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 AMICUS CURIAE LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICUS CURIAE[1]

Amicus Life Legal Defense Foundation ("Life Legal") is a California non-profit 501(c)(3) public interest legal and educational organization that works to assist and support those who advocate in defense of life. Its mission is to give innocent and helpless human beings of any age, particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the nation's courtrooms. Life Legal believes life begins at the moment of conception and does not end until natural death. It litigates cases to protect human life, from preborn babies targeted by a billion-dollar abortion industry to the elderly, disabled, and medically vulnerable denied life-sustaining care.

Because *amicus* and other pro-life voices have experienced viewpoint discrimination by social media, it is interested in clarification from this Court on question one – whether the content-moderation restrictions of Texas H.B. 20 Section 7 comply with the First Amendment.

SUMMARY OF ARGUMENT

Texas adopted H.B. 20 Section 7 to ban viewpoint censorship by the largest social media companies. The core issue is the extent to which the First Amendment protects viewpoint discrimination by a social media host who exercises editorial discretion, however minimal, over the speech of others.

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[1] No counsel for any party authored this brief in whole or in part; no party counsel or party made a monetary contribution intended to fund its preparation or submission; and no person other than *amicus* or its counsel funded it.

This Court has stated, "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press v. United States*, 326 U.S. 1, 36 (1945) (holding that certain monopolistic practices of the Associated Press violated the Sherman Act). The same is true for freedom of speech, as the rule against restraints on the press applies "to cases involving expression generally." *Riley v. Nat'l. Fed'n. of the Blind*, 487 U.S. 781, 797 (1988) (holding that the North Carolina Charitable Solicitations Act infringed freedom of speech).

Under this Court's precedents, the exercise of editorial decision-making does not enjoy the same level of First Amendment protection in every context. NetChoice has presented a flawed argument based on misapplication of precedent and has consequently not proven a likelihood of success on the merits. *Winter v. Nat'l Res. Def. Council, Inc.*, 557 U.S. 7, 20 (2008) (*Winter*) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits"). Therefore, the decision of the Fifth Circuit to vacate the preliminary injunction should be upheld.

ARGUMENT

I. The Cases NetChoice Cites in Support of Its Quest for Unfettered First Amendment Freedom for "Editorial Discretion" Do Not Apply to Social Media.

In its brief, NetChoice makes the broad, general statement that "the First Amendment protects private parties' editorial rights to choose whether and

how to disseminate speech – including speech generated by others." Brief of NetChoice 13. ("BNET") This assertion cannot be sustained across the board. Indeed, the first two cases NetChoice cites, *Manhattan Comty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019) (*Halleck*) and *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (*Forbes)*, say nothing about the *First Amendment* rights of the state-regulated public access channels involved. The other three cases cited were, as discussed below, based on the particular circumstances of the medium involved and are easily distinguishable from the current case. Moreover, in numerous cases involving editorial discretion or similar activities in cases not involving the press, this Court has declined to apply strict scrutiny and ruled in favor of state action to regulate the party involved.

A. Cases Involving the Editorial Discretion of Public Access Channels Do Not Rely on the First Amendment Rights of Those Private, Heavily Regulated Stations.

Cases involving state-owned public access channels do not support NetChoice's quest for an unfettered First Amendment right to engage in viewpoint discrimination. For instance, in *Halleck,* cited by NetChoice, this court upheld the suspension of two individuals from using the public access channels not because the station had the First Amendment right to do so, but because the decision was deemed not to be state action for purposes of the First Amendment. 139 S.Ct. at 1932.

Furthermore, the State's regulations required the public access channels to function almost like

"common carriers" with *restrictions* on their editorial discretion. "Those regulations *restrict MNN's editorial discretion* and in effect require MNN to operate almost like a common carrier." *Id.* (emphasis added). The public access channels had to air programs "on a first-come, first-served basis." *Id.* Importantly, this Court did *not* say that the channel had the First Amendment right to refuse to air the film. In fact, the opinion specifically noted that that issue was not being raised. "A distinct question not raised here is the degree to which the First Amendment *protects* private entities such as Time Warner or MNN from government legislation or regulation requiring those private entities to open their property for speech by others." *Id.* at 1931, fn. 2 (emphasis in original). *Halleck*'s view of the public access channel as similar to a common carrier cannot be squared with NetChoice's claim that the First Amendment supports their unfettered editorial discretion.

In *Forbes*, 523 U.S. 666, also cited by NetChoice, the Court rejected Steve Forbes' First Amendment challenge to the decision of the state-owned public television broadcaster Arkansas Educational Television Commission ("AETC") to exclude him from a presidential debate. This Court held that the debate was a nonpublic forum and that the decision to exclude him was a reasonable, *viewpoint-neutral* exercise of the station's journalistic discretion that did not violated Forbes' First Amendment rights. *Id.* at 683. AETC's decision was based its judgment that Forbes lacked voter support and was not a serious contender in the presidential race. This Court did *not* say that the AETC had the First Amendment right to exclude Forbes's because of his viewpoint. On the contrary, it left open the possibility that a legislative

body could impose neutral rules on public broadcasting: "This is not to say the First Amendment would bar the legislative imposition of neutral rules for access to public broadcasting." *Id.* at 675.

