Nos. 22-277 and 22-555

In The Supreme Court of the United States

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

Petitioners,

v.

NETCHOICE, LLC, dba
NETCHOICE, et al.

NETCHOICE, LLC, dba
NETCHOICE, et al.,

Petitioners,

v.

KEN PAXTON,
Attorney General of Texas.

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

BRIEF OF ITEXASPOLITICS, LLC D/B/A THE TEXAN & POWERHOUSE MANAGEMENT, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS IN 22-277 AND RESPONDENT IN 22-555 ON COMMON CARRIER FINDINGS AND TEXAS INDIVIDUAL EXPLANATION REQUIREMENTS

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INTERESTS OF THE *AMICI*

Amici include:[1]

- **iTexasPolitics, LLC d/b/a The Texan** is a privately-held corporation. *The Texan* publishes an online news website called *The Texan*, which focuses on news and current events in the Lone Star State. Established on April 29, 2019, *The Texan* reports news at www.TheTexan.news. *The Texan* employs journalists committed to traditional reporting standards and rigorous editorial processes. Unlike social media platforms, *The Texan* is subject to legal responsibilities under slander and libel laws, balancing First Amendment protections with accountability. *The Texan* supports HB20, advocating for clear legal distinctions between social media platforms and traditional news sources. This distinction is crucial for journalistic integrity and informed democracy. iTexasPolitics, LLC participated as an *Amicus* before the Fifth Circuit.

- **PowerHouse Management, Inc.** is a privately-held corporation that managed several Internet companies for over 30 years, starting with *Texas.Net*, one of the first Internet access providers in Texas. The family of companies soon grew to include *Giganews, Inc.*, which offered distributed discussion system or

[1] No counsel for a party authored this brief, in whole or in part, and no person other than *Amici*, their members, or their counsel made any monetary contribution to its preparation or submission.

"Usenet" service. *Giganews* became one of the largest global Usenet providers with customers over 170 countries and offers a non-advertiser supported and largely *unmoderated* discussion forum. As such, it is a kind of precursor to today's social media platforms, but without the censorship. *Golden Frog, GmBH* offers privacy-protective no-logging Virtual Private Network ("VPN") service under the name "VyprVPN." Also in the family of companies was Data Foundry, LLC, which owned and operated several data centers that allowed customers to collocate Internet, computing and networking equipment. *Giganews* and *Golden Frog* participated as *Amici* before the Fifth Circuit and district court. Although all those operating companies have been since divested, the experience gained from managing them provided useful insight on freedom of speech and the need to prevent content censorship by powerful multi-national corporations, especially those that are common carriers. PowerHouse seeks to aid the Court by fleshing out Texas and Florida common carriage precedent and its relationship to uncensored online discourse, along with the need for consumer protections like those afforded by HB20 Section 2's transparency and notice requirements.

SUMMARY OF ARGUMENT

A federal court charged with deciding whether a state law is constitutional does not decide what state law "should" be. It interprets the law by applying precedent from the state's highest court.[2] Then the federal court decides whether the state enactment or common law, so construed, violates the U.S. Constitution or other federal law. Similarly, precedent interpreting the federal Communications Act (47 U.S.C. §§ 153, *et seq*.) does not control Texas and Florida common law. The Eleventh Circuit diverged from these principles. The Fifth Circuit adhered to them.

The Florida and Texas bills do not conscript platforms into common carrier status. Both state legislatures properly found the platforms already meet the common law test for common carriage as developed by their respective high courts.

A state does not violate the Constitution by imposing content and viewpoint neutral restriction on common carriers' exercise of purported "editorial discretion." Texas HB20 Section 7 does not require platforms to speak, nor does it restrain their own speech. Similarly, the portions of Florida SB7072 that are content-neutral and do not compel platform speech do not violate the platforms' First Amendment rights.

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[2] *Amici* herein respectfully submit state-specific precedent from Texas and Florida concerning common carriage, as articulated by the highest courts of each state.

Texas HB20 Section 2, as outlined in Tex. Bus. & Com. Code ("TCPRC") §§ 120.051-053, ("Section 2") is a consumer protection measure that ensures transparent and fair content moderation practices. Section 2 mandates clear disclosure of platform policies and community standards in user-friendly language and requires equitable internal dispute resolution processes. It ensures that all users are treated equally, especially when facing content moderation actions, thereby upholding First Amendment principles without placing excessive burdens on the platforms.

