No. 22-555

# In the Supreme Court of the United States

NETCHOICE LLC, DBA NETCHOICE, ET AL.,
PETITIONERS

*v.*

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
RESPONDENT

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

## BRIEF OF PROFESSOR PHILIP HAMBURGER AS AMICUS CURIAE IN SUPPORT OF RESPONDENT


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## QUESTIONS PRESENTED

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

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

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### INTEREST OF AMICI CURIAE[1]

Amicus curiae Philip Hamburger is the Maurice and Hilda Friedman Professor of Law at Columbia Law School. He submits this brief, however, entirely in his own capacity.

This amicus supports corporate speech rights. *See* Philip Hamburger, *Liberal Suppression: Section*

1. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

*501(c)(3) and the Taxation of Speech* 287 (2018). But just because the Platforms are corporations does not mean corporate speech or speech rights are at stake in this case.

Amicus has a direct interest in the outcome of this case because he relies upon social media for learning. Although the Texas free-speech statute protects speech only in that state, the ideas and information circulated in one jurisdiction tend to leak out to others. So amicus looks to common-carrier antidiscrimination statutes to preserve at least a few jurisdictions that are free from the Platforms' viewpoint discrimination.

## SUMMARY OF ARGUMENT

Section 7 of the Texas free-speech statute—its anti-discrimination section—complies with the First Amendment. First, the Platforms have no speech or speech rights in their censorship because unlike newspapers, cable companies, etc., they do not exercise initial choice but leave the public to post what they wish. Second, the Platforms' "freedom of speech" impedes much speech and scientific knowledge and therefore is very different from what ordinarily is considered freedom of speech. Third, the Platforms have no speech rights in allegedly private speech to the extent it is governmental. Fourth, censorship by dominant private Platforms is an irresistible temptation for government to exploit it for public censorship, and the First Amendment does not and probably cannot stop the government from using the Platforms for suppressing dissent. So if freedom of speech is to be protected, common-carrier statutes, like that of Texas, are essential.

Finally, if the Platforms have a right of expressive discrimination against users, it will be difficult to deny this right to other businesses. A decision giving the Platforms a First Amendment right of expressive discrimination will erode antidiscrimination laws.

## ARGUMENT

### I. THE PLATFORMS HAVE NO SPEECH OR SPEECH RIGHTS IN THEIR DISCRIMINATION

Although freedom of speech is essential, attributing the freedom to nonspeakers is unjustified and dangerous. Not every entity that deals in speech is a speaker, and persons can handle speech without having First Amendment protection in that speech. Telegraph and telephone companies, for example, are merely conduits or platforms for speech, not speakers. They therefore have no speech rights in the speech conveyed or in excluding opinion they dislike. Similarly, the massive social-media platforms covered by the Texas free-speech statute (the "Platforms") are merely platforms for the speech of others, not speakers. They have no speech right in viewpoint discrimination against the speech others post on the Platforms. And these conclusions are constitutionally ingrained.

#### A. Unlike Newspapers, The Platforms Leave The Initial Choice About What Gets Posted To The Public, So The Platforms Are Mere Carriers, Not Speakers

The Platforms claim they are speakers because they exercise "editorial discretion" and "curate" what others post on their platforms. Pet. Br. 5, 13. The implication is that the posted material that the Platforms leave undis-

turbed is the Platforms' speech—in the same sense that editors speak through their choice of editorials and curators express themselves through their selection of paintings. But is this analogy accurate?

Although those who present the speech of others can become speakers, they first must choose what is presented. Newspapers and art galleries—as well as cable TV companies and parade organizers—decide at the outset what speech to admit into their venues. Rather than leave authors and artists to post their own speech, these entities choose what to print or present.

An editorial writer cannot simply post his editorial on the pages of the Wall Street Journal; rather he must submit it to the editors, who decide whether to publish it. An artist cannot place her paintings on the walls of Gagosian Gallery. Instead, she must wait for its curators to choose to represent her and then curate a show by selecting some of her paintings. This discretion occurs at the outset, when the newspapers and galleries choose what to present. Nothing can appear unless the newspaper or gallery itself exercises the initial choice.

Similarly, cable TV companies choose their programming. Parade organizers select participants and arrange where they will appear in the lineup. Even when one turns to cakeshops and website designers who incorporate words chosen by customers, the firms exercise artistic choice over presentation. The customers do not decorate the cakes or design the websites.

Thus, all sorts of businesses, large and small, enjoy freedom of speech in presenting the work of others, but only if the companies make the speech their own through

their initial choice. The point is not that the companies are the original speakers or that they agree with all their speakers, but that they decide to present the speech in their newspaper, cable channel, bakery, parade, or other site or platforms. When a business chooses what to present, the published pieces—and the overall impression given by the selection—become the business's speech, an expression of its vision, whether of politics, morals, or art.

The Platforms, in contrast, generally do not exert that initial choice. Rather than choose and post other people's words and images, they generally allow members of the public to come onto their platforms to choose and post their own words. More precisely, the platforms are primarily engaged in allowing users to post on their own—in contrast to, for example, online newspapers and other entities that primarily preselect what they publish and leave others to exercise choice only in commenting or otherwise posting in ways that are merely incidental or related to the companies' preselected material. *Cf.* Tex. Bus. & Com. Code § 120.001(1).

