No. 22-277, 22-555

In The
# Supreme Court of the United States

**ASHLEY MOODY,**
**ATTORNEY GENERAL OF FLORIDA,**
**ET AL.**, *Petitioners*
*v.*
**NETCHOICE, LLC, DBA NETCHOICE, ET AL.**,
*Respondents*

**NETCHOICE, LLC, DBA NETCHOICE, ET AL.**,
*Petitioners*
*v.*
**KEN PAXTON, ATTORNEY GENERAL OF TEXAS**,
*Respondent*

On Writs of Certiorari to the
Eleventh Circuit and Fifth Circuit

## Brief of *Amicus Curiae* Eric Rasmusen In Support of Respondents in 22-555 and Petitioners in 22-277

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## Table of Contents

Table of authorities ................................................iii

Interests of *amicus curiae*.........................................1

Summary of the argument ..................................2

Argument ........................................................ 4

I. Common carrier-style laws have a lengthy history in the United States that comports with First Amendment jurisprudence and sound economic theory....................................4

II. In normal markets, antitrust law can be relied on to prevent monopoly......................................................10

III. Some markets are "natural monopolies" where antitrust law fails and a different kind of regulation is needed............................................................13

A. Increasing returns to scale is the most common reason for natural monopoly..................................................14

B. Network externalities also create natural monopoly, resulting in the need for social media platform regulations......................16

IV. Social media platforms are natural monopolies suitably regulated by HB 20 ..... 19

A. Social media platforms are natural monopolies ..... 19

B. Regulation such as that of common carriers helps solve the problem of natural monopoly ..... 22

C. The Texas statute addresses market failure without becoming government failure ..... 27

D. HB 20 limits the ability of government to pressure companies, thereby limiting censorship ..... 30

Conclusion ..... 31

## Table of Authorities

### *Cases*

*Bantam Books, Inc. v. Sullivan*, 372 U.S. 59 (1963)............................................................8

*Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021)...............................8, 22

*Bristol-Myers Squibb Co. v. Superior Ct.*, 582 U.S. 255 (2017)........................................................8

*Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).................................................6, 10

*Jencks v. Coleman*, 13 F. Cas. 443 (Cir. Ct. D. R.I., 1835)...........................................................5

*Marsh v. Alabama*, 326 U.S. 502 (1946)................7

*Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1723 (2018)................................6

*Missouri v. Biden*, 2023 U.S. Dist. LEXIS 114585 (W.D. La. Jul. 4, 2023)................................................9

*NetChoice LLC v. AG, Fla.*, 34 F.4th 1196 (11th Cir. 2023).........................................................26

*Norwood v. Harrison*, 413 U.S. 455 (1973)..............30

*N.Y. State Rifle & Pistol Ass'n v. Bruen*, 579 U.S. 1 (2022).........................................................10

*Packingham v. North Carolina*, 582 U.S. 98
(2017)........................................................................3, 4

*Primrose v. Western Union Tel. Co.,* 154 U.S. 1
(1894)........................................................................3, 6

*Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74
(1980)...........................................................3, 6, 7, 10

*Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).....18

*Red Lion Broadcasting Co., v. F.C.C.*, 395 U.S. 367
(1969)..............................................................................4

*Turner Broad Sys. v. F.C.C.*, 512 U.S. 622
(1994)...............................................................3, 7, 17

*United States v. Microsoft*, 253 F.3d 34 (D.C. Cir.
2001).............................................................................19

*United States v. Morrison*, 529 U.S. 598 (2000)..8

*United States v. Stanley*, 109 U.S. 8 (1883)..............6

***Constitutions, Statutes, Regulations & Rules***

U.S. Const. amend I.............3, 4, 5, 7, 8, 9, 10, 13, 26

15 U.S.C. §18...........................................................20

26 U.S.C. § 498H(a)(1)..............................................25

Tex. Bus. & Com. Code §§ 120.001(1),
.002(b).........................2, 19, 21, 22, 25, 26, 29, 30, 31

