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, *et al.*

NETCHOICE, LLC, *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 LEGAL SCHOLARS ADAM CANDEUB & ADAM MACLEOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS IN 22-277 AND RESPONDENT IN 22-555

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INTERESTS OF *AMICI* AND RULE 37.6 DISCLOSURE[1]

Amici are legal scholars committed to the sound development of the law of common carriers and the correct interpretation of constitutional terms that affect property and free speech.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to fund the preparation or submission of the brief. Sup. Ct. R. 37.6.

accommodations. He has no stake in the parties or the outcome of this case.

SUMMARY OF ARGUMENT

This *amici curiae* brief is filed in support of the States of Texas (respondent in No. 22-555) and Florida (petitioner in No. 22-277). It is intended to aid the Court by adding to the record a scholarly overview, with relevant legal and historical context, of common carrier and public accommodations doctrines, and how these doctrines bear upon private entities like the social media platforms in this case, particularly with respect to the First Amendment.

Though some property owners, such as homeowners, have absolute rights to exclude speakers or speech they dislike or wish to suppress, not all do. *See* Eugene Volokh, *Bans on Political Discrimination in Places of Public Accommodation and Housing*, 15 N.Y.U. J.L. & LIBERTY 490, 491 (2022). Common carriers are among those who do not. Common carrier law, grounded in actions of assumpsit dating back to the early 17th century, traditionally required businesses making an offering of carriage to the public in general to accept all customers, and public accommodations doctrine required businesses open to the public to honor their offerings to the general public of goods and services. At common law, such businesses may refuse or terminate to some a service offered as a general undertaking to all only if they provide a legally valid reason. *See* Adam

J. MacLeod, *The First Amendment, Discrimination, and Public Accommodations at Common Law*, 112 KENTUCKY L.J. ___ (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4273296 [hereinafter *Common Law*]. Long-established common carrier and public accommodation law rejects certain types of discrimination by such businesses as legally invalid. *Id*. Modern common carrier statutes codified beginning in the mid-19th century have added to the list of such invalid reasons for discrimination based on religion and other viewpoints.

One implication of this legal tradition is that, under long-established common carrier law, private parties that engage in the business of transmitting messages as part of an undertaking to provide carriage to all, such as telephone and telegraph service and similar businesses, must, in general, carry the speech of all regardless of viewpoint or the content of the message. Ma Bell could not refuse to connect telephone calls based on their subject matter or disfavored source; Western Union could not curate the telegrams carried between its offices.

Texas's Act of September 2, 2021, 87th Leg., 2 C.S., ch. 3 (hereinafter "H.B. 20"), which prohibits viewpoint discrimination exercised by dominant social media firms in hosting their users' posts, explicitly invokes Texas's traditional common carrier authority. It is in accord with the principles established in common carrier law before the American founding and repeatedly affirmed in the centuries since. It is plainly constitutional.

Firms cannot evade these laws by asserting that their business conduct is inherently expressive and, therefore, immune under the First Amendment from such common-carrier regulation. Otherwise, any business could evade anti-discrimination laws that prohibit viewpoint discrimination by claiming that their discriminatory conduct is expressive. The First Amendment only comes into play if the business conduct itself is protected speech, as in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), or satisfies the tests for protected expressive action set forth in *Texas v. Johnson*, 509 U.S. 350 (1993).

H.B. 20's viewpoint discrimination prohibition might require social media platforms to transmit views with which they disagree. But this requirement does not restrict or affect *the platforms'* speech, and so it does not implicate the First Amendment. As this Court unanimously found last term in *Taamneh*, social media platforms are in a position of "passive nonfeasance," *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 500 (2023), towards their users' posts. And those platforms, in *Taamneh* and many Section 230 cases, have themselves disclaimed user speech as their own. They cannot now claim First Amendment rights of their own in this transmission of speech of others that they generally offer to carry and accommodate.

ARGUMENT

I. Granting the platforms First Amendment immunity from the challenged statutes would be novel and would defeat the purposes of common carrier law

This Court has never recognized an unqualified First Amendment right of all property owners to exclude individuals or their speech. Had this Court done so, both common carrier and public accommodations statutes, which have existed since the 19th century and which have allowed women, African Americans, Roman Catholics, Jews, and many others to participate more fully in our society, would be at risk of nullification.