The closest the Platforms come to exercising any initial choice over publication is to ban some persons altogether. Even this, however, occurs in response to what such persons have already posted. This deplatforming is therefore not entirely a choice at the outset about what views to carry. And other filters, such as shadow-banning and demonetizing, still allow the censored individuals to continue to post their work for themselves. So even the Platforms' filters generally leave members of the public

to exercise initial choice—to choose and post their speech themselves.

Thus, the very indicia—*editing* and *curating*—that the Platforms rely upon to show that they are speakers actually show the opposite. The Platforms do not edit or curate in the sense of initially choosing what appears on their sites. On the contrary, they indiscriminately allow the public to post on their platforms and then, mostly afterward, defenestrate some for disfavored views. This is discriminatory exclusion, not editing or curating. It shows that the Platforms are not exercising the initial choice that would reveal any of the speech, its compilation, or the resulting composite impression to be theirs.

To avoid this conclusion, the Platforms, arguing through NetChoice, say that their editorial choice can come after posting. *NetChoice v. Paxton*, Pet. Br. 16, 19. But when one considers newspapers, cable companies, parades, bakeshops, etc. they all *initially* exercise choice over what gets printed, posted, or presented. This explains why those businesses are speakers and have speech rights in the speech of others, and why communications carriers, such as telegraph and telephone companies and the Platforms, are not speakers.

### B. Nor Is There Expressive Conduct, Because the Censorship Does Not Produce a Particularized or Coherent Message That Is Likely to Be Perceived

Even if the Platforms' censorship is not exactly speech, it may be supposed that it is expressive conduct. It fails, however, to meet the basic requirements for such expression.

First, conduct is not considered expressive, according to this Court, without "[a]n intent to convey a particularized message" and unless "the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)). It therefore must be asked whether the Platforms' censorship creates a particularized or coherent message and whether it is likely to be understood.

The Platforms hint at their censorship in their terms of service, but without much clarity or particularity. In important instances, moreover, they have censored beyond those terms. The FBI induced them to suppress stories about the Hunter Biden Laptop, leading Twitter's former Head of Trust and Safety, Yoel Roth, to say that "Twitter erred in this case." Farnoush Amiri, *'Hindsight is 20/20': Former Twitter execs tell Congress they screwed up by blocking the Hunter Biden story*, Fortune (Feb. 8, 2023), https://bit.ly/47FrlNN. And Facebook was pressured into censoring doubts about the COVID-19 vaccines that it understood were "completely benign" and "not misinfo." Jim Jordan (@Jim_Jordan), Twitter (Sept. 5, 2023), https://bit.ly/47IokMA (reproducing an internal Facebook email from April 7, 2021). The censorship is thus significantly different from the terms of service, and the public cannot understand the message of the censorship from those terms. Indeed, the terms of service tend to mislead the public about the real extent and focus of the censorship.

Conservatives complain that they are being censored; so anti-conservatism could be the particularized mes-

sage. But others see it differently, concluding that "the claim of anti-conservative animus is itself a form of disinformation: a falsehood with no reliable evidence to support it." Paul M. Barrett & J. Grant Sims, *False Accusation: The Unfounded Claim that Social Media Companies Censor Conservatives*, NYU Ctr. for Bus. & Hum. Rts. 1 (Feb. 2021), https://bit.ly/47Hj4J2. NetChoice's own Director of Public Affairs has promoted the message that the anti-conservative slant is a myth. Robert Winterton, *Conservative Big Tech Campaign Based on Myths and Misundertanding*, NetChoice (May 28, 2020), https://bit.ly/3U5KQMs. Such conclusions confirm that the Platforms' censorship is open to contradictory interpretations and that its message is difficult to discern.

Indeed, the message (if there is any coherent communication) is obscured by the vast scale of the Platforms and the censorship's largely algorithmic and secret character. Adam Candeub, *Common Carrier Law in the 21st Century*, 90 Tenn. L. Rev. 813 (forthcoming 2024) (manuscript at 48), https://bit.ly/48HNlsS. The scale prevents any one viewer from seeing the whole of the censorship, and the algorithms and secrecy further obscure the Platforms' choices. *Id.*

In many businesses—including newspapers, cake shops, web designers, parade organizers, or cable TV—there is no doubt that a particularized or coherent message is very likely to be understood. Here, in contrast, it is doubtful whether there is any such message, let alone one that is very likely to be discerned. The record, moreover, on a preliminary injunction with expedited discov-

ery, is not adequate to show any message at all. So the Platforms' censorship cannot be considered expressive conduct.

A second problem for an expressive conduct claim is that the Texas statute satisfies this Court's *O'Brien* test for regulating expressive conduct:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*United States v. O'Brien*, 391 U.S. 367, 377 (1968). Here, the regulation is within Texas' constitutional power over carriers doing business within the state; it furthers the vital interest of protecting free speech and open debate; that interest, as shown in *supra* Section I.A and *infra* Section IV.D, is unrelated to the suppression of speech; and the antidiscrimination restriction is only what is necessary for protecting speech—indeed, it's so minimal it even avoids requiring the Platforms to pay damages.

