. This law has a very  
6 clear defect.

7           What Texas has done is tried to  
8 countermand the protected editorial speech  
9 decisions of the platform and the only  
10 justification it's offered to the courts below  
11 is that it wanted to essentially amplify the  
12 voice of users on that platform by suppressing  
13 the platform's own protected speech. That is a  
14 defect that is clear under the First Amendment,  
15 and the Court could say only that and resolve  
16 this case.

17           I welcome the Court's questions.

18           JUSTICE THOMAS: General, the -- when  
19 I asked you about the differential -- the  
20 difference in treatment of a private party as  
21 opposed to the government engaged in similar  
22 conduct, your answer was, of course, that it  
23 would -- it would be different, the government  
24 would be bound to comply with the First  
25 Amendment.



1           What -- there was some discussion in a  
2           number of the amicus briefs about instances in  
3           which the government and the private party, say,  
4           Petitioners -- Petitioners here, and the  
5           government coordinating efforts.

6           How would you respond to that?

7           GENERAL PRELOGAR: So let me respond  
8           to that by saying I think the position we're  
9           offering here and the position this Court will  
10          consider next month in the Murthy case are  
11          entirely consistent.

12          We, of course, acknowledge that if the  
13          government actually coerces the platforms and  
14          takes over their editorial decision-making, then  
15          the platforms could be deemed a state actor and  
16          that would be subject to First Amendment  
17          scrutiny.

18          We vigorously dispute that that has  
19          actually happened and the federal government has  
20          engaged in that kind of coercive conduct and we  
21          further dispute the legal standards that were  
22          applied in that case.

23          But there's no inherent tension here.  
24          You know, the federal government obviously can  
25          act and criticize the social media platforms'

1 content moderation decisions. That's just using  
2 the bully pulpit to express views.

3 And if -- if the states disagreed with  
4 how the platforms were exercising their content  
5 moderation standards, it could have done the  
6 same. It could have criticized them, it could  
7 have urged them or tried to influence them to  
8 adopt separate standards. But, here, what the  
9 State did is said, we're going to pass a law  
10 that actually takes over their content  
11 moderation and dictates that it has to be done  
12 in a different way.

13 JUSTICE KAGAN: General, Texas's law  
14 even more than Florida's can be understood as an  
15 expansion of public accommodations laws. And  
16 the United States is often in a position of  
17 defending public accommodations laws and  
18 insisting that they be vigorously enforced. And  
19 how do you see what Texas is trying to do as  
20 consistent with that broader stance about public  
21 accommodations laws?

22 GENERAL PRELOGAR: Yes. So I want to  
23 be very clear and stake out potentially some  
24 separate ground from my friend representing the  
25 platforms in this case with respect to generally

1 applicable public accommodations laws that  
2 protect based on a -- a -- a particular status.

3 We think, of course, those laws are  
4 valid on their face and that they serve  
5 compelling governmental interests. And so, to  
6 the extent that you're looking at how an  
7 ordinary public accommodations law operates, the  
8 refusal to deal, the refusal to serve, as  
9 Justice Barrett said, we think that's a  
10 regulation of conduct and that ordinarily there  
11 would be no First Amendment problem with the  
12 application of that law.

13 Now I acknowledge that it gets more  
14 complicated when those laws are applied to a  
15 business that is providing an expressive  
16 product, and cases like Hurley or 303 Creative  
17 show that in certain applications, sometimes the  
18 public accommodations law has to give way to  
19 First Amendment interests.

20 But I think the -- the Court has drawn  
21 a clear line. It has never suggested that the  
22 mere refusal to deal or serve based on status,  
23 even with respect to an expressive association,  
24 would fail under First Amendment scrutiny.

25 Instead, you know, you look at a case

1 like 303 Creative and, there, the concern was  
2 about changing the message or a case like  
3 Hurley, gay and lesbian individuals could march,  
4 you just couldn't change the message by holding  
5 up a particular sign. So we recognize that  
6 there are going to be some applications where  
7 you'd have to conduct that kind of First  
8 Amendment analysis. But, if the question, the  
9 relevant question, is could you just bar people  
10 on the basis of a protected status from creating  
11 an account and it's not going to affect your  
12 message, they want to, you know, lurk on X and  
13 read other people's posts, I think that that  
14 kind of law would certainly be valid.

15 I want to briefly address, Justice  
16 Gorsuch, the question you asked about the scope  
17 of CDA preemption under Section 230. Just to be  
18 clear on this one, I -- I want to say there are  
19 unresolved issues here. I would warn the Court  
20 away from trying to resolve exactly how much  
21 conduct CDA 230 protects and exactly how that  
22 interacts with the Texas law here.

23 The only point I would make is that,  
24 you know, there are -- there are questions about  
25 what it means to act in good faith, questions

1 about what it means for the platform to take  
2 down content that -- that is otherwise  
3 objectionable.

4 But however those interpretive  
5 disputes might shake out in a particular case,  
6 surely, Texas here isn't saying that its entire  
7 law is preempted and it has no effect whatsoever  
8 and CDA 230 fully takes care of the problem.

9 So I think what the Court could do,  
10 not knowing exactly the scope of how that  
11 preemption issue might be resolved, is to say  
12 whatever exists in that category of speech that  
13 Texas is prohibiting, the editorial decisions  
14 it's countermanding on the one hand versus what  
15 CDA 230 would authorize on the other hand,  
16 whether that's a big category or a little  
17 category, all of the things in that category  
18 constitute protected decisions by the platform  
19 that haven't been adequately justified. And I  
20 think that's all you need to say about the  
21 preemption issue in this case.

22 JUSTICE ALITO: If a legislative body  
23 enacts a law requiring viewpoint neutrality in  
24 some area and it does so because it has -- it is  
25 concerned that people who express a particular

1 viewpoint are suffering discrimination, is that  
2 law unconstitutional on the ground that the  
3 intent of the legislative body was to benefit a  
4 particular group?

5 GENERAL PRELOGAR: No, I don't think  
6 that that kind of law would immediately be  
7 unconstitutional. And, again, I think, if it's  
8 structured like a generally applicable public  
9 accommodations law, there might be important or  
10 significant governmental interests in being able  
11 to protect against that kind of discrimination.

12 CHIEF JUSTICE ROBERTS: Unless there  
13 are any further questions?

14 JUSTICE KAGAN: Can I do one more?

15 CHIEF JUSTICE ROBERTS: Sure.

16 JUSTICE KAGAN: The government has  
17 spent a lot of time defending net neutrality, so  
18 maybe I should have asked you this with respect  
19 to Florida's law just given the breadth of that  
20 law. And why are Internet service providers, in  
21 your view, so different and what if an Internet  
22 service provider wanted to make certain content  
23 distinctions?

24 GENERAL PRELOGAR: Internet service  
25 providers are fundamentally different because

1 they are engaged in transmitting data in order  
2 to make websites accessible, and that is not  
3 inherently expressive.