Common carrier doctrines have been part of the common law for over 500 years. Carriage and accommodation statutes have been a prominent feature of American society for more than a century, and many current common carrier rules predate the Republic's founding by nearly that long. It would be surprising if the First Amendment were to render such rules unconstitutional on the ground that carriers' conduct is immunized because the speech they carry expresses viewpoints.

Recognizing such a broad First Amendment immunity from common carrier regulation could allow phone companies to refuse service to individuals or even interrupt ongoing conversations with advertisements or political messages. Public accommodation laws, to which H.B. 20 is also akin, prohibit excluding

a person from common carriage or a universal license for unlawful reasons. The challenged statute is consistent with the First Amendment under long-standing common carrier law.

A. H.B. 20 satisfies this Court's tests for common carriers

H.B. 20 satisfies the tests that this Court has used to assess States' common carrier regulations. Common carrier law has appeared in this Court's decisions since its earliest cases. *See*, *e.g.*, *Bingham v. Cabot*, 3 U.S. 19, 33 (1795). Drawing on this Court's common carrier precedents and scholarly commentary in a recent case before this Court, Justice Thomas summarized the various bases for common carrier status: (1) a firm exercises market power,[2] (2) an industry is "affected with the public interest,"[3] (3) the entity regulated is part of the transportation or communications industry,[4] (4)

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[2] *See 303 Creative LLC v. Elenis*, 60 U.S. 570, 590–91 (2023) ("Statutes like Colorado's grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants. Often, these enterprises exercised something like monopoly power."); *U.S. v. Champlin Refining Co.*, 341 U.S. 290 (1951) (Because "Champlin does not have a monopoly or any power to establish a monopoly," Champlin was not a "common carrier").

[3] *See Munn v. Illinois*, 94 U.S. 113, 130 (1876) ("Common carriers exercise a sort of public office. . . . Their business is, therefore, 'affected with a public interest.' ").

[4] *See American Trucking Associations v. Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397, 406 (1967) (citing *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 382–383 (1848)) ("From the earliest days, common carriers have had a duty to carry all goods

the industry receives certain benefits from the government,[5] or (5) the firm makes or "holds out" a public offering of carriage.[6] *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222–23 (2021) (Thomas, J., concurring in denial of certiorari).

Some of these tests reflect the "peculiar law respecting . . . common carriers" that predates the American founding, which this Court has acknowledged in

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offered for transportation"); *Chicago, Burlington, & Quincy R.R. Co. v. Iowa*, 94 U.S. 155, 161 (1876) ("Railroad companies are carriers for hire . . . [t]hey are, therefore, engaged in a public employment affecting the public interest."); *Chicago, Milwaukee, St. P. & P.R. Co. v. Acme Fast Freight*, 336 U.S. 465, 484 (1949) (stating that a firm is a common carrier if it "holds itself out to the general public to transport or provide transportation of property . . . and . . . assumes responsibility for the transportation of such property from point of receipt to point of destination"); *Producers Transportation Co. v. Railroad Commission of California*, 251 U.S. 228, 231 (1920) (upholding common carrier status because, *inter alia*, "one of the things which the company was authorized to do . . . was 'to establish and carry on . . . a general transportation business for the purpose of transporting").

[5] *See Western Union Telephone Co. v. Call Publishing Co.*, 181 U.S. 92, 99–100 (1901) ("Common carriers, whether engaged in interstate commerce or in that wholly within the State, are performing a public service. They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render.").

[6] *See U.S. v. Contract Steel Carriers, Inc.*, 350 U.S. 409, 410 (1956) ("[A]ppellee has held itself out by its actions to be a common carrier. . . . offering its transportation service."); *Chicago, Milwaukee, St. P. & P.R. Co. v. Acme Fast Freight*, 336 U.S. 465, 484 (1949) (finding that a firm was a common carrier because "[i]t held itself out not merely to arrange with common carriers for the transportation of the goods, but rather to deliver them safely to the consignee").

its precedents. *See Hodgson v. Dexter*, 5 U.S. 345, 361 (1803). Other categories have been added by State statutes. Industries such as ferries and over-water transport,[7] stagecoaches,[8] railroads,[9] package and letters carriers,[10] and other carriers of messages such as telegraphs, telephones, and internet service providers[11] had, or continue to have, obligations to serve all without unreasonable discrimination.