### C. Liability For Speech Harms Attaches To Speakers, Not Non-Speakers, And This Is An Independent Indication That The Platforms Are Not Speakers

The Platforms are not liable for the speech of others. As put by Section 230: "No provider or user of an interactive computer service shall be treated as the publisher

or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). This section protects interactive computer services from at least defamation liability to the extent they act as carriers for the speech of others.

Rather than introduce a new policy, Section 230 applies the old common law doctrine on common carriers—at least, that is, the freedom-from-liability side of the doctrine. That doctrine recognizes that common carriers cannot be expected to examine closely what they carry and that communications carriers should not snoop on communications. The Platforms and other carriers are thus protected from liability for the dangerous nature of what they convey, whether explosives or words. *See The Nitro-Glycerine Case*, 82 U.S. 524 (1872). Not merely a doctrine or policy, this anti-liability rule is a common-sense recognition of the underlying reality, that whereas users send their goods or words, carriers merely convey them.

Section 230 and old common-carrier doctrine thus are a powerful indication—entirely independent of this case—that the Platforms are primarily carriers, not speakers.

Indeed, Section 230 commands that no interactive computer service "shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). This Court therefore cannot treat the Platforms as publishers or speakers unless that section is unconstitutional. The substantive point, however, is conceptual, not just statutory. The Platforms don't have liability for what they

carry because they are not the speakers—and this conclusion for purposes of liability reinforces the point that they are not speakers for purposes of the First Amendment.

### D. Not Being Speakers, The Platforms Have No Speech Rights Against Texas's Common-Carrier Antidiscrimination Law

Precisely because the Platforms are not speakers, they can constitutionally be barred from discriminating on the basis of viewpoint. To be merely a common carrier for the speech of others, not a speaker, has always come with a pair of legal consequences. On the one hand, the Platforms are not ordinarily legally responsible for the speech they carry. On the other, they can be subject to antidiscrimination requirements without any question of their freedom of speech.

Already in the seventeenth century, this combination of privilege and duty was applied to carriers—simultaneously sparing them legal liability for the views expressed and requiring them to take all comers. Lord Chief Justice Holt observed: "If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier . . . ." *Lane v. Cotton*, 88 Eng. Rep. 1458, 1464–65 (K.B. 1701) (footnotes omitted).

Although carriers nowadays tend to be corporations, common-carrier doctrine is not narrowly about corporations or corporate speech. In the past, most communications carriers, including letter carriers, were individuals. *See, e.g.*, *The New York Directory, and Register, for the*

*Year 1789*, at 29 (1789) (listing "Duncan, Hugh, letter carrier").

The foundation for the paired freedom from liability and antidiscrimination duty was that common carriers held themselves open to the public—this being what made them "common" carriers. Common land was open to all, and so were common carriers. Of course, other indicia of common-carrier status, such as market dominance, have been layered on top of this foundational element. But the underlying indication is when carriers make their services or facilities "common" by holding them open or available to the public. Communications carriers thus become "common" when they let the public, at their discretion, use the carriers to send, share, or post their own lawful messages—that is, when they let the public choose what they post.

The point isn't that the Platforms don't discriminate, but that they let users go on their sites and choose for themselves what to post. In this sense, they hold themselves out to the public and qualify as common carriers, and they thereby reveal that they are merely conduits for speech, not speakers.

The Platforms therefore, like other communications common carriers, can be barred from viewpoint discrimination without abridging their freedom of speech. Put another way, "it's not clear why platforms should have more authority to control mass publication than UPS or phone companies have over the narrower publication involved in the typical mailing or phone bank." Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 387–88 (2021).

### E. The Carrier–Speaker Distinction Is Constitutionally Ingrained

That the Platforms are merely carrying speech, not publishing it, is more than just the reality; it also is deeply embedded in originalism, precedent, and constitutional logic.

Common-carrier doctrine is old, running from early England to the present. So from at least the time of the founding until just recently, there has been no question whether common-carrier doctrine violates the First Amendment. That doctrine has been applied in numerous communications cases, and in each century to new communications technologies. Although affected companies sometimes protested that they were not common carriers, there have been no First Amendment doubts about application of common-carrier law to communications. Common carriers "merely facilitate the transmission of speech of others," and therefore "[e]qual access obligations . . . have long been imposed on telephone companies, railroads, and postal services, without raising any First Amendment issue." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 740–41 (D.C. Cir. 2016). It therefore does not matter that the Platforms' technology is novel; common-carrier doctrine has always been applied to new technology without First Amendment problems.

NetChoice repeatedly misquotes Benjamin Franklin that his newspaper was not "'a stagecoach, with seats for everyone,'" Pet. Br. 2, 22. But that's not exactly what he said. Instead, he repudiated the view that "a newspaper was like a stage-coach, in which anyone who would pay had a right to a place." *Autobiography of Benjamin*

*Franklin* 94 (1901 ed.). NetChoice relies on its bowdlerized quotation to prove "there is no American tradition of forcing private parties to disseminate viewpoints against their will." Pet. Br. 2. But Franklin was distinguishing between newspapers, which published their own views, and stagecoaches, on which there was a "right" of carriage, without discrimination, for persons and letters. The Platforms are like Franklin's stagecoaches, not his newspaper; they are common carriers, not speakers. So the only "right," as Franklin understood, is that conferred by common-carrier doctrine—the right of users against discrimination, not a freedom of the carriers to discriminate.