4           They're certainly providing the -- the  
5 infrastructure, the cable, the fiberoptics, and  
6 the service to make sure that you can log in on  
7 your home computer and access the Internet writ  
8 large, but along the way, they're not compiling  
9 that speech into any kind of expressive  
10 compilation of their own. So we would put them  
11 in the same category as telephone and telegraph  
12 companies or UPS, where you could say, sure,  
13 they're literally facilitating the transmission  
14 of speech, but they're not creating an  
15 expressive product that could implicate the  
16 First Amendment principles at stake.

17           Now then you might ask, okay, well,  
18 what if they want to start discriminating with  
19 respect to the service they're providing for  
20 particular types of websites? The kind of  
21 quintessential example of this is an Internet  
22 service provider that decides to slow down  
23 service to a streaming site, let's say Netflix,  
24 because it wants to direct Internet traffic to  
25 some other website of its own choosing, maybe

1 its own streaming service. We think net  
2 neutrality could come in there and -- and say  
3 you're not allowed to discriminate based on  
4 content in that way, but that's because, again,  
5 there would be no expressive speech or -- or  
6 compilation that you could attribute to the  
7 Internet service provider itself.

8 People don't sign up with Comcast or  
9 Verizon to give them some kind of limited,  
10 curated access to the Internet. They're  
11 engaging in service with those companies because  
12 they need someone physically to transmit the  
13 data so they can get access to the whole  
14 Internet.

15 JUSTICE KAVANAUGH: Can I ask one? I  
16 don't have to buy anything you just --

17 CHIEF JUSTICE ROBERTS: Sure.

18 JUSTICE KAVANAUGH: -- said to rule  
19 for your position in this case, anything you  
20 just said on net neutrality, right?

21 (Laughter.)

22 GENERAL PRELOGAR: You do not have to  
23 agree with me, Justice Kavanaugh. I hope  
24 someday, if it comes to it, to persuade you.

25 JUSTICE KAVANAUGH: I'm not --



1                   GENERAL PRELOGAR:  But -- but --

2                   JUSTICE KAVANAUGH:  -- I'm not saying,  
3  but I just want to make sure that's walled off.

4                   GENERAL PRELOGAR:  -- nothing --

5                   JUSTICE KAVANAUGH:  Yeah.  Yeah.

6                   GENERAL PRELOGAR:  -- about the  
7  Court's decision in this case would at all  
8  affect the net neutrality issue.  You know, we  
9  think that here, the platforms are engaging in  
10 expressive activity.  That's protected by the  
11 First Amendment.  And you can leave for another  
12 day all of the kind of conduit questions that  
13 come up in the net neutrality context.

14                  JUSTICE KAVANAUGH:  Thank you.

15                  CHIEF JUSTICE ROBERTS:  Thank you,  
16  counsel.

17                  Mr. Nielson.

18                  ORAL ARGUMENT OF AARON L. NIELSON

19                               ON BEHALF OF THE RESPONDENT

20                  MR. NIELSON:  Thank you.  It's been a  
21  long day.  Mr. Chief Justice, and may it please  
22  the Court:

23                               This is not the first time that new  
24  technology has been used to stifle speech.  
25  Telegraphs also discriminated based on

1 viewpoint, prompting a national -- a national  
2 scandal. Yet, under the platforms' theory,  
3 Western Union was just making editorial choices  
4 not to transmit pro-union views.

5           Today, millions of Americans don't  
6 visit friends or family or even go to work  
7 online -- on person. Everybody is online. The  
8 modern public square. Yet, if platforms that  
9 passively host the speech of billions of people  
10 are themselves the speakers and can  
11 discriminate, there will be no public square to  
12 speak of.

13           We know this because Twitter has  
14 admitted that their theory of the First  
15 Amendment would allow them to discriminate not  
16 just based on what is said on the platform but  
17 "on the basis of religion or gender or physical  
18 disability."

19           That's not the First Amendment.  
20 That's *Lochner* 2.0. And as more than 40 states  
21 warned the Court, the implications are gravely  
22 serious. For example, as New York explains, if  
23 these algorithms are constitutionally protected,  
24 platforms may be able to continue selling  
25 advertisers the ability to discriminate based on

1 race. Or, as Professor Lawrence Lessig, Zephyr  
2 Teachout, and Tim Wu, who do not typically file  
3 briefs in support of Texas, cautioned, not just  
4 states but Congress may be powerless to address  
5 the social media crisis devastating the lives of  
6 kids.

7 HB 20 is a modest effort to regulate  
8 such power in the context of viewpoint  
9 discrimination. Platforms can say anything they  
10 want under HB 20 about anything. There's no  
11 limit. They can say anything they want. Users  
12 can block anything they don't want. There's no  
13 limit on that. All that's left is voluntary  
14 communications between people who want to speak  
15 and people who want to listen.

16 This law is just nowhere near the  
17 heartland of the First Amendment. Instead, this  
18 is democracy and federalism, not a facial  
19 pre-enforcement injunction.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: If you -- if this was  
22 so clearly within a common law tradition, as you  
23 suggest, why hasn't Congress seen fit to -- to  
24 act as Texas has? And it appears Mr. Clement  
25 suggests that actually Congress has acted in the

1 opposite direction. Would you comment on that?

2 MR. NIELSON: Yeah. I don't see  
3 how -- with all respect to my friend, how their  
4 reading of 230 is at all consistent with what  
5 Congress said. They have all sorts of kind of  
6 policy arguments about how 230 ought to work,  
7 but if you actually just read the words of the  
8 statute, it doesn't work.

9 So his suggestion that Congress  
10 somehow has kicked out Texas or said that that's  
11 not how he wants it to be I don't think is  
12 consistent with the text of the statute. I  
13 didn't hear a lot of textual argument coming  
14 from Mr. Clement there. So that would be my --  
15 my first-line answer.

16 My second-line answer is I have no  
17 idea why Congress does or does not do, but I do  
18 know that Texas has the ability to protect  
19 Texans, and that's what Texas has done here.

20 CHIEF JUSTICE ROBERTS: Counsel, you  
21 began by saying, you know, the platforms, they  
22 want to keep out this person and that person on  
23 the basis of race or sex, and then you said  
24 that's not the First Amendment.

25 Well, the First Amendment doesn't

1 apply to them. The First Amendment restricts  
2 what the government can do, and what the  
3 government's doing here is saying you must do  
4 this, you must carry these people; you've got to  
5 explain if you don't. That's not the First  
6 Amendment.

7 MR. NIELSON: Well, respectfully, Your  
8 Honor, the First Amendment is big. It applies  
9 in a lot of different ways. So it's true, for  
10 us, like, we're saying because this isn't  
11 speech, it's conduct, we can require viewpoint  
12 neutrality.