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*States That Issued Lockdown and Stay-at-Home Orders in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEDIA, (2021).......................8

William Blackstone, COMMENTARIES (1765-1769)..........................................................4, 24

David S. Bogen, *The Innkeeper's Tale: The Legal Development of the Public Calling*, 1996 UTAH L. REV. 51 (1996)............................................................4

Stephen Breyer, *Why Regulation Rarely Achieves the Goals It Is Designed to Serve*, PBS-COMMANDING HEIGHTS..................................................................28

*Trespass on the Case in regard to Certain Mills*, YB 22 Hen. VI, fol. 14 (C.P. 1444)................................24

Brief for Economists as *Amici Curiae*, *NetChoice v. Paxton*, No. 22-555 (2024)..............................17, 18

Brief of Francis Fukuyama *Amicus Curiae*, *NetChoice v. Paxton*, No. 22-555, 21 (2024).......21, 22

David Goldman, *Microsoft removed 'Tank Man' images on Tiananmen Square's anniversary*, CNN, (Jun. 6, 2021)........................................................10

*Gonzalez v. Google*, 2018 U.S. Dist. Ct. Motions LEXIS 5151 (N.D. Cal. Feb. 6, 2018) (Google Mot. to Dismiss Third Amend. Compl.)..................................9

Brandon Gorrell, *The Twitter Files, Part Two: Twitter's Secret Blacklist Thread*, PIRATE WIRES, (Dec. 8, 2022)..........................................................30

Hillary Greene & Dennis Yao, *Antitrust as Speech Control*, 60 WM & MARY L. REV. 1215 (2019).......13

Matthew Hale, *De Portibus Maris*, in 77 (1787)......................................................................24

Brief for International Center for Law and Economics as *Amicus Curiae*, *NetChoice v. Paxton*, No. 22-555, 27 (2024)................................19, 20, 25

*NetChoice LLC v. Paxton*, No. 21-51178, (5th Cir. 2021) (NetChoice Resp. in Opp. to Appellant's Mot. for Prelim. Inj.)................................................17

*Ohio v. Google LLC*, Case No. 21 CV H 06 0274, (Oh. Ct. Comm. Pleas Aug. 13, 2021) (Google Motion to Dismiss).....................................................9

Don Reisinger, *What Would It Take To Beat Google? We Take a Look at the Key Success Factors and the Opportunities for Other Companies in the Search Engine Space*, CNET, (Jan. 2, 2009)........................17

Jed Rubenfeld, *How to Take the Twitter Files to Court*, WALL STREET J., (Jan. 4, 2023)......................30

A. K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 L. & HIST. REV. 53 (2005)....5

Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U.L. REV. 1286 (1996).......................................5

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Ryan Tracey, *Facebook Bowed to White House Pressure, Removed Covid Posts*, WALL STREET J., (July 28, 2023).........................................................30

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Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARVARD L. REV. 156 (1904)......................................................15, 24, 25

## Interests of Amicus Curiae[1]

*Amicus* Eric Rasmusen is the former Dan and Catherine Dalton Professor of Business Economics and Public Policy at Indiana University, now retired.[1] He has also held positions at the business schools of University of Chicago and UCLA, the law schools of Harvard and Yale, and the economics departments of Oxford, Harvard and Tokyo. He has taught in the George Mason University economics-for-judges program and authored *amicus* briefs for the Fifth and D.C. Circuits and the Supreme Court of Indiana.

Prof. Rasmusen is best known for his book on game theory,[2] his work with J. Mark Ramseyer on the law and economics of the Japanese judicial system,[3] and his article with Professor Ramseyer and Judge John Wiley on the economics of exclusive-dealing contracts.[4] Economics is useful in making our moral intuitions precise, by carefully asking whether two seemingly

[1] Rule 37.6 Statement: No party's counsel authored this brief in whole or in part; no party's counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person or entity other than amicus or its counsel funded it.