As common carrier regulation of the social media platforms, H.B. 20 passes each of these tests. First, H.B. 20 is premised on the legislative finding that "social media platforms function as common carriers." H.B. 20, Section 1, para. 3. The Act finds that social media platforms "with the largest number of users are common carriers by virtue of their market dominance." *Id.* para. 4. Beyond that, no one doubts that the largest social media firms have consolidated market power,

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[7] *United States v. Brooklyn E. Dist. Terminal*, 249 U.S. 296, 307 (1919); *United States v. Seatrain Lines*, 329 U.S. 424, 425 (1947).

[8] *Budd v. New York*, 143 U.S. 517, 533 (1892); *Gilmer v. Higley*, 110 U.S. 47, 48 (1884).

[9] *Schwabacher v. United States*, 334 U.S. 182, 201 (1948).

[10] *Barrett v. City of New York*, 232 U.S. 14, 28 (1914).

[11] *Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601, 5692 (2015); *see also* Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J. L. & TECH. 391, 402 (2020) ("[C]ommon carriage became the dominant framework for regulating a wide variety of industries including railroad, telegraphs, and telephones.").

and courts are now accepting allegations of antitrust violations.[12]

Second, while this Court ultimately rejected the concept of a private business "affected with a public interest," first articulated in *Munn v. Illinois*, 94 U.S. 113, 126 (1876), as an "unsatisfactory test" for identifying broad categories of industries susceptible to state regulation, *Nebbia v. New York*, 291 U.S. 502, 536 (1934), the Court recognizes that certain types of business may make themselves a matter of common interest.[13] Not surprisingly, this Court has reaffirmed on numerous occasions since *Nebbia* that common carriers are among them.[14]

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[12] *See*, *e.g.*, *Fed. Trade Comm'n v. Facebook, Inc.*, 581 F. Supp. 3d 34, 44–45 (D.D.C. 2022) (accepting allegations on a motion to dismiss that Facebook enjoys market power in "personal social networking" services).

[13] *See id.*, 523–24 (listing "business units supplying transportation, light, heat, power and water to communities" as examples of activities that "so nearly touch the vital economic interests of society that the police power may be invoked to regulate their charges" for use of their property supplying those commodities).

[14] *Glob. Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45, 55 (2007) (noting that because "the underlying regulated activity at issue here resembles activity that both transportation and communications agencies have long regulated," activity may be treated as "common carrier" and subject to certain "public interest" standards); *United States v. Ne. Rosenblum Truck Lines*, 315 U.S. 50, 54–55 (1942) ("The Act clearly contemplates that contract and common carriers will offer competing types of service, for § 210 prohibits any person from simultaneously holding a certificate and a permit for the same route or territory unless the Commission finds that such is in the public interest.").

Third, H.B. 20 regulates a communications industry. That industry has long been within the category of common carriers, as with telephones, telegraphs, and the like.

Fourth, social media platforms receive benefits from the government of the sort typically enjoyed only by common carriers and public franchises. Most importantly, they have been granted generous "conduit" immunity, unique to their industry, under section 230 of the federal Communications Decency Act of 1996, 47 U.S.C. §230.[15]

Fifth, anyone can open an account on the platforms. The platforms hold out an offer of carriage to all, like the telephone or telegraph companies, and propose a universal bailment of personal property (i.e., data) entrusted to them, like a railroad. NetChoice Br. at 25.

B. NetChoice asks the Court to adopt a novel test that would upend established common carrier and anti-discrimination law

NetChoice asks this Court to fashion a new common carrier definition to immunize social media platforms from common carrier regulation. It argues that common carriers include only businesses that "hold themselves out as affording neutral, indiscriminate access to their platform without any editorial filtering."

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[15] 47 U.S.C. §230(c)(1); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

NetChoice Br. at 25. Under NetChoice's proposed definition, any firm that "require[s] users, as preconditions of access, to accept their terms of service and abide by their community standards," is thereby exercising "editorial discretion" over its users and cannot be a common carrier. NetChoice Br. at 25.

NetChoice's test, as the court below ruled, "lacks any historical or doctrinal support." *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 474 (5th Cir. 2022).