The sheer antiquity and continuity of common-carrier doctrine lends it originalist and precedential weight. So deeply ingrained a distinction cannot be whittled away without departing from long settled assumptions.

## II. A "FREEDOM OF SPEECH" SO SUPPRESSIVE OF SPEECH IS VERY DIFFERENT FROM WHAT ORDINARILY IS CONSIDERED FREEEDOM OF SPEECH

If the Platforms' censorship is their freedom of speech, why is it so dangerous for the speech of others? Ordinarily, one person's speech does not suppress anyone else's speech, let alone the speech of millions. This "free speech," however, massively impedes the flow of communication, and that raises questions as to whether it really is free speech.

When editors at the Wall Street Journal refuse to publish a few dozen editorials a day, they disappoint the

authors, but do not suppress their speech. They are merely refusing to adopt the editorials as their own speech; they are not suppressing anything that anyone has already posted or published on a generally open or common platform. In contrast, the Platforms' supposed freedom of speech removes or limits the visibility of already posted and published speech on a common platform. It does so on a vast scale, shutting down debate for much of the nation. The Platforms' freedom of speech is therefore very strange.

Why is their free speech so threatening to the free speech of others? It is censorship in speech's clothing. Something so paradoxical should be viewed with caution, even trepidation.

### A. Attributing Speech to Mere Carriers Impedes Speech

It is vitally important to protect the avenues for communication. Longstanding doctrine has done this by distinguishing between speakers and non-speakers—in particular, between speakers and communications common carriers—liberating such carriers from the liability of speakers and burdening them with the duty of not discriminating. If they were considered speakers, such carriers would have a First Amendment right to discriminate on the basis of viewpoint. But by recognizing them as merely conduits for the speech of others, longstanding constitutionally ingrained doctrine has simultaneously freed them from liability and barred them from discriminating, thus making them open highways for speech.

If this Court were to treat the Platforms as speakers, it would deny Americans the benefit of this open thoroughfare for speech. It would allow the Platforms to en-

joy the freedom from liability while giving them constitutional protection from the corresponding duty against discrimination, thus enabling them to shut down dissent.

Of course, common carriers, including the Platforms, cannot be forced to carry pornography or other relatively unprotected speech. But they can otherwise be barred from discriminating—especially on the basis of viewpoint. The speech is not theirs, so they have no speech right against the Texas antidiscrimination rule.

This distinction between common carriers and speakers established the practical freedom of Americans to communicate freely, whether by letter carrier, telegraph, or telephone. The distinction remains essential to preserve the open flow of speech. The Court therefore should not alter the distinction by erroneously treating mere carriers as speakers.

### B. This "Speech" Obstructs Scientific Knowledge

If the ghost of Galileo were capable of filing a brief, he would add that although censorship often begins with politics or theology, it always eventually attacks science. John Milton visited Galileo in prison and learned that the Inquisition was depressing scientific inquiry on the Continent. John Milton, *Areopagitica* 24 (1644). That is now happening in America.

Freedom of speech is the pathway of science and progress. So it should be no surprise that censorship almost always impedes science. And it therefore often is lethal. *See, e.g.*, Philip Hamburger, *IRB Licensing*, in *Who's Afraid of Academic Freedom* 153, 181 (2014) (discussing the body-count from suppression of bio-medical information by Institutional Review Boards).

In this instance, the Platforms' supposed freedom of speech has suppressed not only truthful political speech during elections (such the Hunter Biden laptop story) but also truthful medical information during a pandemic (about adverse vaccine events, natural immunity, and so forth). At a policy level, officials and doctors were blinded to risks and remedies. At a personal level, individuals who had been denied crucial information about adverse vaccine events sometimes blithely took the vaccines—only to find themselves crippled. *See, e.g.*, Complaint at 86–87, *Dressen v. Flaherty*, No. 3:23-cv-155 (S.D. Tex. May 22, 2023), ECF No. 1 (regarding Brianne Dressen, who was crippled by her vaccine). Individuals need free speech to protect themselves. Not just politically but also personally, the Platforms' censorship can be lethal.

The Platforms' free speech is very different from other free speech. When free speech massively obstructs communication and scientific knowledge, it doesn't look like free speech at all. Put another way, when the First Amendment is over-read to give speech rights to those who merely carry other peoples' speech, the resulting freedom of speech is apt to endanger free speech, not protect it. It isn't what ordinarily is considered freedom of speech.

## III. THE PLATFORMS HAVE NO SPEECH RIGHT IN THEIR "SPEECH" TO THE EXTENT IT IS GOVERNMENTAL

The Platforms argue about their right as "private parties" to exercise "private editorial discretion" Pet. Br. iii, *passim*. On this basis, they claim First Amendment protection for what they call their "private speech." *Id.*

at 2, 18, 26. But what if their discretion and "speech" is partly governmental, not just private?

Whether one views it as their speech or their censorship, their viewpoint discrimination is substantially governmental. Therefore, even if the Platforms have freedom of speech in their private discrimination, it remains necessary for them to support their contention that it is just private. Their First Amendment rights cannot extend to federal speech, let alone federal censorship.