Section 2's approach to content moderation aligns with international standards like the EU's Digital Services Act ("DSA"), demonstrating that platforms can feasibly comply with these regulations without significant operational challenges or burdens. This alignment suggests a global movement towards more transparent digital spaces, fostering informed user choices and bolstering confidence in platform integrity.

Section 2 catalyzes innovation in content moderation technology, with its requirements potentially driving advancements in automated moderation tools. The integration of an efficient appeals process enhances user trust and positions platforms for increased engagement and revenue growth. Ultimately, Section 2 represents a balanced, content-neutral strategy that upholds consumer welfare and adheres to global standards for digital platform transparency and accountability.

ARGUMENT

I. Texas And Florida Properly Recognized That Platforms Are Common Carriers Under Their Common Law

Texas HB20 Sec. 1(3) finds that "Social media platforms function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States." Similarly, Florida SB7072 Sec. 1(6) provides that "Social media platforms hold a unique place in preserving first amendment protections for all Floridians and should be treated similarly to common carriers." Each state's legislative finding was premised on that state's own common law on common carriage.

The Eleventh Circuit relied on precedent dealing with *statutory* common carriers under the federal Communications Act. It held that social media platforms "*should* be treated more like cable operators . . . than traditional common carriers," *NetChoice, LLC v. AG, Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022) (emphasis added), and ruled that Congress' statutory treatment under the Communications Act "is strong evidence that they are not common carriers." *Id*., 34 F.4th at 1221. The Eleventh Circuit did not rely on Florida state supreme court precedent for guidance on what a Florida common carrier is under Florida common (or even statutory) law. The Eleventh Circuit did, however, acknowledge that common carriers have "diminished First Amendment rights." 34 F.4th at 1221.

Fifth Circuit Judge Oldham mined history and common law precedent and concluded that the Texas legislative finding is legally supportable. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 469-78 (5th Cir. 2022). This deep historical and analytical analysis yielded the right result as to Texas and should be adopted by this Court. The same approach must be taken for Florida because federal courts do not make state law. When a federal court exercising federal question jurisdiction is called to decide whether a state law is constitutional it does not properly undertake to decide what state law "should" be, perhaps by reference to a federal statute. It interprets the law by applying precedent from the state's highest court. Then the federal court decides whether the state enactment or common law, so construed, violates the Constitution or other federal law.

As Judge Oldham found, the social media platforms meet the Texas common law test for common carriage. 49 F.4th at 473-78. The Platforms hold themselves out to serve all members of the public without individualized bargaining: they are willing to accept any user that agrees to their non-negotiable terms of service. 22-255 J.A.217a-218a. Any person can open an account immediately upon acceptance of those terms. 22-255 J.A.70a; 22-277 J.A. 72, 131, 151.

A. Federal Courts Must Apply The States' Highest Court Common Law Precedent, Not Precedent Developed By Federal Courts Interpreting The Federal Communications Act

1. Federal Courts Cannot Change A State's Common Law Or Decide What The State's Common Law "Should" Be

The Eleventh Circuit, the platforms and some platform-sympathetic *Amici* assume that federal courts have the power to independently assess whether Texas and Florida common law is satisfactory or even decide what the states' common law "should" be. But this is not permissible under the modern application of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).[3] Under *Erie* the federal courts must take the state law as it is and then see if it passes Constitutional muster.

The Court is not bound by the two states' legislative findings. Here, however, the legislative findings comport with each state's precedent as declared by the states' highest courts and they deserve some deference.

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[3] *Erie* was a diversity jurisdiction case, but its principles also apply when the court is exercising federal question jurisdiction. *See*, *e.g.*, *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975) (state supreme court holdings resolved "legal incidence of state excise tax." Since the federal government was not the purchaser the constitutional challenges failed).

2. Federal Precedent Interpreting The Communications Act Does Not Preempt Or Overrule Texas And Florida Common Law

The platforms and supporting *Amici*, echoing the Eleventh Circuit, assert platforms cannot be common carriers because they are not telecommunications carriers under the federal Communications Act. *See* 47 U.S.C. § 153(51). The platforms are not Communications Act telecommunications carriers. The communication they handle is done "via telecommunications" but their finished service is not itself "telecommunications" because platforms process user-supplied data. 47 U.S.C. § 153(50). Their offering is therefore not a telecommunications service (§ 153(53)) and they are not § 153(51) telecommunications carriers. This statutory treatment, however, does not change the common law outcome. *See* Part II.B.1. It is relevant only as to the federal Communications Act.