1. It's not clear that NetChoice believes its own common carrier test

It is unclear whether even NetChoice, or the carriers it represents, believe NetChoice's argument. As an initial matter, *anyone* can open an account on these social media platforms, suggesting that they are neutral and that any editing is *de minimis* for most customers. As importantly, the platforms sing a different song when claiming immunity from liability under Section 230 of the Communications Decency Act, 47 U.S.C. §230. This provision "does not protect entities for their own speech; it protects them only when they serve as a conduit for other's *[sic]* speech." *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 126 n.22 (4th Cir. 2022). Twitter, for one, has taken the position that Congress provided this protection because it deemed "that a service provider acting as a conduit for huge quantities of third-party speech should not be held liable for harms stemming from that speech." Notice of Motion & Motion to Dismiss at 10 n.5, *Fields v. Twitter Inc.*,

No. 3:16-cv-00213 (N.D. Cal. Apr. 6, 2016) (quoted in part in *NetChoice*, 49 F.4th at 460 & n.13).

In many Section 230 cases, social media carriers have represented that they use "neutral tools [to] filter or arrange third-party content," Reply i/s/o Mot. to Dismiss*, Colon v. Twitter, Inc.*, 2019 WL 7835413 (M.D. Fla. 2019). Amazon affirms that its "algorithms are content-neutral actions immunized under section 230." Mot. to Dismiss*, Planet Green Cartridges v. Amazon*, 2023 WL 8876746 (C.D. Cal.). Facebook states that it "provides third parties with neutral tools." Mot. to Dismiss, *Forrest v. Facebook, Inc.*, 2022 WL 19000179 (N.D. Cal.).

As this Court found last year in *Taamneh*, these platforms do, indeed, provide neutral access. The Court said the social media platforms' editing "algorithms appear agnostic as to the nature of the content." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 499 (2023). They do not provide editorial control: rather, "[a]ll the content on [the social media] platforms is filtered through these algorithms, which allegedly sort the content by information and inputs provided by users and found in the content itself." *Id*.

In short, the social media platforms' insistence that they have *liability* immunity based on the premise that they *are* "neutral" belies NetChoice's insistence that the same platforms have *regulatory* immunity based on the premise that they *are not* "neutral."

2. Common carrier status is compatible with refusing to carry certain content

Even assuming that the platforms have rules that disallow certain types of content, such prohibitions would nevertheless be consistent with being traditional common carriers.

As the court of appeals explained, all common carriers of messages "filter some obscene, vile, and spam-related expression. . . . Similarly, transportation providers may eject vulgar or disorderly passengers." *NetChoice v. Paxton*, 49 F.4th at 474. Before social media was invented, telephone companies could refuse service to legally suspect or otherwise undesirable users such as "a racing news agency even though [the telephone company] may not be liable to criminal punishment for rendering service." *Right or duty to render or to refuse telephone or telegraph service that may facilitate betting on horse racing or other sports*, 153 A.L.R. 463 (1944); "bawdy houses," *Godwin v. Carolina Tel. & Tel. Co.*, 136 N.C. 258 (1904); or, users who simply violated a telephone company's "General Rules and Regulations" in making annoying and harassing calls that "interfere[d] with the service of other telephone users." *Occhino v. Nw. Bell Tel. Co.*, 675 F.2d 220, 224 (8th Cir. 1982).

What NetChoice argues, in effect, is that so long as a platform describes its terms of service as expressive of the platform's views, it cannot be a common carrier for purposes of regulation of those terms of service. Beyond lacking any precedential support, NetChoice's

"expressive terms of service" rule would, if adopted, undermine common carrier law. If excluding customers for expressive purposes takes an industry out of common carrier status, then Internet, telephone, mail, and package carriers could discriminate unlawfully, characterize their policies as "editorial filtering" and immunize themselves from such common carrier regulation.

Most fundamentally, NetChoice misunderstands the limiting principles of common carrier regulation. If a carrier decides not to offer services to certain people—and claims, consistent with what NetChoice argues here, that such refusal is an expressive action—that decision cannot by itself take the firm outside the common carrier ambit. Instead, the question is whether the service is of a *type* and *scope* of carriage that can be held out to the public in a non-discriminatory way.[16] This limiting principle distinguishes common carriage from private carriage. In a decision by this Court that NetChoice and its *amici* ignore, this Court made this point over a century ago in *Memphis & Little Rock R.R. v. S. Express Co.*, 117 U.S. 1, 20 (1886) (hereinafter the *Express Cases*).