[2] Eric Rasmusen, GAMES AND INFORMATION (1st ed. 1989, 4th ed. 2006), also translated into Japanese, Spanish, Italian, French, and Chinese.

[3] Much of it is summarized in J. Mark Ramseyer & Eric Rasmusen, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN, (2003).

[4] J. Mark Ramseyer, Eric Rasmusen & John Wiley, *Naked Exclusion*, 81 AM. ECON. REV. 1137-1145 (1991).

similar situations are actually different in their essentials—just as law does.[5]

In this brief, *Amicus* addresses relevant First Amendment law, but principally focuses on natural monopoly and market power, economic concepts that justify this Court reversing the Eleventh Circuit and affirming the decision of the Fifth Circuit.

## Summary of the Argument

Online social media platforms resemble traditional natural monopolies with market power. In economics a monopoly is defined not so much by a firm's market share as by its market power, its ability to raise price without attracting competition. For centuries, economic and legal thinkers have understood that natural monopolies can—in some cases—be best managed through common carrier-style laws, like the HB 20 statute adopted by the Texas Legislature.

Antitrust law deals with what might be termed "artificial monopoly": market power created by firms merging with their competitors, conspiring with other firms to keep prices high, or driving them out with unfair practices. But some monopolies are "natural," arising without violating antitrust laws. Consider the water company. The first company in a city to lay pipe to each house will have an un-breakable monopoly without violating antitrust law. Any new competitor

[5] For example, *amicus* illustrates how the common law "got it right" in agency law but how the economics idea of "least cost avoider" can tie together its various doctrines in *The Economics of Agency Law and Contract Formation*, 6 AM. L. & ECON. REV. 369-409 (2004).

would have to lay new pipe, potentially at a loss. The water company is a natural monopoly on the supply side due to costs.

Economists use the term "network externalities" to describe demand-side natural monopolies. When a customer joins the network, that customers generates a positive spillover onto other customers, increasing the value of the network. This model of natural monopoly applies to online social media platforms.

The purpose of the Free Speech Clause of the First Amendment is to ensure a vibrant marketplace of ideas. Economic theory dovetails with this Court's past legal reasoning, strongly supporting common carrier laws to safeguard the promise of the First Amendment.

State governments possess the power to regulate commerce and thereby enforce the First Amendment through reasonable regulations. U.S. Supreme Court precedent has routinely acknowledged common carrier laws in cases like *Primrose v. Western Union Tel. Co.* Moreover, a string of decisions have upheld the ability of the government to enforce the First Amendment through legislation, as in *Turner Broad. Sys. v. F.C.C.*, or for states to offer enhanced First Amendment protections, as in *Pruneyard.*

Today, as this Court reasoned in *Packingham v. North Carolina*, social media platforms are the "modern public square." That public square is vulnerable to censorship through the whims of these platforms, pressure from the U.S. government, or censorship dictates from abroad, from Europe, Canada, or China. Social media platforms have much in-common with municipal water companies, telephone companies, or electrical power generators traditionally subject to common carrier laws. Economic theory supports this intuition.

For these reasons, the decision of the Eleventh Circuit should be reversed and the decision of the Fifth Circuit should be affirmed.

## Argument

### I.
### Common carrier-style laws have a lengthy history in the United States that comports with First Amendment jurisprudence and sound economic theory.

Social media platforms are the "modern public square" and "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). The purpose of the Free Speech Clause of the First Amendment is to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to support monopolization of the market, whether by the government itself or private licensee. *Red Lion Broadcasting Co., v. F.C.C.*, 395 U.S. 367 (1969). State common carrier laws comport with the First Amendment and sound economic theory.