The federal statute and FCC rules also contain a criterion that is not a part of the common law, namely that "the system be such that customers 'transmit intelligence of their own design and choosing.'" The Federal Communications Commission ("FCC") administratively crafted this qualifying criterion starting in the late 1950s. *See Frontier Broad. Co. v. Collier*, 1958 FCC LEXIS 43, *9 (April 2, 1958); *Industrial Radiolocation Service*, 5 F.C.C. 2d 197, 202 (1966). Federal courts began to use it for purposes of applying the federal Communications Act. *See*, *e.g.*, *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir.

1976), *cert. denied*, 425 U.S. 992 ("*NARUC I*"); *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (1976) ("*NARUC II*"); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Sec. 3, added the concept through different words as part of the statutory definition of "telecommunications" in what is now 47 U.S.C. § 153(50).

Texas and Florida do not require that an entity allow users to transmit intelligence of their own design and choosing as a common carrier prerequisite. Most states still do not use this concept for any communications regulation purpose. Only one state (Maryland) has employed the phrase. *See AT&T Communs. of Md., Inc. v. Comptroller of the Treasury*, 405 Md. 83, 98 (Md. 2008). This formulation may be part of the test in Maryland, but it does not bind Texas or Florida. The Eleventh Circuit nonetheless held that since users are not allowed to "transmit messages of their own design and choosing" platforms should not be common carriers. 34 F.4th at 1220. That court wrongly engrafted a federal administrative and now statutory definitional criterion for what is "telecommunications" onto the *Florida* common law test for common carriage.

B. The States Developed The Common Law For Common Carriage

The American states developed the early precedent by borrowing and then applying common law precepts from England. For the first hundred or so years,

common carriage was resolved through the common law and principally at the state level. "Before the arrival of regulatory agencies, policies for public utilities were made by judges employing an evolving common law and legislators promulgating rules in new situations." Alan Stone (1991), *Public Service Liberalism: Telecommunications and Transitions in Public Policy*, Princeton University Press, p. 26. Common carriage was primarily a state-based evolution through state courts and state legislatures promulgating rules in new situations. The federal system did not develop a corollary common law even before *Erie*.[4]

1. Many Firms In Different Fields Can Be Common Carriers

Common carriage is not reserved to those that transport people and commodities. Grist-mills and cotton gins—which processed user-supplied grain or cotton in a manner conceptually similar to data processing of user-supplied information—were common carriers or assigned similar treatment by statute in many states. *See*, *e.g.*, *Merrill v. Cahill*, 8 Mich. 55, 60

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[4] As Judge Oldham notes, 49 F.4th at 469, 472-73, and 478-79, this Court was sporadically called upon to restrict state common carrier regulation through federal constitutional attacks. Except for the now-discredited *Lochner* period and racial segregation line of cases, the Court generally upheld state nondiscrimination mandates. To his list we would only add *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U.S. 92, 98 (1901), which, although pre-*Erie*, used *Erie*-consistent analysis regarding the role of state-court developed common law even as to interstate commercial transactions.

(Mich. 1860); *Sandford v. Railroad Co*., 24 Pa. 378, 383 (Pa. 1855), *cited by Indian River Steam-Boat Co. v. East Coast Transp. Co*., 28 Fla. 387, 410 (Fla. 1891); *Sims v. State*, 1921 OK 68, P5 (Okla. 1921).

2. Holding Out

"Holding out" means expressing an offer to indifferently serve on uniform terms and conditions. *See*, *e.g.*, *NARUC I, supra*, 525 F.2d at 640-42 (collecting cases)[5]; *NARUC II, supra*, 533 F.2d at 608.[6] This is distinguished from private carriers that retain unilateral discretion to exclude applicants and will serve only under an individually-negotiated "special contract." *NARUC I*, 525 F.2d at 641.