### A. The Governmental Realities of the Censorship

The federal government has significantly shaped much of the Platforms' censorship, thus depriving it of its purely private character. The federal role is varied.

First, the government unlawfully applies pressure. Although the Platforms speak of themselves as private companies that have flourished through their private enterprise, they have flourished and achieved dominance only because Section 230 protects them from liability for carrying the speech of others. *See* 47 U.S.C. § 230(c)(1). Taking advantage of the Platforms' dependence on this section, the government has threatened to adjust it unless the Platform censor Americans in line with government demands. *See, e.g.*, *Missouri v. Biden*, 83 F.4th 350, 364 (5th Cir. 2023) (per curiam).

Second, the federal government engages in unlawful cooperation or conspiracies with the Platforms. For example, the government apparently made a deal with Facebook to protect it against European limits on "data flow" from Europe in exchange for Facebook's cooperation with government censorship. *See* Michael Shellenberger, Alex Gutentag & Leighton Woodhouse, *New Fa-*

*cebook Files Expose Biden Censorship-For-Spying Scheme,* Public (Aug. 7, 2023), at https://bit.ly/3HoEHmP.

Third, there is coordination—the most pervasive federal involvement. When a Platform suppresses opinion on its site, it needs to limit the risk of losing users who seek the suppressed opinion elsewhere. And when it hopes its suppression will influence public opinion, it needs to ensure that its users will not find the censored messages on other platforms. So coordination is essential—at least among Platforms with substantially overlapping users. *See* Philip Hamburger, *Courting Censorship*, 4 J. Free Speech L. 195, at Sec. II.F (forthcoming 2024) https://bit.ly/3Ho3AiA.[2]

But the Platforms cannot coordinate among themselves without anti-trust difficulties. *See* 15 U.S.C. § 1. The government solves this problem by offering coordination—sometimes directly, usually through private cutouts—thus enabling Platforms to align their censorship, so individuals suppressed on one cannot express themselves on another.

Fourth, federal agencies have helped form and have subsidized massive censorship and misinformation industries. Whether formed, guided, or supported by the government, private firms and nonprofits inform the Platforms what should be suppressed or treated as misinformation—usually along political lines.

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2. Although X, aka Twitter, has reduced its censorship under Elon Musk, it is relatively small—and other Platforms' users have limited overlap with its users. So even though X has weakened the coordination, coordination remains a viable means for the other Platforms to suppress speech.

Fifth, the government sometimes sedulously prebunks true information to mislead the Platforms into suppressing it. Although the FBI knew that the Hunter Biden laptop was real, not a Russian plant, it urged the Platforms to watch out for Russian disinformation of this sort, thus deliberately deceiving the Platforms into suppressing the laptop story just before the 2020 election.

Sixth, when Platforms suppress the speech of some Americans, they lead those Americans many others to tamp down their future speech, lest it, too, be censored. This chilling of speech is at least partly federal. "[U]nrelenting pressure" from certain government officials likely "had the intended result of suppressing millions of protected free speech postings by American citizens." *Missouri v. Biden*, 83 F.4th 350, 392 (5th Cir. 2023) (per curiam) (quoting *Missouri v. Biden*, No. 3:22-CV-01213, 2023 WL 4335270, at *44 (W.D. La. July 4, 2023)). Both those who are censored and those who fear being censored rationally respond with additional self-censorship. *Id*, 18–19 (regarding testimony by the censored about their further self-censorship).

These varied mechanisms of government censorship show that NetChoice's private-speech claim collides with reality. The censorship on all sorts of questions—including COVID-19, its origins, masks, vaccines, alternative remedies, the Ukraine, election irregularities, political scandals, and humor about the President's family—has often been of governmental origin.

### B. The First Amendment Does Not Protect the Platforms' Governmental Speech

Even on the supposition that the Platforms' discrimination is their speech, they do not have First Amendment rights in that speech to the extent it is governmental. As it happens, all of the federal censorship recited above abridges, or reduces, the freedom of speech and therefore violates the First Amendment. *See* Hamburger, *Courting Censorship*, Part III. The question here, however, is not whether the government has *violated* the First Amendment, let alone whether the private censorship has become so governmental as to be *forbidden* by the First Amendment. Although those issues may matter in other cases, the question here is the very opposite—namely, whether the Platforms' censorship is so demonstrably private as to be *protected* by the First Amendment.

In defense of their claim that their censorship is private speech, the Platforms have kept much of the government's role secret. So the division between their merely private and their more federal censorship is not fully known. And this uncertainty by itself is enough to set this case apart. There is no doubt that the speech of newspapers, parade organizers, cable companies, cake shops, and web designers is entirely private. Here, however, the private choices are so intermingled with secretive government censorship that the mix is uncertain. It therefore cannot be presumed that the Platforms' speech is private; having alleged it is private, they should prove it.

One might respond that although government has instigated the suppression of millions of posts, that's only a small fraction of the billions of posts on the Platforms' pages. Therefore, one might assume that the federal role cannot put a dent in the private character of the Platforms' alleged speech. But the speech suppressed at the government's instigation tends to be especially important and controversial—medically, morally, and politically. It therefore cannot be so easily brushed aside. A significant range of the Platforms' censorship is governmental and unprotected by the First Amendment.