B. Social Media Companies Do Not Exercise Editorial Discretion in the Same Manner as Newspapers

1. Contrary to NetChoice's Assertion, this Court Has Recognized that the Space/Time Limitations of Newspapers and Broadcasters Necessitate Allowance for Editorial Discretion.

The Fifth Circuit correctly addressed the role that space constraints played in the exercise of editorial discretion in *Miami Herald Publ'g. Co. v. Tornillo*, 418 U.S. 241 (1974) (*Tornillo*), and *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n. of Cal.,* 475 U.S. 1 (1986) (*PG&E*). Pet. App. 40a. However, NetChoice asserts, "*Tornillo* itself rejected that rationale, reiterating that the First Amendment protects against compelled publication even when it would not impose 'additional costs' or require publishers to 'forgo publication' of other speech due to 'finite' space." BNET 27-28.

NetChoice has cherry-picked this language. The full quote proves that space constraints *did* factor into the Court's decision to give First Amendment deference to editorial discretion:

> Even if a newspaper would face *no additional costs* to comply with a compulsory access law and would not be forced to *forgo publication* of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the

> First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and *the decisions made as to limitations on the size and content of the paper*, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment.

Tornillo, 475 U.S. at 258 (emphases added).

In context, the quote says the exact opposite of what NetChoice claims. It is *because of, not regardless of,* space constraints that the editorial discretion of newspapers receives First Amendment protection. Furthermore, the language in *Tornill*o referring to "finite" space also confirms the exact opposite of what NetChoice is claiming, namely that space constraints played a determinative role in that opinion:

> It is correct, as appellee contends, that a newspaper is not subject to *the finite technological limitations of time* that confront a broadcaster, but *it is not correct to say* that, as an economic reality, a *newspaper can proceed to infinite expansion of its column space* to accommodate the replies that a government agency determines or a statute commands the readers should have available.

475 U.S at 257 (emphases added).

Together, these quotes show that *Tornillo* based the grant of First Amendment protection to newspapers' editorial decision-making in the context of limited space, regardless of whether the paper had to incur additional costs or forgo publication, because

the editorial process is inherently and of practical necessity discriminating.

The relationship between limited broadcast time and the need for broad editorial discretion was explained in the decision *Columbia Broad. Sys., Inc. v. Democratic Nat'l. Comm.* 412 U.S. 94 (1973). "Since it is *physically impossible* to provide time for all viewpoints, however, *the right to exercise editorial judgment* was granted to the broadcaster. *The broadcaster, therefore, is allowed significant journalistic discretion* in deciding how best to fulfill the Fairness Doctrine obligations. . . ." *Id.* at 111 (1973) (emphases added). Importantly, in their exercise of legislatively granted editorial discretion, broadcasters were still required to uphold the Fairness Doctrine, which meant providing a balanced treatment of controversial questions, exactly as the Texas law requires. *Id.* at 111-12.

Forbes also explained the nature of editorial decision-making by broadcasters: "Public and private broadcasters alike are not only permitted, *but indeed required*, to exercise substantial editorial discretion in the selection and presentation of their programming. . . . To comply with their obligation to air programming that serves the public interest, broadcasters must often choose among speakers expressing different viewpoints." 523 U.S. at 674 (emphasis added).

The difference between the editorial function of newspapers and social media companies is evident from the results. As the Fifth Circuit noted, 99% of posts are allowed to remain on social media sites after screening for spam and obscene content. Pet. App. 35a. In contrast, The New York Times editorial board publishes only 1 to 1.5 percent of letters that it

receives.[2] The paper also receives hundreds of opinion editorial submissions daily, but publishes "only a few."[3] Of necessity, limited space *requires* newspapers to choose between potential speakers and viewpoints, which creates in readers an identification between the newspaper and the published third-party content. No such limitation exists for social media platforms given the "near-infinite space" available to them on the Internet. BNET 28. *Tornillo* does not support NetChoice's position, nor does PG&E, as the Fifth Circuit explained at Pet.App. 40a, *PG&E*.

2. This Court Has Held That, Unlike Newspapers, Social Media Companies Are Passive Conduits of the Speech of Others

This Court's assessment of the "editorial decision-making" of the social media companies stands in stark contrast to the practices of newspapers. As discussed in *Twitter v. Taamneh*, 143 S. Ct. 1206, 1216 (2023) (*Taamneh*), the major social media companies Facebook, X, and YouTube allow users to post content "without much (if any) advance screening." *Taamneh* noted that the social media platforms' relationship with their billion-plus users was "arm's length, passive, and largely indifferent." *Id*. at 1227. Finally, this Court noted "[T]here is no allegation that the

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[2] Stephen Hiltner, *'To the Editor': What Happens When Readers Write Back?,* N.Y. Times (Mar. 28, 2017), https://www.nytimes.com/2017/03/28/insider/to-the-editor-what-happens-when-readers-write-back.html.