13 But, in other cases, the same  
14 companies are saying -- when New York or some  
15 other state says, hey, you can't have algorithms  
16 that try to hook kids, they say, well, we have a  
17 First Amendment right to do that. It's the same  
18 First Amendment, the same First Amendment that  
19 says -- I mean, if it's all First Amendment,  
20 then I guess it's going to be hard for Texas to  
21 say you have to be viewpoint-neutral, but it's  
22 also going to be hard for California and  
23 Illinois or anybody else to say you can't have  
24 an algorithm that hooks kids because it's all  
25 the same First Amendment.

1 CHIEF JUSTICE ROBERTS: Yeah, I'm sure  
2 it's the same for all the other -- the other  
3 states. The question is they don't have the  
4 obligation to act in the same way that you as  
5 the state has the obligation to do.

6 They can discriminate against  
7 particular groups that they don't like, whether  
8 it's a group that encourages kids to take the  
9 Tide pod contest or something else. And you  
10 have different obligations.

11 MR. NIELSON: I guess a couple ways I  
12 could respond to that, Your Honor. The easiest  
13 one I'm going to talk about is, if I may, common  
14 carriage. My reaction coming to this case was  
15 the same as yours. My reaction was: Well, wait  
16 a minute, it's their own platform. You can't  
17 censor. Like, they're private.

18 But that's the exact same scenario  
19 that came up with the telegraph. The idea the  
20 telegraph was dumb pipes is not true. Instead,  
21 what the telegraph was, they had the technologic  
22 -- technological ability to say that we're not  
23 going to let this type of speech through.

24 CHIEF JUSTICE ROBERTS: No, you're  
25 absolutely right, but it's kind of begging the

1 question. You're assuming that they are like  
2 the telegraph. It seems to me that that's a big  
3 part of what the case -- case concerns.

4           And I'm just not sure that -- I mean,  
5 the telegraph had a particular compelling type  
6 of monopoly. I mean, if you didn't want to use  
7 the telegraph that was there, you usually didn't  
8 have an alternative choice, or whether you're  
9 talking about railroads or other types of common  
10 carriers, I'm not sure the same thing applies  
11 with respect to social platforms.

12           MR. NIELSON: So I give you my theory  
13 for why common carriage is important here. As I  
14 look at the cases, and I agree, they're really  
15 hard to figure out where conduct starts and  
16 speech ends and all of that, and you look at all  
17 the various cases this Court has said, some  
18 commentators say they can't be reconciled. I'm  
19 not sure about that.

20           But I think as a helpful way to think  
21 about it is we know that there is a line between  
22 speech and conduct, and we know that common  
23 carriage has always been on the non-speech side  
24 of the line, the conduct side of the line. So,  
25 if this falls within the common law tradition of

1 what is common carriage, nobody has ever thought  
2 that falls on the speech side of the line. So  
3 we -- we can't make them, you know, say  
4 something otherwise that they -- that they  
5 didn't want to say.

6 The whole point of it is that's a  
7 signal to the Court, that's a way that the Court  
8 can figure out which side of the line are we on.

9 JUSTICE SOTOMAYOR: That -- that's --

10 CHIEF JUSTICE ROBERTS: Well, as you  
11 said, it turns on whether you're saying who do  
12 you want to leave the judgment about who can  
13 speak or who can't speak on these platforms, and  
14 do you want to leave it with the government,  
15 with the state, or do you want to leave it with  
16 the platforms, the different various platforms.

17 MR. NIELSON: Well --

18 CHIEF JUSTICE ROBERTS: The First  
19 Amendment has a thumb on the scale when that  
20 question is asked.

21 MR. NIELSON: It does, and that's why  
22 it's important, as I said, to go back to look at  
23 the history on this, because, at some point, the  
24 First Amendment has to end, or everything is  
25 covered by the First Amendment.



1           This Court has said that the way that  
2 we tell the difference is whether it's  
3 inherently expressive. And the Court has said  
4 what they mean by "inherently expressive." They  
5 talked about in, you know, Miami Herald, you're  
6 not a passive conduit. We talked about in  
7 Hurley whether you're intimately connected.

8           Well, this Court last year had a case  
9 in Taamneh where they talked about what these  
10 platforms do, and they say that they are  
11 passively connected to the speech on their  
12 platforms and that they're agnostic about the  
13 content. It's just one big algorithm that's  
14 matching things together.

15           And I think that that's important.  
16 But I also want to stress, if I may, again, this  
17 is a facial posture. And if you look at the  
18 breadth of our statute, there is the talk about,  
19 you know, whether you have to host somebody's  
20 speech. There's also about you just want to  
21 read Facebook. That is one of the provisions of  
22 our statute.

23           You go online in the morning and you  
24 want to see what's going on in the world,  
25 according to their theory, they can stop you

1 from doing that too.

2 And that's surely public accommodation  
3 law. The idea that somebody -- they don't like  
4 somebody because of their race or their  
5 disability or something like that, and we're  
6 going to say we're not going to allow you onto  
7 our platform, that surely cannot be  
8 constitutional. That's what I mean by that's  
9 Lochner.

10 That's you've gone beyond any content  
11 of the platforms themselves on their page to  
12 saying we're not going to let people even look  
13 at what we're selling. That's a bookstore  
14 saying we won't sell you a book. That's  
15 different from saying we won't publish your  
16 book.

17 JUSTICE KAGAN: Do you think that  
18 there are any unconstitutional applications of  
19 your law?

20 MR. NIELSON: I mean, that's a hard  
21 question. I suspect that there might be.

22 JUSTICE KAGAN: What would they look  
23 like?

24 MR. NIELSON: So the one that comes to  
25 mind would be imagine -- and this comes up in --

1 in their brief -- they picked, like, the most  
2 vile example and they say: Imagine a publisher  
3 didn't want to publish the book written by the  
4 Proud Boys, was the example that they used.

5 I think you might very well have an  
6 as-applied challenge to that, but the problem  
7 for them is they picked the most vile example  
8 when I think all of them would say: Well, wait  
9 a minute, surely, you can let them on Facebook  
10 and you can't kick them off because their  
11 grandma said something outrageous, right?

12 So there's got to be a limit there.  
13 And that's why a facial resolution of this case  
14 doesn't work. And if it is, you can't fix a --

15 JUSTICE KAGAN: And how do you  
16 separate the one from the other? Where is the  
17 line?

18 MR. NIELSON: That's hard, right? I  
19 would say this Court struggled with that in 303  
20 Creative because it's really hard to know when  
21 something becomes inherently expressive. And  
22 the Court's cases like Dale, about when does  
23 something that happen, all of those are hard  
24 cases.

25 But, in all of them, this Court has

1 had facts. They've actually looked at the facts  
2 of the case and tried to figure out as applied  
3 whether that makes sense here.

4 In this situation, there's a million  
5 applications of this law that are perfectly  
6 fine. And they pick some of the most vile  
7 possible hypotheticals, ignoring, by the way,  
8 the provision of Texas law which they never  
9 addressed, which says, under Texas law, if you  
10 don't want to hear content, they are allowed to  
11 make sure you never hear that content.