Holding out does not turn on whether the firm purported to reserve some kind of editorial discretion. Holding out means offering to serve all comers on

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[5] *NARUC I* and *II* did not make common law; they looked to common law principles developed by the states to interpret an "indefinite" and "circular" definition in the federal Communications Act. *NARUC I*, 525 F.2d at 640; *NARUC II*, 533 F.2d at 608.

[6] An entity can use the same infrastructure to provide both common carrier and private carrier services. *NARUC II*, 533 F.2d at 608. A good example in the federal Communications Act is that mobile telephony providers are common carriers for their interconnected mobile voice operations but private carriers for their "data" service operations. *See* 47 U.S.C. § 332(c)(1)(A). So, a platform may have common carrier operations (hosting) and non-common carrier operations (newsfeeds). The platform may have a two-sided market (end users on one side and advertisers on the other) with only one side being common carrier.

uniform terms. The question then becomes whether a state can prohibit a future discrimination by a firm that held out in the past but with a claimed right to discriminate. Common carriers originally reserved the right to and did exclude African-American customers, but that practice was properly held unlawful and ineffective.

The test is objective; a label assigned by the carrier, a legislature or party is not determinative. " . . . subjective intentions . . . are not controlling. It is the objective conduct . . . What is crucial is that the common carrier defines itself through its own marketing efforts as being willing to carry any member of that segment of the public which it serves." *Woolsey v. National Transp. Safety Bd.*, 993 F.2d 516, 524-25 (5th Cir. 1993).

3. A Common Carrier Holds Out To Indifferently Serve

The social media platforms do hold out to indifferently serve: they do not negotiate individual contracts and do not make "individualized decisions in particular cases whether and on what terms to deal." *NARUC I*, 525 F.2d at 641; *NARUC II*, 525 F.2d at 641. The "indifferently" part of the test is about the "who" the carrier will serve, not whether it reserves some claimed right to discriminate on the "what" it will handle, especially *after* the contract is formed. *Woolsey*, 993 F.3d at 524; *Gray v. Western Union Tel. Co.*, 87 Ga. 350, 352 (Ga. 1891).

The Platforms hold themselves out to serve all members of the public without individualized bargaining: they are willing to accept any user that agrees to their non-negotiable terms of service. 22-255 J.A.217a-218a. Any person can open an account immediately upon acceptance of those terms. 22-255 J.A.70a; 22-277 J.A. 72, 131, 151. They do not negotiate special contracts with mass-market customers. This is common carriage, not private carriage.

The "editorial discretion" asserted here is euphemism for discriminatory action against otherwise lawful user speech. The platforms and their *Amici* imagine a range of perceived negative consequences if platforms cannot "curate,"[7] but the Texas legislature made a policy decision that, allowing untrammeled private censorship based on non-negotiable but unclear and subjective standards that are arbitrarily applied in practice was worse. This legislative policy-based balancing deserves deference.

4. Common Carriers Cannot Unreasonably Discriminate

Common carriers cannot engage in unreasonable discrimination regarding access to or post-contract provision of their service, or have unjust terms, conditions or prices. *Chevallier v. Straham*, 2 Tex. 115, 116-21 (Tex. 1847); *Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623, 664 (Fla. 1878). Access, terms and prices do not

[7] Texas HB20 would allow removal of many of the posts they describe. The remainder depend on one's policy perspective.

have to be exactly the same. Only unjust or unreasonable discrimination is unlawful. *Houston & T. C. R. Co. v. Rust & Dinkins*, 58 Tex. 98, 108-10 (Tex. 1882). The two legislatures determined that viewpoint discrimination is unjust, unreasonable and unreasonably discriminatory. This is permissible common carrier regulation.

5. Common Carriers Cannot Reserve The Right To Discriminate, Especially If It Hinders Competition

As *Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739-40 (5th Cir. 1960) (collecting cases, including those in Alabama, the forum state) notes, it is the holding out to accept all comers on equal terms and not what happens in each post-contract transaction that is determinative on the question of common or private carrier. "We agree with the Insured that when a person holds himself out to carry all—whether everyone or persons or property of a particular identifiable category—reservations, secret or disclosed, or a refusal to serve is of no consequence. The common carrier's duty to serve all indifferently cannot be lessened by a violation of that duty." 279 F.2d at 740. The boat captain in *Semon* never held out and was therefore a private carrier. Had the captain held out, the consequence of common carrier status could not be vitiated by a claimed right to later discriminate in derogation of that status. *See also Woolsey*, 993 F.3d at 524; *Gray v. Western Union*, 87 Ga. 350, 352 (Ga. 1891). Once the agreement is formed, the common carrier cannot unreasonably discriminate on

a transaction-by-transaction basis even if it expresses a reserved right to do so.