[3] Kevin Krajick, *Writing and Submitting an Opinion Piece,* State of the Planet (May 4, 2020), https://news.climate.columbia.edu/2020/05/04/writing-submitting-opinion-piece/.

platforms here do more than transmit information by billions of people, most of whom use the platforms for interactions that once took place via mail, on the phone, or in public areas." *Id*. at 1228.

In view of the statistical facts and this Court's own understanding of the nature of the companies' "editorial" practices, NetChoice cannot substantiate its claim that the limited type of "editorial discretion" social media sites undertake entitles them to the same First Amendment deference that newspapers receive. The rigorous editorial decision-making that newspapers engage in creates the "intimate connection" between the paper and the communication that they publish, which gives rise to the First Amendment protection granted to them. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 576 (1995) (*Hurley*) (discussing *Tornillo* and *PG&E*). No similar "intimate connection" between these platforms and user content exists.

C. NetChoice's *Hurley* Analysis Is Flawed, Self-Contradictory and Ignores Subsequent Precedent

NetChoice continues its pattern of taking quotations out of context in its treatment of *Hurley*. NetChoice claims *Hurley* stated that "private entities are "intimately connected" to the speech they compile and present—even when they "fail" to "isolate an exact message." BNET 28-29. In reality, *Hurley* explained that, unlike a group of people randomly marching down the street, "we use the word 'parade' to indicate marchers who are making some sort of *collective point*, not just to each other but to bystanders along the way." 515 U.S. at 568 (emphasis

added). This Court found that "though the [musical] score *may not produce a particularized message*, each contingent's expression in the Council's eyes *comports with what merits celebration on that day*." *Id.* at 574. The "intimate connection" results from the selection process, which is made *in accordance with the collective point* and therefore puts the organizer in the position of appearing to have approved of the message of the participant: "GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well." *Id.* at 575. Contrary to NetChoice's assertion, *Hurley* does not support the proposition that *any* private entity is *de facto* intimately connected to the speech it compiles and presents. BNET 28-29. *Hurley* requires a "common theme" or "collective point" and a risk of misattribution. *Id.* at 576, 568.

Subsequent case law supports the view that *Hurley* and *PG&E* involved a danger of attributing the speech of one party to another. "As support, plaintiffs point to First Amendment cases *involving speech misattribution between formally distinct speakers*." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2088 (2020) (emphasis added) (citing *Hurley* and *PG&E*) (holding that foreign affiliates of the Alliance for Open Society International, Inc. possessed no First Amendment rights).

NetChoice's citation to *Wooley v. Maynard,* 430 U.S. 705 (1977) is also inapposite. The case did not discuss or even cite *Hurley*, nor did it involve one party's compilation of the speech of others. To the contrary, the fact that the plaintiffs were required by the state to carry the motto "Live Free or Die" on the

license plate of their privately owned car carries an inherent danger of misattribution.[4] So *Wooley* does not advance NetChoice's position either.

It is understandable that NetChoice would desire the Court overlook *Hurley*'s requirement that a private entity's compilation must have a "collective point." As the Fifth Circuit noted, social media sites lack such a collective point. Pet.App. 38a. NetChoice even acknowledges that not all social media companies have a common theme but instead "foster[] self-expression on an array of topics as diverse as [their] user base[s]." BNET 5. To the extent any individual social media company, such as Pinterest, claims to support a common theme or collective point, it may be able to assert its own challenge against Section 7, using *Hurley* to substantiate its position. But NetChoice itself cannot meet *Hurley*'s requirement of a common theme.

NetChoice alleges that editorial policies reflect the "community each website seeks to foster and the website's value judgments about what expression is worthy of presentation." BNET 5. Even if Pinterest is fostering a community of users centered on recipes, design, etc., Facebook, X, and YouTube cannot make a similar claim. Terms of service or rules of behavior do not establish a common theme. If they did, then any random group of people walking down the street could be considered a parade because municipalities have laws that forbid unruly behavior on city sidewalks. *Hurley*, 515 U.S. at 568 (differentiating a group of

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[4] "Here, as in *Barnette,* we are faced with a state measure which forces an individual, as part of his daily life - indeed constantly while his automobile is in public view - to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715.

people marching from here to there from a parade which has a "collective point").

Finally, NetChoice also contradicts itself on *Hurley*'s requirements of a "collective point" and the significance of misattribution of the speech of the component parts with the compiler. BNET 29. In its discussion of strict scrutiny, NetChoice cites *Hurley* out of context to support its claim that social media companies convey a message when they present speech to users:

> When Facebook, YouTube, or X present speech to their users, they convey *a message* about the type of speech the websites find acceptable and the communities they hope to foster. "Since every participating unit affects *the message* conveyed," requiring a website to include speech it does not want to include, or present speech in ways it would rather not, necessarily alters the content of its message.