12 So all you have left -- I mean, again,  
13 they never mention at all, that's like the focus  
14 point of our brief, they never respond to it.  
15 But that means all that's left is I don't want  
16 to hear this type of speech. I just want to  
17 hear this type of speech. And it's just  
18 voluntary communication. That's a telephone.

19 JUSTICE BARRETT: Mr. Nielson, we --  
20 you -- you heard during the prior argument a lot  
21 of conversation about how broad Florida's law  
22 was. I read Texas's law to be more narrow in  
23 its coverage, that it wouldn't sweep in some of  
24 the examples we were using in the last argument  
25 like Uber, Etsy. Is that -- am I correct?

1                   MR. NIELSON: I think that's fair,  
2 Your Honor.

3                   JUSTICE BARRETT: So what platforms  
4 does Texas's law cover? Am I right that it  
5 covers only the classic social media platforms  
6 like YouTube, Facebook?

7                   MR. NIELSON: So that's what their  
8 deponent has said, the only ones that they were  
9 sure that was covered is Facebook, Twitter, and  
10 YouTube.

11                  JUSTICE BARRETT: But that's their  
12 deponent. Presumably, Texas is the one who can  
13 authoritarily -- if it was in the Texas --

14                  MR. NIELSON: Yeah.

15                  JUSTICE BARRETT: -- courts --

16                  MR. NIELSON: Yeah.

17                  JUSTICE BARRETT: -- I mean, if it's  
18 not them, they're not the ones that get to  
19 decide authoritarily what the scoop -- scope of  
20 the law is?

21                  MR. NIELSON: Well, correct. I mean,  
22 we would have to prove it at trial, that they --

23                  JUSTICE BARRETT: Well, what's --

24                  MR. NIELSON: -- are subject to it.

25                  JUSTICE BARRETT: -- Texas's position

1 about the scope of the law?

2 MR. NIELSON: Well, the law says that  
3 it applies to any platform with more than 50  
4 million active users per month. So I'm not sure  
5 where some of the other platforms fall on that.  
6 The ones that we know are the three biggest ones  
7 fall within that.

8 JUSTICE BARRETT: So you're -- you're  
9 making that judgment based on size. So it's  
10 nothing about the definition. I mean, in the  
11 last argument, we were pointing out that the  
12 Florida law in defining what a platform does and  
13 how it works would encompass Uber, for example.

14 MR. NIELSON: Oh, oh, oh --

15 JUSTICE BARRETT: But you're saying  
16 that you're just distinguishing this is based on  
17 numbers.

18 MR. NIELSON: No, I apologize, Your  
19 Honor. There is also a separate provision which  
20 defines "social media platform" as a website  
21 open to the public, allowing a user to create an  
22 account and enables users to communicate with  
23 other users for the primary purpose of posting  
24 information, comments, and so on.

25 JUSTICE BARRETT: And so is it Texas's

1 position that that definition then covers the  
2 classic social media sites? And by "classic  
3 social" -- "social media sites," I mean sites  
4 like Facebook and YouTube.

5 MR. NIELSON: Yes, Your Honor.

6 JUSTICE BARRETT: Okay. And that it  
7 would not sweep more broadly to some of these  
8 other things, like Etsy?

9 MR. NIELSON: I don't think so, Your  
10 Honor, but the important --

11 JUSTICE KAGAN: But the district court  
12 thought it covered WhatsApp. Do you think that  
13 it doesn't?

14 MR. NIELSON: I don't know the -- I  
15 don't know the answer. That's the answer --  
16 that's the best I can give you. I don't know.  
17 We don't have discovery into that. We have the  
18 deponent, their own witness said these are the  
19 three that we are sure are covered.

20 It might very well be. That's another  
21 reason why it's hard to do this on a facial  
22 basis, because it might very well be WhatsApp,  
23 which sure looks like a telephone to me, would  
24 be covered by our rule, though.

25 JUSTICE JACKSON: But what about -- I

1 mean, within the big three, there are some  
2 email-looking functions, aren't there? I mean,  
3 I -- I appreciate that it's hard to do this  
4 because we don't have a record, but I understood  
5 that face -- Facebook, for example, which you  
6 say would be covered, has a messenger  
7 function --

8 MR. NIELSON: Yes, Your Honor.

9 JUSTICE JACKSON: -- which looks like  
10 email. So wouldn't we have to do this at the  
11 level of the functionality of these various  
12 platforms rather than at the kind of entity  
13 level?

14 MR. NIELSON: Yes, Your Honor, you  
15 would. And it's not just that. You'd also have  
16 to go through the different types of verbs  
17 included in our statute for censoring, including  
18 the one that they keep ignoring, which is the  
19 ability to receive the expression of somebody  
20 else.

21 That's when I say you look at the text  
22 of the statute, their theory would mean that  
23 even if you just want to lurk and just listen  
24 and see what other people are saying, they can  
25 kick you off for any reason at all. So, if you



1 have somebody who had never posted anything or  
2 their speech is identical to the speech of  
3 somebody else, their theory is: Well, we can  
4 kick you off.

5 That seems to be pretty far into the  
6 world of public accommodations, like, you know,  
7 303 was a narrow case. If that's what 303  
8 means, like, boy, now we're really, really,  
9 really big, you know, hence, Digital Lochner or  
10 Lochner 2.0, the idea that everything can't be  
11 protected by the First Amendment. At some  
12 point, there's lines of content.

13 JUSTICE GORSUCH: Counsel, yeah,  
14 during the prior argument, which I'm sure you  
15 listened to attentively --

16 MR. NIELSON: Yes, Your Honor.

17 JUSTICE GORSUCH: -- there -- there  
18 was some discussion about how difficult life  
19 will be if these injunctions are dissolved and a  
20 parade of horribles and expenses and difficulty  
21 geofencing Texas or Florida. Can you address  
22 some of those concerns?

23 MR. NIELSON: Yes. Two answers if I  
24 may? First, there was some suggestion that the  
25 prohibition on discrimination against Texas or a

1 part of Texas is somehow a trap to keep -- keep  
2 companies in. That's not true.

3 If you read the statute, that's not  
4 what it says. There's a separate provision in  
5 the statute which is the jurisdictional hook,  
6 which is, you know, if you're doing business in  
7 Texas -- and, by the way, even if Texas tried to  
8 do that, there's something called personal  
9 jurisdiction that you can simply just leave a --  
10 a forum. That's this Court's decision in Ford.

11 So that argument, it's just not true.  
12 But the other part that I think is really  
13 important about this is Texas's law, what is the  
14 remedy here? It's an injunction. There's no  
15 damages here. It's an injunction.

16 And, in fact, we know that it's not  
17 going to flood the courts because the injunction  
18 against the attorney general is limited to the  
19 attorney general. There's private enforcement  
20 of Section 7.

21 And we have a handful of cases because  
22 you don't get damages. So it's hard unless you  
23 have a really darn good case to be able to go to  
24 court if nobody's going to get damages for  
25 prevailing, which I think matters a lot in terms

1 of, like, what are the real-world consequences  
2 here?