The caselaw also reveals a special concern when a common carrier discriminates between two customers that are in competition by advantaging one and disadvantaging the other. *Indian River*, *supra* was one such case in Florida, and it cited to precedent from other jurisdictions. In each, the common carrier gave special treatment to one customer and less favorable treatment (or completely refused service) to a competitor of the first, thereby putting the latter at a competitive disadvantage. 28 Fla. at 435-37. If the facility is "public" (common carrier), however, it cannot be used to create a "hindrance of competition." *West Coat Naval Stores Co. v. Louisville & N. R. Co.*, 121 F. 645, 650 (5th Cir. 1903).

The Fifth Circuit referenced an *Amicus* submission relating to digital outlets' business requirement to have a presence on social media platforms, and their reliance on monetization through the platforms to disseminate their own speech. 49 F.4th at 483, n. 35 referencing Babylon Bee Merits *Amicus* at 4.[8] That filing recited a long list of examples where platforms took arbitrary and discriminatory adverse action against the *Babylon Bee* and its sister non-parody site *Not the Bee*. *Id.* at pp. 22-27, 35-36. These actions had a competitive impact because the platforms did not subject

[8] Undersigned counsel represented the *Bee* entities at the Texas District Court and Fifth Circuit.

other competing sites (such as *Slate*) to the same standards.

Amicus The Texan is an online news publisher with an online presence (https://thetexan.news) that also relies on social media platforms to distribute its printed, audio and video articles.[9] Some platforms have flagged *The Texan's* content as "political" and this has impeded *The Texan's* ability to reach a wider audience. Content has also been rejected without sufficient explanation and often it is not possible to reach customer service or otherwise determine what the problem is or how to solve it. Texas HB20 does not single out newspapers for special treatment, but the bill would still protect *The Texan* from platform action with competitive implications, such as favoring other, preferred news sites that lean in a particular direction or support certain narratives. It would also require better explanations and an internal dispute resolution process.

6. Texas And Florida Still Consider The Public's Interest

The public's interest is still a factor under Texas and Florida common law as declared by those states' two highest courts, despite criticism over several

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[9] *See The Texan*, Facebook (Jan. 19, 2024), https://www.facebook.com/thetexanmedia/?checkpoint_src=any; *The Texan*, Twitter (Jan. 19, 2024), https://twitter.com/thetexannews; *The Texan*, Instagram (Jan. 19, 2024), https://www.instagram.com/thetexannews/.

decades. *See Texarkana v. Wiggins*, 151 Tex. 100, 104 (Tex. 1952); *Denton v. Denton Home Ice Co*., 18 S.W.2d 606, 609 (Tex. 1929); *Southern Bell Tel. & Tel. Co. v. Nineteen Hundred One Collins Corp*., 83 So. 2d 865, 871 (Fla. 1955); *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd*., 134 Fla. 1, 10 (Fla. 1938). Neither state supreme court has expressly eliminated this factor.

Market power may or may not be a component of the test depending on the jurisdiction. Neither Texas nor Florida common law hinges common carrier status on market power.[10] For these states market power or control of an important public resource can be a strong indication the public's interest requires some form of regulation. Stated another way, in Texas and Florida market power is not determinative but can be an important input into whether the public's interest justifies regulation above that generally applicable to all businesses.

C. The Two States Did Not Impose Common Carrier Status; They Merely Recognized The Platforms For What They Already Are

The Texas and Florida bills do not involuntarily force any firm to assume common carriage status. They

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[10] Opinions differ on whether market power is necessary for federal Communications Act purposes. *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 426-435 (D.C. Cir. 2017) (Kavanaugh, J., dissenting on denial of reh'ng *en banc*).

merely recognize a status the platforms already possess. *United States v. California*, 297 U.S. 175, 181 (1936); *Lone Star Steel Co. v. McGee*, 380 F.2d 640, 648 (5th Cir. 1967) ("A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so"). These firms are not common carriers because of legislative conscription; the platforms voluntarily assumed the role. The two states merely so recognized and proceeded to implement a common carrier-based nondiscrimination requirement.