BNET 36 (citing *Hurley*, 515 U.S. at 572-73) (emphasis added).

The full quote from *Hurley* actually says "Since every participating unit affects the message *conveyed by the private organizers* [i.e. the collective point], the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade." *Id*. at 572-73 (emphasis added). NetChoice cannot have it both ways. Social media companies cannot both deny they need to show a collective point and also claim that Section 7's requirement that they present all users' speech alters their collective point in violation of their First Amendment rights under *Hurley*.

Without a "collective point," social media companies lack a message. Therefore, the concerns

NetChoice expresses regarding Section 7 altering the content of "their speech" simply fall flat.[5] Lacking an intimate connection to the users' speech, social media companies are not speaking at all when they allow users to post on their sites.

II. Editorial Discretion Does Not Receive the Same Level of Protection in Every Circumstance.

Assuming *arguendo* that editorial discretion is in some sense speech, this Court's decision in *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), illustrates that a statute that interferes with editorial discretion is not *per se* an unconstitutional infringement on speech. In that case, this Court upheld the 1992 Cable Act which required cable operators to set aside some channels for local broadcast television. The Court acknowledged that the cable operators exercised editorial discretion over "which stations or programs to include in [their] repertoire." *Id.* at 636. Yet, with respect to the programs aired on cable, the Court stated, "Once the cable operator has selected the programming sources, the cable system functions, in essence, *as a conduit for the speech of others*, transmitting it on a continuous and unedited basis to subscribers." *Id.* at 629

[5] "And laws that compel speakers to "alter the content of their speech" are necessarily "content based. . . .Section 7 is plainly content based, as it requires covered websites to alter the content of their speech . . . . [R]equiring a website to include speech it does not want to include, or present speech in ways it would rather not, necessarily alters the content of its message." BNET 36 (citing *Hurley, PG&E* and other cases).

(emphasis added). The Court acknowledged that the law interfered with the editorial discretion of cable operators to a certain degree yet stated that the interference did not merit the same level of scrutiny in every situation.

> The [FCC] rules reduce the number of channels over which cable operators exercise unfettered control, . . . Nevertheless, *because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny applicable to the must-carry provisions*.

Id. at 637 (emphasis added). The Court upheld the provisions because they were content neutral and did "not depend on the content of the cable operators' programming." *Id*. at 644. Logically, because social media companies operate more like the cable companies in *Turner*—i.e. as conduits—they are not entitled to the same First Amendment deference as newspapers. *See also* Section I.B.2, *supra,* (discussing *Taamneh*.)

Other cases have upheld infringements on the exercise of editorial discretion in other contexts. In *Pittsburgh Press Co. v. Pittsburgh Comm'n. on Human Rels.*, 413 U.S. 376, 391 (1973), this Court upheld a city ordinance which was construed to forbid newspapers to carry sex-segregated classified advertising, even though it minimally interfered with newspapers' editorial decisions on the placement of ads. *Id*. at 383-84. The Court distinguished the protection offered the press for content "originated by Pittsburgh Press, its columnists, or its contributors" from the decision to deny the protection for editorial decision-making over the content of third-party advertisers. *Id*. at 391.

In *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) the Court upheld an FCC decision to require a broadcasting company to provide reply time to an individual that the station had attacked personally. The Court held that the First Amendment rights of the viewing and listening public were paramount over the right of the broadcasters. *Id.* at 391. Presciently, this Court stated, "Although broadcasting is clearly a medium affected by a First Amendment interest, . . . *differences in the characteristics of new media justify differences in the First Amendment standard applied to them*." *Id.* at 387 (emphasis added).

III. A Content Neutral Regulation Can Be Constitutionally Applied to an Entity That Serves as a Conduit for the Speech of Others

A. Social Media Companies Are Conduits, Similar to Cable Companies

Social media companies' relationship to the content on their sites bears several similarities to the relationship between cable operators and the programs that they host. They both host speakers—users and cable programmers, respectively—who then produce the speech that appears on the platforms. Cable programmers produce television programs, and social media users produce posts. Neither cable operators nor social media companies choose or, for the most part, produce, the content on their sites. But while cable operators select programmers (and therefore the general subject matter of the programs), social media companies do not even select users. The users select *them* as well as the subject matter of their

own posts. So social media companies are conduits even more so than cable operators because, in their normal operations, they are more passive with respect to which users they host and the content of users' posts. It is only after the users post that social media companies take any action, which serves to underscore the passive nature of their relationship to the content on their sites.

NetChoice has gone to great lengths to describe the "editorial discretion" that social media companies practice in order to beef up their claim that *their* speech is being infringed by Section 7. But a close look at their claims reveals that they do nothing more, and in fact they do less, than cable operators do in their exercise of editorial discretion.