3 They're going to have some lawsuits by  
4 the attorney general for injunctions. And if we  
5 can't prove it, if we can't prove viewpoint  
6 discrimination, they will prevail.

7 JUSTICE KAVANAUGH: Did you say they  
8 could stop doing business in Texas under this  
9 law?

10 MR. NIELSON: Yes, Your Honor, of  
11 course. I mean, it's -- it's true under the  
12 law, but it's also just true as a matter of  
13 personal jurisdiction. Anybody can get out of  
14 any jurisdiction that they want to.

15 JUSTICE KAVANAUGH: I just meant under  
16 the law.

17 MR. NIELSON: Correct, yes, under the  
18 law, yes, Your Honor.

19 CHIEF JUSTICE ROBERTS: How does that  
20 -- how does that work if you're talking about  
21 Facebook? I mean, if somebody -- or emailed and  
22 all that. If they send something into Texas,  
23 are they doing business in Texas?

24 MR. NIELSON: No, Your Honor, though  
25 that would be a fun personal jurisdiction case.

1 The answer as I understand it is you have to  
2 purposely avail yourself of the forum. So  
3 merely because somebody can look at your  
4 website, if you're not having some purposeful  
5 direction towards the forum, that's generally  
6 not sufficient.

7 CHIEF JUSTICE ROBERTS: Well, no,  
8 these -- it's a worldwide sort of thing and  
9 people are going to be sending stuff left and  
10 right and you know that as the -- as the  
11 company. I'm not sure -- I don't see how they  
12 can wall off Texas from the activities of the  
13 social media platform.

14 MR. NIELSON: Well, I mean, two  
15 answers. One, they can. They have the  
16 technological ability. It's called geofencing,  
17 which they can carve off. I mean, if they  
18 wanted to, they can probably carve off this  
19 building itself. They have the ability all the  
20 way down to that granular level.

21 But, again, more than that, it isn't  
22 just it shows up there. If you want to have an  
23 account with Facebook or Twitter or any of the  
24 others, like, there's a contractual relationship  
25 between the two. So they have customers that

1 are in these places. And people say, well, they  
2 don't have any customers because they're not  
3 charging any money. Well, we know that if  
4 they're not charging any money, like, you're the  
5 -- you're the product.

6 So they're taking your data and  
7 they're selling it to the advertisers, which is  
8 why it's so important that we recognize that if  
9 this algorithm is protected by the Constitution,  
10 then they can take that data and sell it to  
11 people and have highly targeted ads based on  
12 socioeconomic characteristics.

13 The New York brief explains that on  
14 page 12, which I think is important and doesn't  
15 -- shouldn't get lost in this. They picked,  
16 again, the most vile examples, which are the  
17 fanciful things that we don't usually do in a  
18 facial posture, and they try to say, well, that  
19 means the whole law should fail. There's a  
20 whole lot of perfectly fine applications that  
21 the Court needs to remember and not lose sight  
22 of here.

23 JUSTICE KAVANAUGH: What -- what about  
24 a terrorist's speech? How is that handled?

25 MR. NIELSON: Yeah. So a few ways.

1 The first response that I would have to that is  
2 the provision of the statute that they ignore,  
3 which is no user has to receive anything they  
4 don't want.

5 JUSTICE KAVANAUGH: Right. That still  
6 allows --

7 MR. NIELSON: Sure. Okay.

8 JUSTICE KAVANAUGH: -- the  
9 communication of it. So that's not --

10 MR. NIELSON: All right. Let's go  
11 through that there. So now -- now we're -- now  
12 we're -- most of the universe is gone, but the  
13 next level of this, under Texas law, if it's  
14 illegal, they don't have to do that either. So  
15 I'm assuming that a lot of the terrorism is  
16 going to be, you know, like we're inciting you  
17 come join Hamas or something like that.

18 JUSTICE KAVANAUGH: No, no, no, no.  
19 Just the pro-Al-Qaeda kind of messages that were  
20 common --

21 MR. NIELSON: Okay.

22 JUSTICE KAVANAUGH: -- pre-9/11,  
23 post-9/11, not necessarily incitement but  
24 advocating.

25 MR. NIELSON: Okay. Sure.

1 JUSTICE KAVANAUGH: Yeah.

2 MR. NIELSON: So we put aside the two  
3 -- first two --

4 JUSTICE KAVANAUGH: Yeah.

5 MR. NIELSON: -- levels here. Third,  
6 they're allowed under the statute to pick any  
7 categories they want. So, if they want to keep  
8 the category for which this speech falls in,  
9 that's their choice. If they want to cut that  
10 category out, they're free to do so. They just  
11 can't do so on a viewpoint basis.

12 And at the end of the day --

13 JUSTICE KAVANAUGH: So, in that last  
14 clause, they can't do it on a viewpoint basis,  
15 how does that work with terrorist speech?

16 MR. NIELSON: Sure. So it's hard to  
17 say with terrorist speech because you'd have to  
18 pick the category, but assume that it is, you  
19 know, Al-Qaeda. You can't -- you could -- you  
20 can't very well say you can have the, you know,  
21 anti-Al-Qaeda but not the pro-Al-Qaeda. If you  
22 just want to say no one's talking about Al Qaeda  
23 here, they can turn that off.

24 And then the last point, this is at  
25 the very end of the game, so you've gone through

1 all of those things, all you have left are  
2 voluntary people wanting to talk to each other.  
3 And, I mean, people say horrible things on the  
4 telephone, and that's -- and I don't think we've  
5 ever thought, well, you know what, we're going  
6 to turn -- we're going to turn that off because  
7 we don't want the telephone providers to be able  
8 to say -- have that sort of right to -- to  
9 censor.

10           If I may, I mean, with some hesitance,  
11 I want to talk about Orwell a little bit, and I  
12 say that with some hesitance. But my reaction  
13 coming to this case was very similar to yours.  
14 I looked at this and I'm like: Wait a minute.  
15 These are companies. They have their own  
16 rights. We don't generally think of censorship  
17 as something from the -- from private people.  
18 That's the government.

19           Here's how I came around on this.  
20 Maybe it'll persuade you. Maybe it won't. I  
21 came around on this to say this is something  
22 further up the food chain than that ordinary  
23 level of political discourse. This is just the  
24 type of infrastructure necessary to have any  
25 kind of discourse at all. That's why I keep



1 going back to the telegraph.

2           This isn't, you know, the -- the level  
3 of discourse where they're making the content  
4 decisions that we make our decisions based on.  
5 This is the infrastructure that we need to have  
6 any sort of discourse at all.

7           So, if we say we want to have that  
8 type of infrastructure not have, you know,  
9 censorship on it, that would mean we would have  
10 to have a rapid -- a massively increased federal  
11 government because it would have to control all  
12 the infrastructure. And then we would have,  
13 okay, now you can't discriminate based on this  
14 kind of infrastructure of how things work.