In the *Express Cases*, the Court reviewed whether express services—the "FedEx" of their day—could be regarded as common carriers. Express services entered into contracts with railroads for a certain amount of cargo space or number of passenger tickets. With this

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[16] *See* Adam Candeub, *Common Carrier Law in the 21st Century*, 90 TENN. L. REV. 813, 838–45 (2024).

guaranteed transport, the express services would provide speedy delivery of parcels and messages. The Court observed that the industry (like package delivery services today) "has become a public necessity and ranks in importance with the mail and the telegraph." *Id.* If any carrier was affected with a public interest, express services were.

But, despite the importance of express services, the Court found that a general offering of express services was impossible—not because of the company's choice or its desire to engage in "filtering" (editorial or otherwise), but because of the physical capacity for such services that the railroad's existing infrastructure could sustain. "No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines, one company will, at times, fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided." *Express Cases*, 117 U.S. at 20. Because the railroads did not (indeed, could not) guarantee express carriage to everyone who might demand it, but instead contracted individually with customers seeking express carriage, the railroads had *not* made themselves common carriers of *express freight*, notwithstanding that they were, and remained, common carriers of persons and property generally. *Id*. at 21–25.

Following this rule, the lower courts exempted other services that were not functionally capable of

common carriage as to those services due to the specialized nature of their offering, like, for example, circus trains. "The law appears to be well settled that a railroad is not obliged to receive and transport as a common carrier the cars of a circus carrying its equipment of tents, wagons, animals, and employees, and other paraphernalia. . . . The hauling of a train composed of cars belonging to a circus, made up and loaded by the employees of the circus, to be hauled usually at night, and carrying horses, elephants, and wild and savage beasts, is not the ordinary business of a common carrier." *Sasinowski v. Bos. & M.R.R.*, 74 F.2d 628, 631 (1st Cir. 1935). Similar reasoning applied to railroad companies' obligation to haul luxury Pullman sleeping cars. *Denver & Rio Grande R.R. v. Whan*, 89 P. 39, 42 (Colo. 1907). Luxury services and other individualized forms of carriage are not common carriage.

In contrast, where a firm has the capacity and ability to hold itself out as making a common offering of carriage to all, and either does offer a common carriage or is obligated to do so by some franchise grant from the public, common carrier obligations apply. *Southern Express Co. v. McVeigh*, 61 Va. 264 (1871); *Weymouth v. Penobscot Log Driving Co.*, 71 Me. 29, 37–39 (1880); MacLeod, *Common Law*, at *36–*42.

For instance, in an opinion written for New York's highest court by then-Judge (and future Associate Justice of this Court) Benjamin Cardozo, the New York Court of Appeals required telegraph companies to offer "private wires," which were dedicated lines used for certain businesses, to all, on the same terms—even

though telegraph companies had never held themselves out as providing the service on equal terms, and had particularized contracts with the Associated Press. *Postal Tel-Cable Co. v. Associated Press*, 127 N.E. 256, 260 (N.Y. 1920). The court reasoned that "private wires have become an important branch of the telegraph business. They are given, not only to the press but to bankers and brokers and many others." Because the telegraph company offered carriage on its wires to the public, and because the nature of the business's capital investment allowed it to make a standardized offering to all, private wires "must be offered to those who need them with evenhanded impartiality. . . . What it grants to one, it must, in like conditions . . . grant impartially to all, within the limits of capacity." *Id*.

The future Justice's reference to "capacity" shows that the standardized offering depended upon the carrier's ability to offer carriage in a non-discriminatory way. The carrier need not have offered private wires to customers; it "need not depart from the beaten track at all." *Id*. at 260. But having the means to provide private wires, it could not lawfully "govern the deviation by prejudice or favor." *Id*.

As with telegraphs and private wires, social media companies have the capacity to offer viewpoint non-discriminatory services to all. Moreover, they promise access and carriage to all, on terms open to all. If they believe the absence of discrimination would result in service objectionable to some users, that does not grant them the right to discriminate with impunity. Instead, such discrimination is reasonably regulable. If the

companies are concerned about such service if they are subject to such anti-discrimination regulation, then "platforms [should] enable users to block objectionable content and decide for themselves how to protect their own individual online experiences." Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J. L. & TECH. 391, 397 (2020).