It is even more governmental when one focuses on the overall impression or mix of posts on the Platforms' sites. The Platforms claim a speech right in the "compilation" or overall impression given by their sites, Pet. Br. 20, 28, not in the particular posts they include or exclude. Yet this compilation is determined by the government, not the Platforms. The federal government is at the top of the censorship hierarchy. So even if the government were to seek suppression of only A, B, and C and were to permit the rest of the alphabet, the total effect—barring three letters and leaving the rest undiminished—is substantially federal and thus too governmental to enjoy First Amendment protection as "private speech."

Lastly, the Platforms do not have clean hands in seeking an injunction protecting their "private speech." In many instances, the Platforms have voluntarily assisted the government in censoring Americans. Whether or not they have conspired with the government, they at least have helped it violate First Amendment rights. Any

equitable remedy protecting their supposedly private speech should therefore be denied.

## IV. STATE COMMON-CARRIER LAW REINFORCES THE FIRST AMENDMENT BY PRECLUDING GOVERNMENT CENSORSHIP

The First Amendment by itself cannot prevent government censorship—as painfully evident from the current government censorship imposed through the Platforms. The danger arises partly from First Amendment doctrine, and partly from the concentration of so much speech in dominant Platforms. When First Amendment doctrine fails to stop government censorship in its tracks, and when so much of the nation's speech runs through dominant common carriers, there is a powerful temptation for government to exploit such Platforms for censorship. State common-carrier statutes, such as that of Texas, are therefore crucial for reinforcing the First Amendment. Before censorship becomes ineradicably ingrained in American life, this Court needs to recognize that common-carrier antidiscrimination duties are the only mechanism that can successfully protect open debate from private and public threats.

### A. The First Amendment's Inefficacy Necessitates a Common-Carrier Solution

The First Amendment is profoundly valuable, but it has been demonstrably unable to prevent the government from using the Platforms to suppress speech. Although the amendment should have stopped that government censorship in its tracks, it has not done so.

One reason is judicial doctrine. *See generally* Hamburger, *Courting Censorship*, *supra*. The Court's state-action doctrine requires the conduct of private intermediaries to be converted into state action, and its First Amendment doctrine confuses *abridging* and *prohibiting*. *Id.* at Parts II & III. So government thinks it can get away with censorship as long as it is privatized and not too coercive. *Id.*

Even without these doctrinal failures, the First Amendment does not concretely limit the government's ability to manipulate private carriers. Although it bars abridging the freedom of speech, there will always be room at the margins for government to get away with subtle shaping of carriers' decisions.

Exacerbating the ineffectiveness of the First Amendment is the difficulty of getting an injunction. The web of government interactions with the Platforms has been so complex and elusive that, even after five years of censorship, there is only one injunction against the government's censorship. *Missouri v. Biden,* 83 F.4th 350 (5th Cir. 2023). Because of this Court's artificially narrow state-action doctrine, *see* Hamburger, *Courting Censorship*, Part II, that injunction is incomplete, leaving significant elements of the censorship in place. All the same, the injunction has been stayed. *See Murthy v. Missouri*, No. 23-411, 2023 WL 6935337 (U.S. Oct. 20, 2023). And even if the injunction is eventually sustained, the secrecy of the censorship means it will be difficult to know until too late whether there has been full compliance.

So the First Amendment, by itself, is not enough. Nor are injunctions. The only effective way to stop govern-

ment from obtaining public censorship through private Platforms is to prevent the Platforms from engaging in their private censorship. Only when the Platforms cannot give government what it wants will the censorship come to an end.

### B. Private Censorship by Dominant Platforms Is an Irresistible Temptation for Public Censorship

The First Amendment's inefficacy is especially dangerous because of the dominance of the Platforms. When the Platforms are so dominant, and the government enhances their control by coordinating their censorship, the risk of private viewpoint discrimination is very serious. Even more perilous is the temptation for government to exploit that private power to impose governmental viewpoint discrimination.

Although the First Amendment only bars government censorship, that does not mean private censoriousness should be viewed with equanimity. Much of our society has drifted toward cancel culture—an intolerance of dissent—and when much communication is concentrated in dominant companies their censoriousness is especially worrisome.

Such companies, notably the Platforms, are chokepoints or obstacles to open communication. The point is not that they are monopolies, but that their dominance allows them to suppress public debate—especially when, as noted *supra* in Section II.F, their viewpoint discrimination is coordinated by the government. (NetChoice is silent about the government's role, even though it is the elephant in the room.)

With this government-buttressed dominance, the Platforms can privately dampen debate and oppress minority views across the nation. So even though not barred by the First Amendment, the Platforms' suppression of political, scientific, and moral dissent is a threat to the open debate that is necessary for freedom, progress, and even peace. Quite apart from the danger of federal censorship, there is great value in limiting private viewpoint censorship by dominant communications carriers.