Common carrier laws have deep roots in the United States, predating European settlement in the New World.[6] William Blackstone, an ardent supporter of

[6] *See* David S. Bogen, *The Innkeeper's Tale: The Legal Development of the Public Calling*, 1996 UTAH L. REV. 51, 80 (1996) (explaining

property rights, wrote of a "duty to serve" when one "'hang[s] out a sign. . .designating one's property "open[]. . . . for travelers."[7] In the early republic, as new technologies transformed American life, common carrier laws were extended to support equal access. "There is no doubt, that [a] steamboat is a common-carrier of passengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations," as Justice Story wrote in 1835. *Jencks v. Coleman*, 13 F. Cas. 443, 443 (Cir. Ct. D. R.I., 1835).

From the time of its ratification in 1868, the Fourteenth Amendment served as the "legal basis for securing equal access to public accommodations."[8] The Civil Rights Act of 1875, which prohibited racial discrimination in many privately-owned commercial establishments, was based on the concept of common carriers. *Id.* at 59. Although enforcement of this new Civil Rights Act was blocked by the Supreme Court, the Court did note noted that "[i]nnkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable

the development of innkeeper's laws in England in the late Middle Ages, recognizing by 1503 that innkeepers could not turn away paying customers who sought shelter).

[7] Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U.L. REV. 1286, 1309-10 (1996) (quoting William Blackstone, *Commentary on the Laws of England* (Professional Books Ltd., 1982 reprint) (Edward Christian ed., 15th ed. 1809)).

[8] *See* A. K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 LAW & HIST. REV. 53, 58 (2005).

persons who in good faith apply for them." *United States v. Stanley*, 109 U.S. 8, 25 (1883).

Despite the Waite Court's tacit permission to move ahead with Jim Crow laws, thus creating a racial carve-out to common carrier laws, common carrier laws remained intact and even grew stronger in subsequent jurisprudence. The Court reasoned that "Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce; and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination." *Primrose v. Western Union Tel. Co.*, 154 U.S. 1,14 (1894) (holding that although telegraph companies were not traditional common carriers, common-carrier-style legal concepts properly applied).

Although this Court has concluded that businesses may refuse service when it does not violate common carrier or public accommodations laws, it has never upheld an absolute Constitutional right for a business to deny service. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1723, 1723-34 (2018); *compare Heart of Atlanta Motel v. United States*, 379 U.S. 241, 242-43 (1964). The Court held unanimously in 1980 that even if the federal Constitution does not grant a right to freedom of speech in a private but publicly accessible place, such as California's Pruneyard Shopping Center, "the requirement that [the shopping center] permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

In 1994, the Court upheld must-carry rules for cable television providers, an example of equal access rules that do not burden the First Amendment. *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 657 (1994). Justice Anthony Kennedy, writing for the majority explained: "The potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Id.*

States and the federal government can regulate to protect the First Amendment because both levels of government possess the power to regulate commerce. "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position," as Justice Black observed. *Marsh v. Alabama*, 326 U.S. 502, 509 (1946). In *Marsh*, the Court held that a privately-owned location can become a public forum, holding for a Jehovah's Witness who was convicted for handing out religious literature in a company town. *Id.* at 509–10.

The Court's decision in *Packingham*, describing social media platforms as the "modern public square" pre-dated the 2020 Covid-19 pandemic, during which states issued long-lasting lockdown orders, transforming these online platforms into virtually the only public square available to Americans.[9] Although federal courts could conclude that an online platform amounts to a public forum, judges commonly look to the will of legislators before making such pronouncements. "Not surprisingly, the bulk of American law is still state law, and overwhelmingly so." *United States v. Morrison*, 529 U.S. 598, 661 (2000). Indeed, "'the States retain many essential attributes of sovereignty. . . And at times, this federalism interest may be decisive." *Bristol-Myers Squibb Co. v. Superior Ct.*, 582 U.S. 255, 263 (2017).