Understanding the limits of common carrier regulation provides a response to NetChoice's argument that a state cannot force an industry into common carrier status. (NetChoice Br. at 32). As the Fifth Circuit pointed out, NetChoice has "amnesia"—forgetting that "nearly every other industry [railroads, grain elevators, telephones, gas, and water] historically subjected to common carrier regulation initially discriminated against [certain of] their customers and sought the right to continue to do so." *NetChoice*, 49 F.4th at 475. Courts enforced the common carrier duties of these industries because these industries had the capacity to, and did, make a non-discriminatory offering of common carriage.

C. H.B. 20 is well within established common carrier doctrines governing online businesses and media

The Texas legislature has done nothing constitutionally novel by enacting the provisions challenged here. H.B. 20 is consistent with a centuries-old legal tradition. The doctrines governing private and public

undertakings have been part of our fundamental law—the common law—since the first actions of implied, universal assumpsits in the early 17th century. *See generally* MacLeod, *Common Law*, at *13–*16; J.B. Ames, *The History of Assumpsit: II—Implied Assumpsit*, 2 HARV. L. REV. 53 (1888); 6 William Holdsworth, A History of English Law 639, 689 (1924).

When American legislatures began to enact civil rights statutes in the 19th century, legislators and judges alike understood those laws, and the constitutional provisions that authorized them, to be declaratory of the much older doctrines that arose out of universal assumpsit actions at common law. Discussions about the scope of common-law rights and duties featured prominently in legislative debates about the constitutionality of the Civil Rights Act of 1875, which was proposed not to create new rights but merely to provide a new federal remedy. Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873, 877–92, 895–98, 899–900 (1966). So attentive were the members of Congress to the common law as a source of and limit to their constitutional authority that Congress excluded restaurants from the Act's coverage because the legal authorities of that time taught that "there was no common-law duty to serve all people in a restaurant," in contrast to the duties of common carriers and public accommodations. *Id.*, 889 & n.83, 897 n.130, 901 n.150.

Courts, too, have, from the outset, interpreted such acts to be declaratory of and consistent with pre-existing common-law doctrines. *See Ferguson v. Gies*, 46 N.W. 718, 719–20 (Mich. 1890) (Michigan public accommodation statute was "only declaratory of the common law"); *Piluso v. Spencer*, 172 P. 412, 413 (Cal. App. 1918) (finding that California legislature had changed "the rule at common law as to inns" by amending a statute that had been interpreted to declare the common law rule); *Woollcott v. Shubert*, 111 N.E. 829, 830 (N.Y. 1916) (except in certain particulars, the rights declared in New York's statute "were those existing at the common law"). *Compare Bell v. Maryland*, 378 U.S. 226, 254 (1964) (Douglas, J., concurring) ("Apartheid . . . is barred by the common law as respects innkeepers and common carriers"); *id*. at 293–97 (Goldberg, J., concurring) (the Fourteenth Amendment secures equal access as a right of the "good old common law"). They also recognized the constitutional power of state legislatures to expand the common-law's coverage so long as legislation does not abrogate vested rights. *Piluso*, 172 P. at 413; *Anderson v. Pantages Theater Co.*, 194 P. 813, 814–15 (Wash. 1921); *Rockwell v. Pennsylvania State Horse Racing Comm'n*, 327 A.2d 211, 213–14 (Pa. Commonwealth Ct. 1974); *Woollcott*, 111 N.E. at 831.

The grandfather of common carrier and public accommodation statutes, the Massachusetts 1865 legislation, prohibited discrimination "on account of color or race" in "any licensed inn, in any public place of amusement, public conveyance, or public meeting." Laws of Mass. 1866, at 242. Other 19th-century statutes

affirmed and even expanded common-law protections for those who accepted the general undertaking of a business owner, with salutary results for society at large. *See Piluso*, 172 P. at 413; *Anderson*, 194 P. at 815.

In light of this Court's decision in the *Civil Rights Cases* of 1883 that the Fourteenth Amendment did not empower Congress to pass or enforce laws requiring nondiscriminatory conduct of individuals or other private entities, numerous states followed Massachusetts's lead. Eighteen states had statutes governing common carriers and public accommodation by 1900. This number rose throughout the 20th century, so that nearly all states, as well as numerous local jurisdictions, now have such statutes. KONVITZ & LESKES, A CENTURY OF CIVIL RIGHTS 156–57 (1961).