Recognizing the value of common-carrier doctrine as a barrier to discrimination by the dominant carriers, scholars have praised that doctrine for creating a "second free speech tradition." *See* Tim Wu, *Is Filtering Censorship? The Second Free Speech Tradition*, Brookings Inst. (Dec. 27, 2010), https://bit.ly/3vH2BYh. To be precise, "a rich body of common carrier and quasi–common carrier law prevented many of these companies from engaging in viewpoint discrimination or otherwise threatening the interests that the First Amendment protects." Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299, 2319 (2021).

Unfortunately, the danger from private dominance is not apt to remain merely private. When private companies offer mechanisms for suppression or other injustice, government will tend to view that private power as an avenue for it to do what, under the First Amendment, it cannot do on its own. Here, the Platforms' capacity for private suppression makes them an almost irresistible opportunity for public suppression. Indeed, a multitude

of bystanders, not just the federal government, have taken advantage of the chance to silence their critics. State governments, some pharmaceutical companies making COVID-19 vaccines, and the Ukrainian intelligence service have sought the Platforms' censorship—confirming that the opportunity for censorship offered by dominant carriers is a dangerous temptation.

It therefore is fortunate that common-carrier doctrine imposes an antidiscrimination duty, especially on dominant carriers. Recognizing this, the Texas statute applies only to the most clearly dominant social media platforms—those with more than 50 million users each month. *See* Tex. Bus. & Com. Code § 120.002(b). It thereby ensures that it remains clearly within the scope of common-carrier doctrine, and it also thereby takes aim at the danger that government will abuse dominant Platforms for its own censorship. In other words, the statute, like common-carrier doctrine generally, recognizes that when discrimination is pursued by dominant communications carriers, the risk of censorship is both private and governmental.

The claim is not that government is evil, but that it cannot help itself. It cannot be expected to resist the temptation to exploit dominant communications carriers to tamp down its critics. The dominance of the Platforms is clear from the government's reliance on them for its censorship, and because of their dominance, government will always be tempted to use them for its public suppression.

It cannot be sufficiently emphasized that private power is unconstrained by the Constitution, but that is

precisely why dominant private power sometimes needs to be constrained by statute. The First Amendment therefore should not be misconstrued to prevent anti-discrimination regulation of communications common carriers—especially the massive private carriers that have such profound power to censor others and that therefore will always arouse the interest of censorious officials.

Common-carrier doctrine is the foundation of our antidiscrimination law. Its carrier-speaker distinction for communications carriers has always been considered entirely aligned with the First Amendment. So there is every reason to apply it to censoring companies that are dominant, even domineering. *See* Volokh, *supra*, at 389, 415 (noting the strength of arguments "for limiting the power of massive corporations . . . when the corporations are using their immense 'financial resources' not just to try to persuade listeners through the corporations' own speech, but to suppress others' speech" and observing that "this sort of common carrier rule would be constitutionally permissible.") And, of course, the justification for such limits on massive censoring carriers is all the greater when, because of their dominance, government is apt to coopt them for its censorship.

In sum, the Platforms want this Court's blessing to speak power to truth. But the freedom of speech belongs to those that speak, not to those who fail to exercise the initial choice that would make the speech theirs. By following this distinction, and by focusing on just the most clearly dominant carriers, the Texas statute follows deeply ingrained constitutional assumptions to protect

speech from both private discrimination and the temptation for government to use it for public censorship.

### C. States Have a Profound Structural Role in Protecting Speech from Federal Suppression

State protection against federal censorship dates back to the Alien and Sedition Acts. When Congress in the 1798 Sedition Act authorized seditious libel prosecutions, Kentucky and Virginia adopted resolutions against this federal violation of the Constitution. *See* The Virginia Report of 1799–1800 Touching the Alien and Sedition Laws 22, 162 (Richmond 1850). In the same tradition, in the face of a much worse federal assault on the First Amendment, Texas has provided an effective remedy against the federal danger. This time, fortunately, the mechanism is not interposition or nullification, but a lawful free-speech statute designed to be enforced in the courts.

The states' role in protecting speech from federal threats is not only historical but also logical, as Americans cannot rely on the federal government to prevent federal censorship. State legislation can come to the aid of the First Amendment by establishing remedies that Congress is unlikely to adopt.

In none of this Court's precedents has a communications common carrier—a business primarily engaged in allowing users to write and post on their own—been recognized to have a speech right to remove or otherwise suppress such speech. So if this Court were to overturn Texas' lawful common-carrier statute, that would be the Court's active choice, not something required by law. This Court would be taking responsibility for the ensu-

ing censorship, and censorship would become the Justices' legacy.

### D. There Are Compelling State Interests in Protecting Speech from Dominant Private Power, Especially When It Has Been Governmentally Enhanced, and in Protecting Speech from Federal Exploitation of that Private Power for Government Censorship

The risks of private and public power cannot be entirely disentangled. Although the First Amendment is aimed against public power, it cannot fully stop the public exploitation of private power for censorship. Common-carrier doctrine is therefore an essential aid to the First Amendment. Whereas that amendment bars government censorship, common-carrier statutes, such as the Texas law, prevent the private censorship that government inevitably will exploit. The Texas statute is thus essential. It prevents the Platforms from giving government what it inevitably will seek, and it thereby protects speech from government censorship in ways the First Amendment cannot.