Here, the Texas Legislature, in exercise of its sovereign authority, has acknowledged the status of online platforms as a critical public forum, and implemented equal access rules to open that forum to lawful expression. In the United States, "The government cannot accomplish through threats of adverse government action what the Constitution prohibits it from doing directly." *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021). Granting a liability shield to traditional common carriers like telephony providers without imposing common carrier obligations opens the door to outsourced censorship prohibited under the First Amendment. *See, e.g. Bantam Books, Inc. v. Sullivan*, 372 U.S. 59, 59-63 (1963). In fact, the federal government has actively outsourced censorship to

[9] *See States that issued lockdown and stay-at-home orders in response to the coronavirus (COVID-19) pandemic, 2020*, BALLOTPEDIA, (2021), https://ballotpedia.org/States_that_issued_lockdown_and_stay-at-home_orders_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020.

online platforms, with the Biden Administration messaging online platforms to remove posts it viewed as "misinformation; thereby the "United States Government seems to have assumed a role similar to an Orwellian 'Ministry of Truth.'" *Missouri v. Biden*, 2023 U.S. Dist. LEXIS 114585, at *209 (W.D. La. Jul. 4, 2023).

Faced with common carrier laws that would ensure First Amendment rights in these modern public forums, online platforms have argued simultaneously that they are publishers protected by the First Amendment, using "editorial judgment" with posts by third parties and platforms immune from publisher liability under 47 U.S.C. § 230. *See* Google Motion to Dismiss, *Ohio v. Google LLC*, 2022 Ohio Misc. LEXIS 200, at *22 (Oh. Ct. Comm. Pleas Aug. 13, 2021) (Case No. 21 CV H 06 0274); *see also* Google Mot. to Dismiss Third Amend. Compl., *Gonzalez v. Google*, 2018 U.S. Dist. Ct. Motions LEXIS 5151, at *1 (N.D. Cal. Feb. 6, 2018). Upheld in court, these contradictory contentions would mean near total immunity for online platforms.

If state common carrier laws affirming First Amendment rights in cyberspace are blocked, new, much lower thresholds for speech will be set from abroad through foreign regulations. The U.K., Canada, Australia, and European Union have much weaker protections for speech than the U.S., to say nothing of the strict speech restrictions that China seeks to globalize.[10] Microsoft, for instance, blocked the famous

[10] *See, e.g.* Bobby Allen, *'Walk the talk' or face fines: EU boss tells Musk, Zuckerberg and TikTok chief*, NPR, (Oct. 12, 2023), https://www.npr.org/2023/10/12/1205375878/walk-the-talk-or-face-fines-eu-boss-tells-musk-zuckerberg-and-tik-tok-chief.

"Tank Man" image worldwide on the 30th anniversary of China's brutal 1989 crackdown on protestors.[11]

Common carrier laws align with the First Amendment's protection, fitting within the rubric of heightened protection for rights through commercial regulations and enhanced state free speech rights upheld by this Court in *Heart of Atlanta Motel* and *Pruneyard*. Dating to centuries before the U.S. Constitution was signed, common carrier laws are part of the "text, history, and tradition" of U.S. Constitutional law and comport with sound economic theory. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 579 U.S. 1, 79 (Kavanaugh, J. concurring).

Economic theory supports the intuitions of this Court. For over a century, economists have studied "natural monopoly," a market in which economies of scale or network externalities mean that only one firm can reasonably serve the market, and competition is infeasible. This idea is crucial in understanding the idea of the common carrier laws, and their role in safeguarding the First Amendment.

## II.
## In normal markets, antitrust law can be relied upon to prevent monopoly.

In most industries, the size of a company is determined by the balance of two factors. The company incurs fixed costs such as overhead, plant, and

[11] David Goldman, *Microsoft removed 'Tank Man' images on Tiananmen Square's anniversary*, CNN, (Jun. 6, 2021), https://www.cnn.com/2021/06/06/tech/tank-man-tiananmen-square-microsoft/index.html.

equipment which it must pay for even if it never produces a unit of output. It also incurs variable costs such as wages and materials costs which rise as it produces more output. The average cost per unit depends on both of these. For small levels of output, the fixed cost is spread over very few units, so the average cost is very high. For large levels of output, the fixed cost is spread over many more units, but variable costs tend to rise because the business comes closer to capacity and because management becomes more difficult as the size of the business increases. Eventually the fixed cost is spread over so much output that its effect on the average cost becomes negligible, and the average cost begins to rise because the variable cost part of it dominates.