D. Neutral State Law Nondiscrimination Obligations Do Not Violate Platforms' First Amendment Rights

If state common law in Texas and Florida, as established by their courts, conflicts with the Bill of Rights, the Constitution wins. Here, however, there is no conflict. States have the authority to prohibit viewpoint discrimination by common carriers, provided the limitations are content and viewpoint neutral. In terms of hosting, the states' legal precedent reduces the platforms' rights to censor user-generated content. This is because a platform, like a telephone company facilitating a conversation, is not the speaker when it hosts user content.[11]

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[11] This Court recognized that a state can impose regulations restricting common carriers' editorial discretion. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019).

Once common carriage is present, non-censorship and other nondiscrimination obligations necessarily follow. *Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 687 (1998), *citing Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 101, 107-09 (1973) and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969), noted that unlike broadcast licensees, a common carrier must accommodate "the right of every individual to speak, write, or publish" (internal quotations cleaned up). This is not a violation of the common carrier's First Amendment rights because the common carrier is not the speaker and has no First Amendment right to censor or moderate lawful user-supplied speech; to the contrary it has an enforceable duty to not discriminate or censor lawful speech and an even higher obligation if the action affects competitors that are in the customer base.

Common carriers do retain First Amendment rights as to their own speech. The hosting function, however, does not involve platform speech or any platform-expressive activity. Texas HB20 Section 7 silences no one and it does not compel anyone—including the platforms—to speak. The parts of Florida SB7072 that are content-neutral operate in similar fashion. These state bills do not violate the First Amendment insofar as they impose a content-neutral nondiscrimination mandate.

II. HB20 Section 2's Disclosure, Complaint, And Appeal Requirements Do Not Unduly Burden The Platforms.

Texas HB20 Section 2 is constitutional.[12] Texas HB20 Section 2's ("Section 2") disclosure, complaint, and appeal requirements align with constitutional principles, enhancing transparency and user rights on digital platforms. Section 2 mandates content action disclosures, ensuring users' informed engagement and protecting platforms from undue governmental pressure.[13] This approach parallels global digital governance standards, as seen in the EU's Digital Services Act, showcasing alignment with international best practices in platform regulation. By requiring clear content management disclosures and efficient user appeal mechanisms, Section 2 balances the need for platform accountability with the constitutional imperative to protect free speech. Thus, Section 2 represents a constitutionally-aligned framework, essential for maintaining an open, fair digital public square.[14] Section 2 compliance by platforms would demonstrate a commitment to innovation, user engagement, and free speech,

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[12] *Amici* herein take no position on the Florida legislation as to its individualized-explanation requirements.

[13] *See* Br. of *Amici Curiae* Prof. Philip Hamburger et al. in Support of Resp't's Opp'n to Appl. to Vacate Stay at 19-20, *Netchoice, LLC v. Paxton*, No. 21A720, U.S. (2022).

[14] *See* Br. of *Amici Curiae* Babylon Bee, LLC et al. in Opp'n to Pl.'s Mot. for Prelim. Inj. at 19-20, *Netchoice, LLC v. Paxton*, No. 1:21-cv-00840-RP (W.D.Tex. 2021).

reflecting a content-neutral stance in safeguarding consumer welfare.

A. Large Social Media Firms Already Voluntarily Comply with the European Union's Digital Services Act and Other Individualized Notice Principles

Covered social media platforms, operating globally, tailor their content moderation, appeals, and review policies according to local jurisdictions. Their presence in various markets signifies the economic benefit they gain from adapting to these different locations. The argument that Section 2's disclosure, notice, and appeal provisions will excessively burden platforms is unfounded. Platforms already comply with similar requirements under the EU's Digital Services Act, Regulation (EU) 2022/2065 ("DSA"),[15] so they could manage what Section 2 requires by using the same or only slightly modified tools.

The EU's DSA and Section 2 have slightly different size thresholds[16] and different geographic scope but they converge in principle and practice for how they deal with content moderation, transparency, and user rights. Both require that large digital platforms

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[15] Regulation (EU) 2022/2065, Digital Services Act, O.J. (2022) L277/1 *et seq*.