The "text, audio, graphics and video" that they make, BNET 4, is for the most part a generic aspect of the platform, and not an "original, customized" site such those created by the plaintiff in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023). In their displays of their channel lineups and in the provision of audio and visual capabilities for programs, cable operators do the same thing. It is important to note that the audio and video capabilities facilitate the *speech of users* for which social media companies are passive transmitters, just as cable operators are with respect to the programs they host. *Taamneh,* 143 S.Ct. at 1227; *Turner,* 512 U.S. at 629.

NetChoice claims the websites edit and organize customized compilations of content that includes their own speech, user speech and advertisements matched to users' content. BNET 4. To be clear, they do not alter the content of users' speech, and they have

specifically denied creating any content.[6] Furthermore, cable operators also provide these things. They include their own speech (announcements), user speech (cable programs), and advertisements tailored to specific interests of viewers.[7]

NetChoice's claim that "Every user's feed is an "original, customized creation," "tailored" "for each" user and intended to "communicate ideas", BNET 4 (citing *303 Creative*, 143 S. Ct. 2298), is a ridiculous stretch at best. If the feed is "original," it is because each user made it so by posting an original comment. Simply organizing posts is not a creative effort any more than the organizing of channel lineups is a creative effort. Cable operators organize cable programs logically for ease of access by viewers and allow them to purchase packages according to the viewers' interests.[8] The social media's "tailoring" is not significantly different from what cable operators do when they allow viewers to choose packages and deliver only what their customers want to see. The "communicate[d] ideas" are those of the users, not of the social media companies, whose platforms lack a "collective point." See Sec. I.C., *ante*.

In a turnabout from its claim that an "intimate connection" "does not require a risk that the speech

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[6] Adam Candeub, Editorial Decision-Making and the First Amendment, 2 Journal of Free Speech Law 157, 166 (2022) https://www.journaloffreespeechlaw.org/candeub2.pdf (collecting examples).

[7] *Guide to TV Advertising on Cable and Local Broadcast Networks,* Linchpin SEO, https://linchpinseo.com/blog/guide-to-tv-advertising/ (updated Jan. 10, 2024).

[8] *See, e.g. What Channels Are Available in Each Package,* DIRECTV, https://www.directv.com/channel-lineup/ (last visited Jan. 8, 2024).

may be misperceived as having been created by the disseminator", BNET 29, NetChoice states that the "expression is 'displayed on' proprietary 'graphic and website design' alongside 'the name of the company'" such that '[v]iewers will know' the website is responsible for the expression on it." BNET 4-5 (citing *303 Creative*). In reality, all viewers will know that the users have decided to post *their expressions* on a particular social media site. Oftentimes, users will post the same or similar material on other sites as well. *From their own experience posting content*, they know that the social media company is not the source of the content of user speech. And they recognize the difference between the generic "graphic and website design" of the platform and the expressive content of user speech. NetChoice's reference to language from *303 Creative* regarding the "graphic and website design" alongside the "name of the company" is in the context of the "original artwork" which the plaintiff in that case created for each of her clients that was displayed on sites containing the name of her company. 143 S. Ct at 2307. These individualized designs are nothing like the *generic* graphics and website designs that appear on every users' feed on social media sites, which are not original for each user, and that merely identify those sites as the *host* of users' speech.

Perhaps more to the point, if NetChoice *truly* believed that users misattributed other user's speech to the platforms as they allege, the three main social media platforms would not be continuing to give a platform to the supporters of the Ayatollah Khamenei

and his rhetoric.[9] As the supreme ruler of Iran, the leading state sponsor of terrorism, he is responsible for encouraging and plotting attacks against the United States. Through proxies, he supports terrorism across Africa, Asia, Europe and North and South America.[10] The platforms' continued hosting of his content fundamentally undermines their concerns that, if they comply with Section 7, users will believe they are themselves supporting terrorism despite them actually opposing it. BNET at 6.

In *Turner*, this Court held there was "little risk" that viewers would believe that the contents of cable programs were endorsed by the cable operators. 512 U.S. at 655. Viewers that subscribe to a particular cable company in order to watch a program are fully aware that the program is the creation of HGTV, ESPN, etc., and not of the cable company. The same is true for users that log on to Facebook, X, or YouTube.

To further support its claim that users' speech can be attributed to the social media companies, NetChoice goes to great lengths to argue that its organization of content conveys ideas about what social media sites consider as "deserving of expression, consideration and adherence" as well as "support." BNET 5-6 (citing *Turner* and *Hurley*). NetChoice argues that the *Turner* Court held that the

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[9] Group by SaKee Irru, Ayatollah Khameini, Facebook, https://www.facebook.com/groups/766432757478290 (last visited Jan. 19, 2024); @khamenei_ir, X, https://twitter.com/khamenei_ir_ (last visited Jan. 19, 2024); Ayatullah Khamenei Speeches English (@ayatullahkhameneispeechese6557), YouTube, https://www.youtube.com/@ayatullahkhameneispeechese6557 (last visited Jan. 19, 2024).