15           That's not -- I mean, that is Orwell,  
16 right? So, for me, the answer is, for these  
17 kind of things like telephones or telegraphs or  
18 voluntary communications on the next big  
19 telephone/telegraph machine, those kind of  
20 private communications have to be able to exist  
21 somewhere. You know, the expression like, you  
22 know, sir, this is a Wendy's. There has to be  
23 some sort of way where we can allow people to  
24 communicate --

25           JUSTICE JACKSON: And is that just

1 because of the -- the modern public square? I  
2 mean, Mr. Clement has said many, many, many  
3 times that there's a distinction between public  
4 and private and that that's sort of driving his  
5 analysis as to when and under what circumstances  
6 this kind of regulation can be done.

7 And are you just rejecting that  
8 because you're suggesting that they merge in  
9 this situation given the nature of the  
10 communications?

11 MR. NIELSON: I am not doing that.

12 JUSTICE JACKSON: Okay.

13 MR. NIELSON: And that's, again -- you  
14 know, I'll try again to be artful. These are  
15 complicated concepts. But I think about the  
16 common carrier as a really useful tool for this  
17 Court because we know that there's hard lines to  
18 draw. It's really hard to tell the difference  
19 between FAIR and Miami Herald, like, in the  
20 application, especially when you kind of get  
21 down to the granular level. It's really kind of  
22 hard to tell.

23 I think it would be helpful if the  
24 Court had a compass that could kind of, like,  
25 give us some direction of where to draw those

1 lines. And common law, common carriage is that  
2 compass.

3 JUSTICE JACKSON: But are you  
4 suggesting that a common carrier, as the SG  
5 pointed out, could never have First Amendment  
6 protected activity? I mean, that's why I keep  
7 going back to doesn't this have to be not at the  
8 level of entity but at the level of sort of what  
9 exactly are they doing in a particular  
10 circumstance? Because you just seem to say,  
11 well, these are common carriers, so everything  
12 they do is conduct and, therefore, we can  
13 regulate it. And I don't know that that's the  
14 way we've ever thought about this.

15 MR. NIELSON: Well, it is how the  
16 Court thought about it with telegraphs, which I  
17 think is a useful way of thinking about it. I  
18 mean, my friend in the government says, well,  
19 you know, they're just transmitting speech. But  
20 that's totally question-begging because they  
21 have the technological ability not just to do  
22 that.

23 The reason that cellphones don't,  
24 like, screen your calls or telegraphs didn't  
25 like --

1 JUSTICE GORSUCH: Well, Mr. Nielson,  
2 I'm sorry to interrupt --

3 MR. NIELSON: Oh, sorry.

4 JUSTICE GORSUCH: -- but I -- I -- I  
5 think you'd agree with Justice Jackson, though,  
6 that there might be some speech that these  
7 carriers, even as a common carrier, would be  
8 their own.

9 MR. NIELSON: A hundred percent, yes,  
10 Your Honor.

11 JUSTICE GORSUCH: And -- and you do  
12 have to take that function by function.

13 MR. NIELSON: Yes, and that's the  
14 other part of this law, which I think is so  
15 important is -- to recognize is we don't say one  
16 word about what they can say.

17 So I'll kind of disaggregate the  
18 functions of what's going on here. They have  
19 the one function, which is they are creating a  
20 message. We do nothing about that. They can  
21 say whatever they want about specific posts or  
22 anything, and that's fine.

23 But there's a separate thing that they  
24 do, which is facilitate conversations between  
25 two people, which is like a phone.

1 JUSTICE GORSUCH: I understand that.  
2 Now one of the things that we've sometimes  
3 looked at in the past, this Court I mean, in the  
4 common carrier world is market power.

5 MR. NIELSON: Yes, Your Honor.

6 JUSTICE GORSUCH: And how do you  
7 analyze that here? On the one hand, there are  
8 network effects that one would take account of  
9 in any analysis of -- of market power, and that  
10 might -- might help you. On the other hand,  
11 this is a bit unlike a telegraph in the sense  
12 that there might only be one right-of-way to run  
13 the wires, and there might be serious practical  
14 barriers for more than one set of wires.

15 Here, one can start a new platform at  
16 least in theory anytime.

17 MR. NIELSON: Yeah. So I guess --

18 JUSTICE GORSUCH: Fewer barriers to  
19 entry but market effects.

20 MR. NIELSON: Sure. So the first  
21 answer is, if we are not talking about speech,  
22 if we're just in the world of conduct, then  
23 we're not talking about market power at all.  
24 And we know that because cellphones are  
25 intensely competitive markets and yet they're

1 still all common carriers. But let's move that  
2 aside.

3 Now we're saying that there's some  
4 sort of, you know, reason to focus on market  
5 power. It's true. This is not like the market  
6 power of there's just one bridge. But, as an  
7 economic matter, there's really no difference.

8 And I know this -- here's, like, a  
9 simple kind of way to look at it: Twitter has  
10 its -- its -- its platform. There's a lot of  
11 competitors for Twitter, would-be competitors,  
12 including Threads for Meta, which is backed by,  
13 like, one of the largest companies in the world.  
14 They invested massive amounts of money to try to  
15 break up the Twitter monopoly, and they failed  
16 miserably. I mean --

17 JUSTICE GORSUCH: So what -- what do  
18 we do about -- I mean, there's some legislative  
19 findings here about market power. What do we --  
20 what deference do we owe those, if any?

21 MR. NIELSON: I would think  
22 considerable deference, Your Honor. This is a  
23 sovereign state. We don't usually treat states  
24 like the FTC where we subject it to, you know,  
25 arbitrary and capricious hard-look review. The

1 state is entitled to make determinations as a  
2 matter of law as to how things are.

3 And, obviously, at some point, it  
4 might be so far afield, but some -- I sure hope  
5 that the states get, you know, some deference on  
6 such important questions from the this Court.

7 CHIEF JUSTICE ROBERTS: This may --

8 JUSTICE BARRETT: Mr. Nielson, can I  
9 just -- oh, sorry. Go ahead, Chief.

10 CHIEF JUSTICE ROBERTS: This may be  
11 the same question that Justice Gorsuch was  
12 asking, but does the nature of the economy at  
13 issue matter to us? I mean, the social media  
14 platforms, the Internet, all of that stuff, an  
15 incredibly dynamic market. You know, the  
16 government maybe not so much.

17 And -- and it's -- it's -- and yet  
18 it's -- it's sort of an inflection point to say  
19 that the government has the authority, by  
20 categorizing the members -- the participants in  
21 this dynamic market as common carriers, to take  
22 over extensive regulation of them, not with  
23 respect to communication, but all sorts of  
24 things.

25 I mean, when you're talking about

1     railroads or telegraphs, it's not just moving,  
2     transportation, it's what the railroads look  
3     like, what the safety things they have to have,  
4     a whole range of things, that, you know, in the  
5     wild west economy surrounding the social media  
6     platforms and the Internet may be totally inapt.