[16] The DSA applies to platforms with over 45 million users, whereas HB20 covers those with over 50 million users. *See id.* at art. 33, para. 1. *See also Shaping Europe's Digital Future*, EUROPEAN COMMISSION, https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package (accessed Jan. 16, 2024).

disclose their content moderation policies and algorithmic effects.

The DSA requires that Very Large Online Platforms ("VLOPs") provide "clear and specific statements" for the reasons content is removed or restricted, information on the type of restriction(s) imposed, on the territorial scope, and the duration of the restriction.[17] The DSA mandates annual independent audits to ensure compliance, and even goes as far as levying fines of up to 6% of global revenue for non-compliance.[18] Yet, the DSA has led to innovation, manifesting tangible benefits for EU users. Meta and TikTok now offer a non-customized feed option, and Facebook and Instagram provide chronological content viewing.[19]

The DSA requires that VLOPs:

- Specify the nature of any restrictions imposed, such as visibility limitations (i.e., content removal), monetary restrictions, service provision limitations, or account suspensions.[20]

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[17] *DSA Transparency Database: Submission of Clear and Specific Statements*, EUROPEAN COMMISSION, https://transparency.dsa.ec.europa.eu/page/documentation.#submission-of-clear-and-specific-statements (accessed Jan. 17, 2024).

[18] Velazco, *E.U.'s Sweeping Rules for Big Tech*, WASHINGTON POST (Aug. 30, 2023) (login required).

[19] *Id.*

[20] *DSA Transparency Database: Submission of Clear and Specific Statements*, EUROPEAN COMMISSION, https://transparency.dsa.ec.europa.eu/page/documentation.#submission-of-clear-and-specific-statements (accessed Jan. 17, 2024).

- Identify the type of content restricted (i.e., text or video), its creation date, and language.[21]
- Clearly state the duration and geographical scope of these restrictions.
- Explain the reasons behind moderation decisions, including the source of content investigations.[22]
- Indicate whether automated tools were used in their decision-making process.
- Clearly state the grounds for the content removal, including whether they were based on legal reasons or terms of use or acceptable use violations.
- In cases of legal violations, cite specific laws.[23]
- For terms of service or acceptable use policy breaches, state the relevant contractual grounds must be clearly referenced.[24]
- Provide a complaint mechanism for users to appeal content moderation as well as account suspension (or limitations) decisions.[25]

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[21] *Id.*

[22] *Id*.

[23] *Id.*

[24] *Id*.

[25] *Questions and Answers: Digital Services Act*, EUROPEAN COMMISSION, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348 (accessed Jan. 18, 2024).

Section 2 requires that Social Media Platforms:

- *Content selection and personalization*. Publicly disclose how platforms select and personalize content for each user; the methods and criteria for promotions; guidelines and procedures for reviewing, approving, promoting, demoting, and removing content, suspending users, and detailing how their use of algorithms impacts user-generated content an account suspensions on the platform in an "acceptable use policy." TCPRC §§ 120.051-52;
- *Biannual Transparency Reports.* Publish transparency reports every 6 months that include high-level statistics on content moderation, namely the number of policy-violation alerts received; alert methods; frequency of actions against such content or users; and outcomes of appeals on these actions. *Id.* § 120.053.
- *Complaint and Appeal System.* Maintain a complaint and appeal system that provides clear reasons for user-generated content removal and account suspension; allow user appeals and respond to them within 14 days. *Id.* §§ 120.051-52.

Many platforms that have headquarters in the USA made the strategic corporate decision to voluntarily adapt their operations to meet the DSA by developing and implementing tools. Those same tools can be used to comply with Section 2 obligations.

Many of the covered platforms under the DSA and HB20 also support the "Santa Clara Principles on Transparency and Accountability In Content Moderation" ("The Santa Clara Principles").[26] The Santa Clara Principles, like Section 2, establish openness, due process, cultural competency, and human rights requirements that Internet platforms should follow in order to offer significant, public-facing transparency surrounding their moderation of all user-generated material, whether paid or unpaid.[27] The United Nations Educational, Scientific and Cultural Organization ("UNESCO") has also established standards on transparency in content moderation that have been endorsed by many platforms.[28] Perhaps more tellingly, the U.S. is a signatory to Covenant on Civil and Political Rights ("ICCPR") since 1977, and ratified it in June 1992. While the ICCPR does not directly govern the actions of private parties, it does require that state parties ensure that speech rights are protected against abuse by private actors, such as large social media platforms and VLOPs. The ICCPR requires that speech restrictions—whether by the state or powerful private speech regulators—be imposed in a manner

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[26] *The Santa Clara Principles on Transparency and Accountability in Content Moderation*, https://santaclaraprinciples.org/ (accessed Jan. 17, 2024).