The alignment of public power and dominant private power, leading to the consolidation of government and society, is the stuff of nightmares. Of course, not all nightmares are alike. Fascist, communist, and now democratic conformity are very different. But this version of a public–private alliance is already resulting in much exclusion—from social media platforms, from payment services, from teaching and studying, from grants, from access to scientific data, and so forth. That is enough of a nightmare, and it gets worse every year.

Lest it be thought that this concern about a consolidation of government and society is overstated, consider what is said by the censorship's advocates. They candidly espouse not merely a "whole-of-government" program, but a "whole-of-society" effort, in which government and dominant corporations join together, under federal direction or at least with federal coordination, to suppress dissent. J.D. Madox, Casi Gentzel & Adela Levis, *Toward a Whole-of-Society Framework for Countering Disinformation*, Mod. War Inst. at West Point (May 10, 2021), https://bit.ly/47BiRY0. With a few more years of censorship, our free nation may permanently become something very different.

The censorship is already deliberately altering our minds in ways from which we may never fully recover. The director of the Cybersecurity and Infrastructure Security Agency (CISA) says that the "most critical infrastructure is our 'cognitive infrastructure.'" Maggie Miller, *Cyber Agency Beefing Up Disinformation, Misinformation Team*, The Hill (Nov. 10, 2021), https://bit.ly/47BiU68. In such ways, government justifies mind control.

Censorship thus offers government an apparently irresistible avenue for power—in elections, medicine, and culture. For example, when government, with a wink and a nod, can use dominant common carriers to deny us information and the full range of views, it can render elections meaningless. And if this Court is none the wiser, we will have this Court to thank for a sort of tyranny.

In normalizing censoriousness, suppression, and oppression, the censorship is transforming American cul-

ture. Sensing which way the wind is blowing, many Americans now support censorship. It therefore would be very dangerous for this Court to confirm the legitimacy of censorship by overturning the Texas statute.

Amid all these risks—none of which are even mentioned by NetChoice—there are multiple compelling state interests. Private discrimination by dominant carriers is already a profound danger, especially when government enhances the dominance—for example, with Section 230 immunity and government coordination. The temptation for the federal government to exploit such carriers for its own censorship is even more perilous. And Texas' common-carrier solution is traditional, constitutionally ingrained, and sanctioned by longstanding precedent. It also is remarkably unrestrictive—given that Section 7 bars only discrimination, imposes no damages, and punishes contempt only after a trial and a refusal to cooperate. *See* Tex. Bus. & Com. Code § 143A.007.

We have reached a tipping point. It already is difficult to resist the censorship. Many academics, commentators, and lawyers are afraid to sign briefs against the censorship—even against the governmental censorship. And because the Platforms deliberately spread their legal business through almost all major law firms, some opposing amici in this case have been unable file their briefs—it being difficult to find members of the Supreme Court bar who are unafraid and don't have conflicts.

Soon resistance will be impossible. If this Court does not sustain the Texas statute, the censorship will be here

to stay. There will be no turning back. It will become a permanent feature of the nation's legal and mental landscape, determining election results, dictating culture, and aligning public and private power to suppress dissent. The nation will be forever changed.

So the nation needs a decision clearly upholding the Texas statute and needs it now. Only then will other states adopt such legislation. Only then will the joint private–public censorship regime come to an end.

## V. PROTECTING THE PLATFORMS IN EXPRESSIVE DISCRIMINATION WOULD ERODE ANTIDISCRIMINATION LAWS

Finally, if the First Amendment gives the Platforms a right of expressive discrimination, the nation's antidiscrimination laws will be vulnerable.

Although the Platforms couch their discrimination in terms of *discretion*, it is a discretion to discriminate against users. Remember, the position of the Platforms is that they have an expressive interest not in their users' particular posts, but the "compilation" or overall impression given by users on their sites. Pet. Br. 20, 28. So if the Platforms have this right to express themselves by discriminating against users, they could discriminate from any viewpoint. And why wouldn't other companies, which are not common carriers and not so dominant, also have such a right?

If this Court wishes to reconsider the limits on antidiscrimination laws, it could begin (as it has) by exploring the religious liberty of churches to select their ministers or members, or the expressive freedom of small businesses not to endorse views antithetical to their own.

But is this Court ready to conclude that vastly wealthy public corporations can discriminate in line with in their expressively taste in users—indeed, discriminate in the carriage of other people's speech, not even their own? This would unravel antidiscrimination law in its common-carrier heartland and thereby render all other antidiscrimination law open to question.

To be sure, the Platforms carry speech, not passengers. But that doesn't give the Platforms a greater speech interest. A bus company and a Platform equally have an expressive interest (vile as it may be) in excluding conservatives, Jews, or vaccine skeptics. So if the Platforms have such a right, perhaps restaurants could express their vision of race by refusing to seat Blacks, bus drivers could expressively discriminate against Jews (as recently happened), and so forth.

The Platforms' arguments thus prove too much. Expressive discrimination against users is precisely what common-carrier laws have long forbidden. If this Court nonetheless permits such discrimination by the Platforms, it will not end well for antidiscrimination laws.

## CONCLUSION

This Court therefore should hold the Texas statute constitutional and affirm the decision below.

Respectfully submitted.

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