This pattern is the common one for businesses. If a firm is too small, it can't spread its fixed costs over enough units of output. If a firm is too big, its costs tend to rise faster and faster as it strains its capacity. The minimum average cost will be somewhere in the middle. Figure 1 graphs average cost with dollars per ton on the vertical axis and tons of production on the horizontal axis. The result is what is called a "U-shaped cost curve" with an optimal size at which average cost per unit is minimized.[12]

[12] Jacob Viner, *Cost Curves and Supply Curves*, 3 ZEITSCHRIFT FÜR NATIONALÖKONOMIE /J. OF ECON., 23-46 (1931).

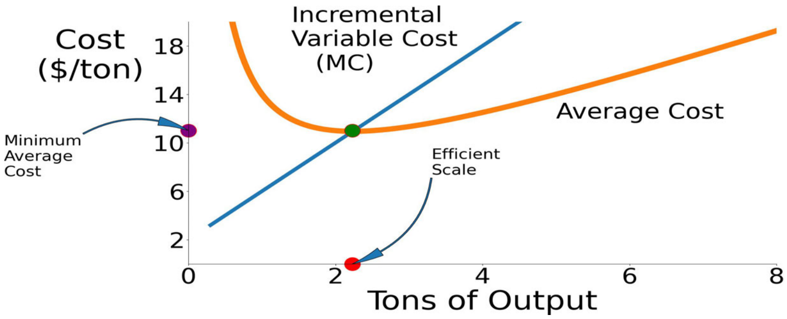

**Figure 1.** U-shaped cost-curve.

Consider the implications of the U-shaped cost curve on how much the industry is concentrated in a few firms. If the minimum average cost is at an output of 10 tons per day, and 50 tons per day is demanded by buyers, the market would be served by 10 firms competing the price down to minimum average cost. No company could dominate the market, because if it tried to produce all 50 tons, its average cost would rise and it would be unable to compete with the smaller companies. If demand were 150 tons per week, we would have fifteen companies; if it were 20 tons we would have only two.

What we might call "artificial monopoly" ruins this picture. Price conspiracies are an example. Even if there are 10 firms in the industry, they could agree to all charge a high price. Since passage of the Sherman Act of 1891, however, it has been illegal for businesses even to talk to each other about prices, even if they don't make formal agreements. This is a limitation on speech, but courts have decided this kind of government regulation does not violate the First Amendment.[13]

## III.
## Some markets are "natural monopolies" where antitrust law fails and a different kind of regulation is needed.

U-shaped cost curves, a familiar model in market economics, demonstrates the problem of natural monopolies in action and why regulations other than antitrust are needed to resolve natural monopoly problems. In a situation where cost curves are U-shaped,  average cost first falls and then rises with output. That in turn depends on the variable cost rising with output, so the extra cost of producing extra units rises with output.

Natural monopoly arises in situations where "bigger is better," because diminishing returns do not set in as usually expected.

[13] Hillary Greene & Dennis Yao, *Antitrust as Speech Control,* 60 WM & MARY L. REV. 1215-1268 (2019) (citing FTC v. Superior Ct. Lawyers Ass'n, 493 U.S. 411, 448n. 7 (1990).

### A. Increasing returns to scale is the most common reason for natural monopoly.

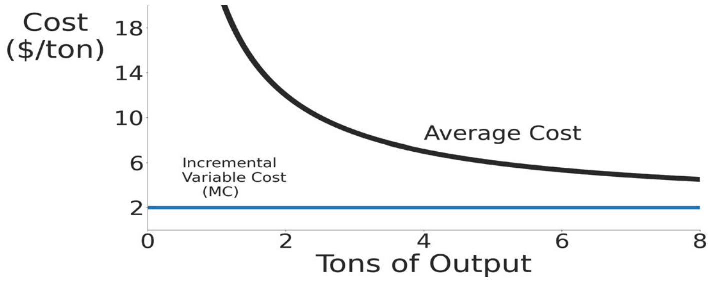

**Figure 2.** Cost-curve with increasing returns to scale.

Not all industries have U-shaped cost curves. Consider Figure 2. The graph shows what happens when firms have a fixed overhead cost and then a constant variable cost for each extra unit. As the overhead is spread over more and more units, the average cost falls. Unlike before, though, average cost never rises again, because the unit variable cost never rises.