[27] *Id.*

[28] *Letting the Sun Shine In: Transparency and Accountability in the Digital Age* at 1, UNESCO, 2021, https://unesdoc.unesco.org/ark:/48223/pf0000377231 (accessed Jan. 17, 2024).

that is clear, transparent, not-arbitrary, and that provides adequate notice to the specific users.[29]

B. HB20 Section 2's Disclosure, Complaint, and Appeal Requirements Benefit the Platforms and Encourage User Confidence in Platform Integrity

Section 2 does not on its own prohibit content moderation. Nor does it require all platforms to adopt the same policies. Instead, it can provide a critical point of competitive distinction as each platform tailors its offerings to the needs of their respective users.[30] Section 2 mandates transparency so both users and social media platforms better understand how content moderation decisions get made. Consumers can make an informed choice about which platform they wish to use.[31] This will mean fewer surprises and enhance content moderation economies of scale because moderation decisions will be transparent to users on the front end. Fewer users will be confounded when posts or

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[29] *See* International Covenant on Civil and Political Rights, art. 19, Dec. 16, 1996, 999 U.N.T.S. 171, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights#article-19 (accessed Jan. 17, 2024).

[30] Br. for Babylon Bee, LLC et al. as *Amici Curiae* Supporting Def.-Appellant Paxton at 20, *NetChoice, LLC v. Paxton*, No. 21-51178, 49 F.4th 439 (5th Cir. 2022).

[31] *See* Matt Perault, *Section 230 Reform: A Typology of Platform Power*, CPI ANTITRUST CHRON., May 2021, at 18 ("Different approaches to content moderation enable users to make choices based on their moderation preferences").

user accounts are stricken, downgraded, or terminated from the platform.

Transparency requirements limit the backlash social media firms often face after they take some action.[32] Transparency quells disputes before they occur by requiring clear enunciations of what is and what is not an acceptable use of the platform. This will, in turn, stimulate competition between different social media firms with diverse audiences and varying terms of use.[33] Section 2 mandates clear disclosure and appeals processes, enabling informed user choices and reducing misunderstandings about content decisions.

Section 2 also protects both the public and social media platforms from improper governmental pressure to circumvent the First Amendment.[34] Requiring screening and removal consistency gives social media platforms a basis to refuse governmental demands to target viewpoints and messages that the government disfavors.

Social media platforms, with their capacity for innovation and significant technological resources, can adapt to an increased number of user appeals without compromising safety functions. The challenge of handling more appeals could drive advancements in automated moderation technologies, leveraging AI for

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[32] Babylon Bee Br. at 44.

[33] *Id.* at 45.

[34] Br. for Babylon Bee, LLC et al. as *Amici Curiae* in Support of Appellant's Mot. To Stay Prelim. Inj. Pending Appeal at 15, *Netchoice, LLC v. Paxton*, No. 21-51178 (5th Cir. 2021).

efficient and accurate processing. These platforms, designed for scalability, can manage the costs associated with additional appeals without diverting funds from critical areas, as they typically possess diverse revenue streams and sizeable budgets.

An efficient appeals process could lead to greater user engagement and higher revenue. Improved moderation processes driven by a surge in appeals could lead to fewer errors and a subsequent reduction in appeals, offering valuable insights for refining policies and enforcement mechanisms. Additionally, implementation of Section 2 may encourage users to follow platforms' terms more closely, thereby reducing violations and enhancing overall platform integrity. Above all—and despite the political theater—Section 2 is a concerted and content-neutral effort to protect consumer welfare.[35]

HB 20 Section 2's disclosure, complaint, and appeals requirements do not violate the First Amendment.

CONCLUSION

The Court should affirm the Fifth Circuit judgment as to all issues *sub judice* and reverse the Eleventh

[35] *See generally* Robert Bork, *The Anti-Trust Paradox* (Bork Publishing 2021).

Circuit judgment relating to Florida's neutrality and hosting provisions.

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