[10] U.S. Dep't of State, Bureau of Counterterrorism, *Country Reports on Terrorism 2022* 4-5 (2022).

cable companies' "organization" of content conveyed "ideas" which were affected by "every piece of expression in a feed." BNET at 5. True to form, NetChoice took this general statement of First Amendment principle out of context. In fact, *Hurley* distinguished *Turner* on this very point:

> Thus, when dissemination of a view contrary to one's own is forced upon a speaker *intimately connected* with the communication advanced, the speaker's right to autonomy over the message is compromised. In *Turner Broadcasting, we found this problem absent in the cable context*, because "given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."

Hurley, 515 U.S. at 576 (emphasis added) (quoting *Turner*, 512 U.S. at 655).

Since social media companies' relationship with the content on their sites is even more attenuated than that of cable companies, and users themselves post content, there is even less reason to think that users will attribute posts to the company.

NetChoice resorts to citing the existence of terms of service as a basis for granting First Amendment protection for its "editorial decisions." BNET 5-6. But cable operators have terms of service as well, which allow them to terminate a subscription when viewers violate them.[11] They also have affiliation agreements

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[11] See, e.g., *Terms of Service / Policies,* Spectrum, https://www.spectrum.com/policies/terms-of-service) (last visited

(continues)

with programmers and base their decision as to whether to select a channel on whether that program will adhere to the agreement.[12] Terms of service are not a "common theme." *See* Sec. I.C. They are irrelevant and do not change the social media companies' role as a conduit of users' speech.

B. Like the Cable Act, Section 7 Is Content Neutral

1. Section 7 Does Not Alter Social Media Companies' Speech

This Court's analysis of the Cable Act in *Turner* is also helpful in assessing whether Section 7 is content based or content neutral. NetChoice continues its misapplication of *Hurley,* by claiming that the law is content based because it "requires covered websites to alter the content of their speech." BNET 36. As discussed in Section I.C., *supra*, the law does no such thing because the social media companies, with only some possible exceptions not relevant to this facial challenge, have no "common theme" to alter. Similarly, *Turner* said the must-carry rules did not force the cable operators to alter their messages because, like the social media companies, they were merely a conduit of the content they carried. *512 U.S.* at 655.

Jan. 8, 2024); *DIRECTV Residential Terms of Service*, DIRECTV (effective as of Nov. 14, 2023), https://www.directv.com/legal/directv-residential-terms-of-service/.

[12] *Cable Television, Programming of,* Encyclopedia.com, https://www.encyclopedia.com/media/encyclopedias-almanacs-transcripts-and-maps/cable-television-programming.

2. Section 7's Exclusions Are Not Based on Agreement or Disagreement with Speech"

NetChoice claims that the law is content-based because it excludes certain content from its prohibition. BNET 37. Pet. App. 82a-83a. However, the Cable Act in *Turner* also contained exclusions. It exempted from the must-carry requirements any broadcast station that was "predominantly utilized for the transmission of sales presentations or program length commercials." 47 U.S.C. § 534(g)(1). This exemption did not render the law content based, as it had nothing to do with the government's agreement or disagreement with the message of these broadcast stations. *Turner,* 512 U.S. at 642 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The same is true of the exemptions in Section 7.

3. Section 7's Application to Large Social Media Companies Is Justified by Their Market Power

NetChoice further alleges that, since Section 7 excludes sites that carry news, sports or entertainment, the law "singles out a few websites for disfavored treatment." BNET 37. The cable operators made the same argument because the Cable Act did not apply to other members of the press. *Turner*, 512 U.S. at 659. The Court held that heightened scrutiny was unwarranted because the application of the must-carry rules to cable companies only was justified on the basis of the "'special characteristic' of the

particular medium being regulated." *Id.* at 660.[13] This "special characteristic was the "bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id*. at 661.

NetChoice's assertion that Section 7's application to social media platforms having more than 50 million monthly active users in the U.S. is "arbitrary" and ideologically based ignores the disproportionate size of the larger companies as compared to the competitors mentioned by NetChoice – Parler, Gab, and Truth Social. BNET 8. Just like the cable operators, the largest social media companies exercise a "bottleneck monopoly power" over social media usage on the Internet that warrants singling them out.[14] The market power of Facebook, X, and YouTube dwarfs that of their competitors. Facebook had 2.96 billion monthly active users and 2 billion daily active users as of December 32, 2022.[15] X had 528.3 million monthly monetizable active users in 2023.[16] YouTube had more than 2.7 billion monthly active users as of 2023 and over 122 million active users daily. It has

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[13] The Fifth Circuit justified the exclusions from Section 7 because, unlike the sites that carry news, sports or entertainment, social media platforms are user-generated, and thus are fundamentally different. Pet. App. 82a.

[14] The Fifth Circuit discussed the platforms "market power" in its analysis of the application of the common carrier doctrine to the platforms. Pet. App at 72a-75a.

[15] Meta Platforms, Inc., *Form 10-K for Fiscal Year Ended Dec. 31, 2022,* 56 (Feb. 1, 2023), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/e574646c-c642-42d9-9229-3892b13aabfb.pdf.