Only one firm can survive in this industry. Indeed, only one firm *should* survive. There is no sense in making two firms incur the overhead. If the customers owned the industry, they would want to consolidate it into one firm. The problem, however, is that though having one firm minimizes the cost of product, it also allows that firm to operate as a monopoly, raising the price and reducing quality.

In Figure 2 the average-cost curve is falling over its entire length, and the variable cost curve is flat. The company has a large fixed cost but constant variable cost; it has to pay for overhead, but its cost to produce an extra unit is always the same no matter how much it produces. Thus, the bigger a firm's output, the lower its average cost.

Suppose there are two firms in the industry and we think about having them compete price down to variable cost and split the market. What would happen? Competition will drive them to reduce their prices so as to produce more output and spread the fixed cost over more units. If both firms do that, however, neither will have enough sales to cover their fixed costs. If one firm has a head start, and gets most of the customers, it will have the lowest average cost and be able to survive by charging a lower price—which in turn means it will get more customers. We would expect a costly war of attrition as the two firms each struggle along making losses in the hopes that the other firm would drop out, leaving it free to raise prices drastically as a monopoly.

Whichever company first enters and invests will have a monopoly. Potential competitors know what will happen if they enter: a war of attrition that will hurt them as much as the incumbent firm. The first firm will naturally have a monopoly. "The risk of loss in such a case is too great, for since the market for both old and new is limited to the locality, the struggle must of necessity be so desperate that neither can expect to escape serious injury."[14]

[14] Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARVARD L. REV. 156-173 (1904) [hereinafter Wyman].

### B. Network externalities also create natural monopoly, resulting in the need for social media platform regulations.

Network externalities are the demand-side equivalent of the supply-side's increasing returns to scale. Increasing returns to scale make bigger better because as scale increases, the average cost falls. Network externalities make bigger better because as scale increases, each consumer is willing to pay a higher price. The classic example is the telephone network. A telephone is useless if nobody else has one. If two people have them, they can call each other, but the usefulness is still limited. If a hundred people have them, each is willing to pay quite a bit more. If a hundred million people have them, each is willing to pay even more, since the group of consumers will include many people they know.

The biggest phone company will be able to charge the highest price, because its product is more useful. If no government regulation is imposed, only one company will survive. Government regulation, however, in the form of a requirement that each phone company place calls to its customers, can restore competition to the market by eliminating network externalities; all the companies are then in one big network.

Social media platforms have obvious network externalities. People who want to post a message or a photo will prefer platforms like Twitter/X, Facebook, and Instagram to smaller companies that try to compete. Google, by contrast, has fewer network externalities, succeeding by offering a product that users prefer to competitors like Yahoo.[15]

Unlike supply-side natural monopoly, demand-side natural monopoly does not depend on physical objects. NetChoice's response brief in the 5th Circuit says:

> Unlike the cable companies in *Turner* (and phone companies and railroads), websites have no natural monopoly over physical infrastructure. And websites do not possess any bottleneck that would 'destroy[]' an entire speech medium used by half of the country. Platforms lack 'the physical power to silence anyone's voices.'[16]

This is correct, except that platforms have the physical power to stop someone's voice just as much as a telephone company does. A natural monopoly does not have to be based on "physical infrastructure" or "possessing a bottleneck." Invisible, non-material advantages are just as powerful.