"Over time, some States have expanded the reach of these nondiscrimination rules to cover virtually every place of business engaged in any sales to the public." *303 Creative LLC v. Elenis*, 600 U.S. 570, 590–91 (2023). Such statutes typically prohibit discrimination on the basis of race, sex, religion, and national ancestry. *Ne. Pennsylvania Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 428 (3d Cir. 2019) ("The County['s] [public bus advertisement] policy which excludes religious and atheistic messages . . . discriminates based on viewpoint").

Importantly, numerous States have already extended common carrier and public accommodation rules to online businesses. California and New York statutes apply to online entities, David Brody & Sean

Bickford, *Discriminatory Denial of Service Applying State Public Accommodations Laws to Online Commerce*, Report of the Lawyers' Committee for Civil Rights under Law, 21 (Jan. 2020) and, according to one estimate, seventeen States' statutes likely apply to online entities. *Id*. For instance, California's statute "applies to online businesses," based on findings "that visiting a website with intent to use its services is, for purposes of standing, equivalent to presenting oneself for services at a brick-and-mortar store." *White v. Square, Inc.*, 446 P.3d 276, 277–78 (Cal. 2019).

This expansion of coverage is consistent with centuries-old doctrines. At common law, a carrier that offers carriage to all on equal terms, instead of negotiating terms of carriage individually, is a common carrier, having offered to the public at large a bailment of their property and persons. MacLeod, *Common Law*, at *16–*19, *33–*39. Social media platforms and other online businesses that offer to take possession of customers' data are offering common carriage because they are offering a bailment to the public. The only difference between them and a railroad is that the bailment is for intangible property rather than tangible. Adam J. MacLeod, *Cyber Trespass and Property Concepts*, 10 IP THEORY 4, 13–14 (2021), https://www.repository.law.indiana.edu/ipt/vol10/iss1/4/ [hereinafter *Cyber*]; *compare Carpenter v. United States*, 585 U.S. ___, 138 S. Ct. 2206, 2268–70 (2018) (Gorsuch, J., dissenting) (explaining that a wireless telephone carrier has a bailment of customers' private data).

At common law, private property becomes a place of public accommodation when the owner confers on the public at large a universal license (as opposed to a personal or private license) to enter the premises. MacLeod, *Common Law*, at *16–*19, *23–*29. Though public accommodation owners do not have all the duties of a common carrier, the common law has long enforced their duty not to discriminate "without good reason." 3 William Blackstone, Commentaries on the Laws of England *164 (1765). Online businesses and platforms that offer to the general public a license to enter and make use of their services fall comfortably within this category. The only notable difference is that the business owner has licensed entry to a virtual, rather than physical, domain. MacLeod, *Cyber*, at *14–*18. States have broad power to regulate against discrimination in public accommodations, and have done so in a multitude of ways, including guaranteeing access to individuals of all political viewpoints and affiliations. Volokh, *Bans on Political Discrimination in Places of Public Accommodation and Housing*, 15 N.Y.U. J.L. & LIBERTY, at 491–92.

H.B. 20 falls within states' broad power to regulate common carriers. The law focuses on large internet platforms that play central roles in American economic, political, civic, and social lives—much as restaurants, hotels, inns, and telephones do. It defines a "social media platform" as an "Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting

information, comments, messages, or images," and it excludes from coverage Internet, email, and online service providers. Tex. Civ. Prac. & Rem. Code §143A.001(4); Tex. Bus. & Com. Code §120.001(1). It further limits coverage to social media companies with 50 million active users, Tex. Civ. Prac. & Rem. Code §143A.004(c), and limits its protection to users in Texas, §143A.004(a) & (b).

H.B. 20 is notably *less* restrictive than most historical common carrier laws. It does not prohibit social media carriers from promulgating and enforcing reasonable regulations, nor does it even forbid them from discriminating on most grounds that would be unlawful at common law, but instead limits the grounds of prohibited censorship to viewpoint and geographic discrimination. Tex. Civ. Prac. & Rem. Code §143A.002. The platforms are free to engage in content-based discrimination, continuing their bans on nudity, harassment, or other objectionable content. It expressly authorizes censorship of unlawful expressions, activities that might be used to exploit children, and incitement. §143A.006(a). It preserves the right of social media carriers and users to censor content on a user's own platform or page at the user's request, §143A.006(b), and expressly disclaims any legislative intention to expand or infringe intellectual property law protections, §143A.006(c).