[16] Matthew Woodward, *Twitter User Statistics 2024: What Happened After "X" Rebranding?,* Search Logistics (Dec. 21, 2023), https://www.searchlogistics.com/learn/statistics/twitter-user-statistics/.

239 million users in the United States.[17] By contrast, Parler had 700,000 monthly active users in 2022, Truth Social had 2.8 million,[18] and Gab had 3.7 million monthly users globally in 2020.[19] To put these numbers in perspective, if you add up all the users on the three smaller sites (assuming they are all distinct users), they total 7.2 million. The number of users on those sites represents, at best, 0.24% of the monthly users of Facebook, 1.4% of the monthly active users of X, and 0.27% of the monthly users on YouTube. In fact, one Pew Research Poll found that only 1% of Americans get news regularly from Parler or Gab, and only 2% get it from Truth Social. Only 6% of Americans get news from the seven alternative social media cites studied. Forty-four percent of Americans were unaware of the existence of any of the alternative sites. The most well-known alternative site was Parler, but 61% of Americans had never heard of it.[20] By contrast, 30% of Americans get news

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[17] GMI Blogger, *YouTube Statistics 2024 (Demographics, Users by County & More)*, Global Media Insight (Jan. 4, 2023, 1:33 AM), https://www.globalmediainsight.com/blog/youtube-users-statistics/#country (last visited Jan. 8, 2024).

[18] Max Zahn, *Parler, Platform Popular Among Conservatives, Temporarily Shut Down After Acquisition,* ABC News (Apr. 14, 2023, 6:04 AM), https://abcnews.go.com/Business/parler-platform-popular-conservatives-temporarily-shut-after-acquisition/story?id=98582220.

[19] Jazmin Goodwin, *Gab: Everything You Need to Know About the Fast-Growing, Controversial Social Network*, CNN.com (Jan. 17, 2021, 4:49 PM), https://www.cnn.com/2021/01/17/tech/what-is-gab-explainer/index.html.

[20] Naomi Forman-Katz, Galen Stocking, *Key Facts About Truth Social*, Pew Research Center (Nov. 18, 2022), https://www.pewresearch.org/short-reads/2022/11/18/key-facts-about-truth-social-as-donald-trump-runs-for-u-s-president-again/

from Facebook, 26% get it from YouTube, and 12% get it from X.[21] As almost 62% of adults get news from social media (mostly Facebook), and that number is increasing; the market power and influence of these platforms is staggering.[22] Therefore, deplatforming speakers or censoring viewpoints on the large platforms denies those speakers access to billions of viewers who would not even know to seek them out on alternative sites and greatly reduces their presence on the Internet.

Furthermore, censorship of speakers or viewpoints weakens the ability of potential viewers and customers to find the speaker, even if that person has a website. This is because social media activity (shares, likes, comments) indirectly results in higher ranking on search engines like Google. The more visible a profile is on social media, the more people will link to and visit the profile's website. Increased activity on a website is a search engine optimization (SEO) tool which results in higher Google ranking.[23]

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[21] Jacob Liedke, Luxuan Wang, *Social Media and News Fact Sheet*, Pew Research Center (Nov. 15, 2023), https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/.

[22] Antonio Kim & Alan R. Dennis, *Says Who? The Effects of Presentation Format and Source Rating on Fake News in Social Media,* 43 MIS Quarterly 3, 1025, 1026 (2019).

[23] Andy Crestodina, *How Does Social Media Affect SEO?,* Orbit Media Studios, https://www.orbitmedia.com/blog/how-does-social-media-affect-seo/; Mike Khorev, *How to Use Social Media Platforms to Improve Google Rankings* (Sept. 21, 2022), https://mikekhorev.com/how-to-use-social-media-platforms-to-improve-google-rankings; Rachel Handley, *Social Media SEO: How to Rank Higher on Social Media & Google,* Semrush Blog (Oct. 10, 2023), https://www.semrush.com/blog/social-media-seo/.

In addition, Google, which owns YouTube and is responsible for over 91% of Internet searches[24], can manually reduce a website's ranking in Google searches.[25] The combination of censorship by social media and Google's search engine would render a website impossible to find by anyone other than a site's already existing network. It would render the affected speaker invisible and effectively banish them from the Internet "public square." *Packingham v. North Carolina,* 582 U.S. 98, 107 (2017) (striking down statute prohibiting registered sex offenders from accessing a commercial social networking site if minors are permitted to become members, likening the Internet to the "modern public square"). Suppression on social media can be likened to giving someone a phone number (in the day of landlines) but denying them a spot in the phone book. The bottleneck monopoly power of the large social media companies therefore justifies singling them out for purposes of preventing viewpoint-based censorship on those sites.

4. Section 7 Applies to Users' Speech Regardless of Viewpoint.

NetChoice asserts that Section 7 suppresses "particular ideas or viewpoints." BNET 40. But, like the must-carry rules, *Turner,* 512 U.S. at 645, Section 7's ban on viewpoint discrimination is unrelated to content because it applies to all viewpoint

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[24] *Search Engine Market Share Worldwide Dec 2022-Dec 2023,* StatCounter, https://gs.statcounter.com/search-engine-market-share (last visited Jan. 8, 2024).