7             Now, you know, I don't know if it  
8     comes at a time when you -- you -- you need to  
9     make that transition or not, but that is a very  
10    big step when it comes to the extent of  
11    government regulation.

12            MR. NIELSON: I -- I certainly think  
13    that's fair. My reaction -- my response is  
14    going to be this is a facial pre-enforcement  
15    injunction. We should at least be able to make  
16    our showing on the facts. We're quite confident  
17    that we would be able to show not just market  
18    power but durable, extensive market power here.

19            I -- I -- I actually don't think it  
20    would be even all that difficult to make that  
21    showing, so to the extent that market power is a  
22    requirement, I think that they haven't shown  
23    that they're likely to -- they're likely to  
24    prevail on the merits as to that, which is  
25    another reason why a facial injunction is just



1 simply inappropriate.

2           Bring an as-applied case and we're  
3 happy to litigate that. It's really hard to,  
4 what's facially, they can pick a few examples,  
5 and then say the whole thing fails.

6           JUSTICE BARRETT: Mr. Nielson, what  
7 besides market power -- I want to give you a  
8 chance to elaborate on your definition of  
9 "common carrier." I mean, you've said conduct,  
10 market power, what else?

11           MR. NIELSON: Sure. So the main  
12 requirement of common carrier, this is where  
13 common carriage and public accommodation are, if  
14 not, you know, cousins, maybe twins, is it has  
15 to be open to the public, which means that it's  
16 not a private associational group or something  
17 like that. You hold yourself out open to the  
18 public with non-differentiated contracts. You  
19 have this as a contract with everybody. So  
20 that's the very first one.

21           The second is it has to be the type of  
22 industry that has traditionally been regulated  
23 as such. So, for public accommodation, that's  
24 your inns and your restaurants. For common  
25 carriage, that's where you're talking about

1 things like bridges and -- and  
2 telecommunications.

3 JUSTICE BARRETT: But then you get  
4 into the problem of having to draw the analogy,  
5 right? I mean, the Chief just called the  
6 Internet kind of like the wild west of the  
7 Internet and the Internet looks a lot different.  
8 Even each of these platforms has different  
9 functionalities within it.

10 So, you know, when you extend common  
11 -- when you -- when you call -- you've got grist  
12 mills and then railroads and cable companies.

13 MR. NIELSON: Mm-hmm.

14 JUSTICE BARRETT: Each time you  
15 encounter something new that might qualify as a  
16 common carrier, you have to make a decision does  
17 it -- does it fit the bill or not.

18 MR. NIELSON: Sure. So I guess I can  
19 keep going further. That's why some courts have  
20 said, well, maybe there's additional  
21 requirements that we can put on common carriage.  
22 One is market power, which is, not everybody  
23 says, I don't know how that works with  
24 cellphones, but they said, well, you need market  
25 power, and the other was it has to be somehow

1 invested with a public interest.

2 And, here, under that, we know that if  
3 it's state action to block somebody from your  
4 Twitter account, how can that not be infected  
5 with a public interest?

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Thomas?

9 Justice Alito?

10 Justice Sotomayor?

11 JUSTICE SOTOMAYOR: I have a problem  
12 with laws like this that are so broad that they  
13 stifle speech just on their face, meaning I  
14 think that's what the government's been trying  
15 to say.

16 If you have a particular type of  
17 speech that you want to protect against or -- or  
18 promote, it would be one thing to have that kind  
19 of law. But we have a company here, Discourse,  
20 who's also a direct messaging app.

21 And there's no question that your law  
22 covers them, but they tell us that their whole  
23 business model is to promote themselves to a  
24 particular message and groups of messages. So  
25 they're not doing it indiscriminately. You're

1 basically saying to them, if they're out there  
2 and they're a common carrier, they can't have  
3 this -- this kind of business model.

4 MR. NIELSON: I mean, two responses if  
5 I may, Your Honor. The first is, as to the  
6 particular company, we're only talking about the  
7 three largest -- maybe more depending on who  
8 falls within the 50 million -- the largest  
9 telecommunications companies on earth. We're  
10 not talking everybody else.

11 JUSTICE SOTOMAYOR: Oh, so that -- so  
12 you -- they -- okay.

13 MR. NIELSON: So -- but, as to the  
14 second point --

15 JUSTICE SOTOMAYOR: You're agreeing  
16 with them that basically --

17 MR. NIELSON: Yeah.

18 JUSTICE SOTOMAYOR: -- this law is  
19 aimed towards them?

20 MR. NIELSON: To -- to -- yes, to the  
21 largest. We've never disputed that. But, even  
22 if you agree with all of that, I -- I -- I  
23 disagree with you, but I understand that there's  
24 still applications of this law that should be  
25 allowed to go into effect.

1                   I don't see how they can say that they  
2                   can kick somebody off for off-platform speech of  
3                   their grandmother. That can't be. Or because  
4                   they don't like it where you live in Texas, you  
5                   know, you live in El Paso and not Dallas, so  
6                   you're not as valuable to the advertisers, so  
7                   we're going to kick you off. Surely, that can't  
8                   be okay.

9                   CHIEF JUSTICE ROBERTS: Justice Kagan?  
10                   Justice Kavanaugh?

11                   JUSTICE KAVANAUGH: Two very quick  
12                   ones. On the deference to the legislative  
13                   findings point, my memory is that there was a  
14                   trial in Turner Broadcasting.

15                   MR. NIELSON: Yes, Your Honor, that's  
16                   Turner II. So, you know --

17                   JUSTICE KAVANAUGH: That's a --

18                   MR. NIELSON: -- maybe there will be a  
19                   Paxton II. I'm not sure how that plays out.

20                   JUSTICE KAVANAUGH: Right. But there  
21                   wasn't just -- there wasn't just Congress said  
22                   this, that's good to go. There was a trial  
23                   about that, right?

24                   MR. NIELSON: Sure, Your Honor.

25                   JUSTICE KAVANAUGH: Yeah.

1                   MR. NIELSON: And like I said, we're  
2 happy to -- to go to trial, but the Court --

3                   JUSTICE KAVANAUGH: That's all I  
4 wanted to ask there.

5                   MR. NIELSON: Oh, of course. Of  
6 course.

7                   JUSTICE KAVANAUGH: And then, on -- on  
8 common carrier, if a company says we're not a  
9 common carrier, we don't want to be a common  
10 carrier, we're carrying a lot, but we're not a  
11 common carrier, can the state make them into a  
12 common carrier?

13                  MR. NIELSON: The state -- that's a  
14 great question, and that was the first question  
15 I had when I came to this case. The answer is  
16 no, if you are not a common carrier, you can't  
17 suddenly become a common carrier. That's why I  
18 think it's important to think of it as a compass  
19 to kind of tell you where the line is.

20                  But I would urge the Court, if you're  
21 interested, again, we've heard, you know, read  
22 Professor Volokh's article.

23                  One thing that really struck me as  
24 strange was, well, wait a minute, they have  
25 terms of service, so how can they be a common

1 carrier? Because if you have terms of service  
2 saying you can't do this.