II. The protections provided by the First Amendment do not change this analysis

Social media platforms, or any other carriers, cannot evade such regulation merely by asserting that

their business conduct is inherently expressive and deserving of First Amendment protection. Otherwise, any business could evade common carrier duties by claiming it is expressing its viewpoint by selective carriage. Instead, the First Amendment only comes into play if the business conduct is pure speech, as in *303 Creative*, or satisfies the tests for expressive action set forth in *Texas v. Johnson.*

NetChoice never claims their members' exercise of editorial discretion over user expression is their members' own "pure speech." *303 Creative*, 600 U.S. at 597 (2023). To the contrary, as discussed in Section II.B.1, the platforms in many cases involving Section 230 of the Communications Decency Act of 1996, 47 U.S.C. §230, have asserted an inconsistent claim—that they simply transmit content "provided by another information content provider [i.e., users who post content on the internet]"—rather than create any content or transmit any message of their own—in order to claim Section 230(c)(1)'s liability protection. As mentioned above, this Court accepted this characterization just last term in *Taamneh*, unanimously finding that social media platforms are in a position of "passive nonfeasance" towards their users' posts. *Taamneh*, 598 U.S. at 500.

That leaves a backup regulatory immunity argument for the carriers: that editorial discretion is expressive action. NetChoice maintains that its editorial discretion is not speech and does not convey a message but instead creates "curated experiences." (NetChoice Br. 31) But, to receive First Amendment protection, an

act must have "[a]n intent to convey a particularized message," and "the likelihood [must be] great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

Further, as Chief Justice Roberts made clear in *Rumsfeld v. F. for Acad. & Institutional Rts., Inc*., 547 U.S. 47 (2006), the First Amendment protection only applies in situations in which the "complaining speaker's own message was affected by the speech it was forced to accommodate," *id.* at 63; the message the editor communicates must be "overwhelmingly apparent," *id.* at 64; and, "[t]he expressive component of . . . actions is not created by the conduct itself but by the speech that accompanies it . . . [without] explanatory speech." *Id.* at 66.

These conditions are missing here. First, the platforms have the "bandwidth" to express their views to all their users. H.B. 20 does not restrict platforms' speech.

Second, whatever message the platforms supposedly try to convey by exercising editorial control, it is hardly "overwhelmingly apparent." People use social media to communicate with friends and family and many others. Such users cannot receive any "particularized message" from Facebook or X by divining secret, implicit messages conveyed by how Facebook or X arranges posts. Rather, such users choose their followers, and block others. Users, not platforms, create online experiences. The platforms' editorial actions,

even if they did try to convey messages, are either invisible or ambiguous, not overwhelmingly apparent.

In theory, a user could examine the billions of content moderation decisions and thereby perceive the message the platform's editorial discretion intended to convey. But that is not a realistic possibility for the common user. Most editorial acts—such as so-called shadow-banning or boosting content through secret algorithms, are invisible, and, even if they were not, it is impossible for users to examine the billions of posts on the large social media platforms. To put the point another way with a mundane example, if a user's posts suddenly became no longer visible on a social media platform, his friends would not necessarily have any idea whether, for instance, the platform had expressed an ideological disagreement and de-platformed him, or whether the friend was just taking a "screen vacation."

Third, these acts of editorial discretion only have meaning if accompanied by "explanatory speech" and, therefore, lack First Amendment protection under *Rumsfeld*. *See* 547 U.S. at 66. The lack of certain kinds of "conspiracy theories" on a platform communicates its use of editorial discretion to eliminate "disinformation" only if the platforms' TOS states an anti-disinformation policy. Otherwise, the user who finds no such content when he is on the platform may very well conclude—falsely—that none of the people whom he follows peddle conspiracies.

CONCLUSION

Social media platforms carry data and messages for customers, and are therefore carriers. They offer carriage to all on equal terms and have the capacity to serve all, and are therefore common carriers. Common carriers have borne duties of non-discrimination since long before the American founding.

A common carrier has First Amendment rights and may express (or not express) its own views, but it may not pass its customers' views off as its own for the purpose of censoring their carried expression. By interpreting H.B. 20 as a declaration of long-standing common carrier doctrines, this Court can avoid any First Amendment conflict.

The Court should affirm the Fifth Circuit's judgment in No. 22-555 and reverse the Eleventh Circuit's judgment in No. 22-277.

Respectfully submitted,

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