[25] *Manual Actions Report,* Google Support, https://support.google.com/webmasters/answer/9044175?hl=en (last visited Jan. 8, 2024).

discrimination regardless of subject matter, or whether the particular viewpoint is conservative, liberal, or centrist. The purpose of Section 7, like the must-carry rules in *Turner*, is unrelated to the suppression of speech; rather its purpose is to "protect the free exchange of ideas and information" in Texas. H.B. 20 (1)(2) . Texas' law does not engage in viewpoint discrimination; it seeks to end it on social media.

C. Section 7 Satisfies Intermediate Scrutiny

Section 7 is a content-neutral regulation which "furthers an important or substantial governmental interest" that "is unrelated to the suppression of free expression", and the "incidental restrictions" imposed on "alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner*, 512 U.S. at 662 (citing *United States v. O'Brien*,
391 U.S. 367, 377 (1968)).

Section 7 furthers the important governmental interest of "protecting the free exchange of ideas and information in this state." H.B. 20 (1)(2). It is directly related to the First Amendment right of the public to receive ideas as "a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (holding that the Board of Education's ban on certain books violated the First Amendment). This interest is similar to the governmental purpose of "promoting the widespread dissemination of information from a multiplicity of sources" that was upheld as an important government

interest sufficient to satisfy intermediate scrutiny in *Turner*. 512 U.S. at 662.

Private censorship is no less damaging to the fabric of a democratic society than state censorship, and the government has the constitutional authority to legislate against it. As this Court cogently stated in *Associated Press v. United States*:

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

326 U.S. 1, 35-36 (1945).

Given their inordinately large market power over the social media audience, these large platforms have the ability to repress the "free flow of ideas" no less than the Associated Press did as a corporate monopoly. This governmental interest, connected as it is to the government's responsibility to safeguard First Amendment freedoms of the public, is, like the

interest asserted in *Turner,* a "governmental purpose of the highest order, for it promotes values central to the First Amendment." 512 U.S. at 663. This interest is unrelated to the suppression of free expression or to the content of any speakers' messages. *Id.* at 662. In fact, Section 7 seeks to safeguard *any* speaker and *any* viewpoint from platform censorship.

Furthermore, the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. NetChoice has cited raw numbers in an effort to establish how Section 7 "would fundamentally change the character of these websites." They state that Facebook, Google and X took action over a total of 3.86 billion accounts or user submissions involving spam, pornography, child safety and extremism in a six-month period in 2018. BNET 6. However, these raw numbers are deceiving because the number of posts on these websites in a six-month period is well over two hundred billion. (Facebook users post more than 134 billion comments in that time, while X users post more than 91 billion tweets.[26]) Furthermore, Section 7 only bans viewpoint-based editorial decisions. Therefore, these decisions would not all change if it were allowed to go into effect. Given that only 1% of posts are removed as a result of platforms' "editorial discretion", Pet. App. 35a., less than 1% of editorial decisions would be affected. In comparison, the Cable Act required cable systems to set aside up to one-third of their channels for broadcast stations. *Turner,* 512 U.S. at 630. The actual impact of the Cable Act on

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[26] "It appears that for *every minute* of the day, approximately 500 hours of video are uploaded to YouTube, 510,000 comments are posted on Facebook, and 347,000 tweets are sent on Twitter." *Taamneh*, 143 S.Ct. at 1216 (emphasis in original).

cable systems was greater than the impact Section 7 would have on the platforms and was not considered burdensome. "[O]nly 1.18 percent of the approximately 500,000 cable channels nationwide is devoted to channels added because of must-carry, . . . weighted for subscribership, the figure is 2.4 percent." *Turner II,* 520 U.S. at 214.

Section 7 involves less of an intrusion on the limited "editorial discretion" of the platforms than the Cable Act imposed on cable operators. The latter have a limited number of channels, though they are in the hundreds, *Turner,* 512 U.S. at 628, as compared to the limitless Internet. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) ("the Internet can hardly be considered a 'scarce' expressive commodity"). Given the role of space limitations in *Tornillo* and *PG&E*, Section I.B.1, *supra*, social media companies are in an even weaker position than cable operators to claim that their "editorial discretion" is affected by Section 7. They will not have to give up any channels, or column space, to comply with the content moderation provision

CONCLUSION

NetChoice has not shown a likelihood of success on the merits of its First Amendment claims. It has taken quotations out of context in order to make the case that every exercise of editorial discretion, no matter how minimal, warrants the highest level of First Amendment scrutiny. It has failed to adequately distinguish cases involving parties that exercised editorial discretion, yet, as conduits for the speech of others, did not prevail on their First Amendment claims. The Fifth Circuit's decision denying the preliminary injunction should be upheld.

Respectfully Submitted,

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