3 And this Court addressed that very  
4 problem. The case -- the case that he cited is  
5 New York Central v. Lockwood from 1873 where the  
6 Court said you can't just get out of the duties  
7 of common carriage by contract. If you're a  
8 common carrier, you're a common carrier unless  
9 you stop opening yourself up to the public.

10 JUSTICE KAVANAUGH: Seems a little  
11 circular, but I'll end there. Yeah.

12 MR. NIELSON: Sure.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Barrett?

15 JUSTICE BARRETT: I just want to get a  
16 clarification. So you said that Facebook could  
17 geofence and just pull out of Texas? Was that  
18 correct?

19 MR. NIELSON: Of course, of course,  
20 Your Honor. Yeah.

21 JUSTICE BARRETT: Okay. Because I was  
22 just confused. Mr. Clement was pointing out,  
23 you know, that according to the provisions of  
24 the law, you couldn't. And I'm looking at  
25 143A.002.

1 MR. NIELSON: Mm-hmm.

2 JUSTICE BARRETT: And it says, you  
3 know, that you can't censor users' expression,  
4 ability to receive information, et cetera, based  
5 on a user's geographic location in this state or  
6 any part of the state.

7 So you don't understand that to say,  
8 well, based on your location in Texas, we're not  
9 going to let you post content?

10 MR. NIELSON: Your Honor, this is one  
11 of the prohibitions of the law, that they can't  
12 -- let me state it a different way if I -- if I  
13 may.

14 There's a provision of the law which  
15 is the jurisdictional hook that says who is  
16 subject to this law at all. If you choose to do  
17 business in Texas, then this provision kicks in,  
18 and you can't discriminate against people after  
19 you've chosen to do business in Texas based on  
20 the status that they're in Texas.

21 But, if you don't want to do business  
22 in Texas at all, that's a separate provision,  
23 and you can get out of Texas. This is the  
24 prohibition on what you can't do. If you choose  
25 to do business in Texas, you can't darn well



1 discriminate against somebody because they're in  
2 El Paso.

3 JUSTICE BARRETT: And doing business  
4 in Texas is -- is what, just allowing Facebook  
5 users to sign up in Texas, or is it, you know,  
6 Facebook accepting ad money from Texas  
7 corporations?

8 MR. NIELSON: That question has not  
9 been resolved by any of the Texas courts because  
10 none of them have been. But, as I read it, it  
11 is you have to have, you know, customers in  
12 Texas. You've entered into contractual  
13 relationships with Texans.

14 JUSTICE BARRETT: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Jackson?

17 JUSTICE JACKSON: So Justice Barrett  
18 had exactly my same thought, and I just want to  
19 clarify. So this doesn't speak in your view to  
20 a business decision not to offer services in  
21 Texas because, for example, their requirements  
22 are too burdensome.

23 Instead, this is you're offering  
24 business in Texas and everywhere else, but you  
25 are prohibiting them from discriminating against

1 people on the basis of their geography, meaning  
2 they're in Texas?

3 MR. NIELSON: Yes, Your Honor.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Rebuttal, Mr. Clement?

8 REBUTTAL ARGUMENT OF PAUL D. CLEMENT  
9 ON BEHALF OF THE PETITIONERS

10 MR. CLEMENT: Thank you, Mr. Chief  
11 Justice. Just a few points in rebuttal.

12 First of all, as to the common  
13 carrier. The two classic elements of common  
14 carrier status are missing here. One is that  
15 you just transmitted or carried messages from  
16 point A to point B. That's not what's going on  
17 here.

18 We use the word in our -- our brief  
19 and from this Court's cases "disseminate."  
20 "Disseminate" means to spread broadly. That  
21 means you're in the expressive enterprise  
22 business. There's zero tradition of treating  
23 entities in the expressive enterprise business  
24 as common carriers.

25 And then the -- the other factor is

1 there really is like an essential facility. You  
2 know, the telephone wires used to go, the copper  
3 wire, the last mile to every house in America.  
4 So, if you were kicked off Ma Bell, you were  
5 really out of luck. This is the opposite  
6 situation in the Internet where you have lots of  
7 other choices.

8           This is just not a common carrier.  
9 Not that that really is talismanic under the  
10 First Amendment anyways. Justice Thomas made  
11 that point back in Denver carrier case and he  
12 had it exactly right there.

13           Now, second, public accommodation. I  
14 wouldn't be worried about any other  
15 accommodation law -- public accommodation law.  
16 No other public accommodation law prohibits  
17 discrimination on the basis of viewpoint and  
18 applies exclusively to speakers.

19           That is a First Amendment red flag  
20 that you're trying to limit speakers' ability to  
21 discriminate on the basis of viewpoint. That's  
22 just a frontal assault on editorial discretion.  
23 Every other public accommodation law that I'm  
24 aware of works differently.

25           Third point, protecting kids. If

1 you're at all concerned about protecting kids on  
2 the Internet, that should be a vote in our favor  
3 in this case because, if you can't do viewpoint  
4 discrimination, that disables us from doing many  
5 of the things that our companies try to do to  
6 protect youths online. I mean, the idea that,  
7 okay, we're going to have to choose between  
8 having -- if we have suicide prevention, we have  
9 to have suicide promotion to avoid viewpoint  
10 discrimination, that should be a non-starter.

11           And protecting kids is important even  
12 as to the disclosure provision. There is a  
13 record on this case at page 161 of the Joint  
14 Appendix, a witness from Stop Child Predators  
15 testified and said these disclosure provisions  
16 give a roadmap to predators to figure out why  
17 their messages aren't getting to children so  
18 they can figure out why they got bounced and  
19 they can try again and sort of work their way  
20 around.

21           So the last point, and I think this is  
22 an important one to end on, this idea that  
23 somehow we're in -- you know, behind the eight  
24 ball because we brought a facial challenge,  
25 there is a -- a proud tradition of facial

1 challenges to vindicate First Amendment rights  
2 in this country. That's how many of these cases  
3 have been brought. There's an equally proud  
4 tradition of getting a preliminary injunction  
5 against a law that is chilling speech.

6           And as the -- the General pointed out,  
7 I mean, the party presentation rules have to be  
8 foundational here. If we had gone into the  
9 district court and said this is unconstitutional  
10 on its face, and they said no, it's not because  
11 of Gmail, we could have had a fair debate about  
12 that. We could have modified our complaint if  
13 necessary. That's a difficult issue. As I  
14 said, the only court that I've seen that -- that  
15 deals with it directly said Gmail is not a  
16 common carrier. But, in all events, we could  
17 have litigated all of that. But the Plaintiffs'  
18 burden is not to think of any theory the  
19 government could come up with on appeal and then  
20 foreclose it in the district court.

21           Thank you.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel, all counsel.

24           The case is submitted.

25

1                   (Whereupon, at 1:49 p.m., the case was  
2 submitted.)  
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## Official - Subject to Final Review

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