The brief of amici Digital Economists in this Court says:

[15] *See* Don Reisinger, *What Would It Take To Beat Google? We Take a Look at the Key Success Factors and the Opportunities for Other Companies in the Search Engine Space,* CNET, (Jan. 2, 2009), https://www.cnet.com/tech/services-and-software/what-would-it-take-to-beat-google/.

[16] NetChoice Resp. in Opp. to Appellant's Mot. for Prelim. Inj., *NetChoice LLC v. Paxton*, 49 4.Fth 39 (5th Cir. 2022) (No. 21-51178).

> While network effects can have negative effects on competition, they also can be pro-competitive. Network effects mean that larger platforms can be more efficient than smaller ones, all else being equal.[17]

The Digital Economists are correct that network externalities means that larger platforms are more efficient. They are wrong in saying that this is pro-competitive. Consumers are better off with a large monopoly platform than with no platform at all. But this is true of any monopoly, even artificial ones. When U. S. Steel was formed in 1901 by merging most of America's steel capacity, steel production rose, but America was nonetheless better off than if those steel mills had evaporated. In the case of a natural monopoly, we can go even further. If the town's monopoly telephone company is split into ten firms that don't interconnect, prices will fall, but the product will be so much less useful that consumers will be hurt. "Efficient" is not the same as "pro-competitive." Best of all would be to have one phone company, to obtain network externalities, but regulated prices, to avoid excessive profits.

The Digital Economists' brief says:

> Even in *Ohio v. Am. Express Co.*, antitrust violations were not found in the 'indirect network effects' of two-sided platforms in

[17] Brief for Economists as *Amici Curiae*, *NetChoice v. Paxton*, No. 22-555, p. 24 (2024) (citing Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018)).

> merchant credit card networks or in anti-steering provisions.[18]

This too is true but irrelevant. A natural monopoly, unlike an artificial one, does not violate antitrust laws. Our antitrust laws do not say that being big, or being a monopoly, is unlawful. They just say that engaging in unfair business practices, or merging, or conspiring with other firms to create a monopoly is unlawful. If a company just happens to grow so much that its competitors go bankrupt, the company has not violated any laws and it is free to enjoy its high profits without facing antitrust enforcement. Such is the case with natural monopoly. Microsoft ran into antitrust trouble not because it was dominant in the market for computer operating systems but because it engaged in unfair business practices. *See United States v. Microsoft*, 253 F.3d 34, 57 (D.C. Cir. 2001).

## IV.
## Social media platforms are natural monopolies, suitably regulated by HB 20.

### A. Social media platforms are natural monopolies.

Are the social media platforms natural monopolies? An estimate used by *amicus* International Center for Law and Economics says that Facebook has market share of  50%, Instagram 16%, and X/Twitter 15% in the market of social media websites.[19]

[18] *Id.*

[19] Brief for International Center for Law and Economics as *Amicus Curiae*, *NetChoice v. Paxton*, No. 22-555, 27 (2024) [hereinafter

Recall that to the economist, the problem of monopoly is not market concentration but market power. This avoids the problem of how define "market" and "product." If we define the market as "social media platforms," Twitter's share is 15%. If we define it as "software," its share is tiny. If we define it as "social media platforms that limit posts to 280 characters or less," Twitter's share is 100%.

Focus on market share is misplaced. Rather, we need to ask if Twitter has market power. If this were an antitrust case, companies and the Antitrust Division would bring expert witnesses to explain statistical analyses of whether advertising rates would rise if Twitter were to merge with You-Tube. The Court would follow the Clayton Act and ask whether "the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. §18.

The suggestion that if social media platforms allowed more dissenting voices, the bulk of their customers would leave is misplaced. No one has succeeded in entering and competing with the incumbent social media giants head to head, despite the technological ease of doing so and the large advertising profits that could be earned. Nor do they compete with each other. Journalists unhappy with Twitter don't switch to Instagram. Podcasters unhappy

International Center for Law and Economics] (citing *Leading social media websites in the United States as of August 2023, based on share of visits*, STATISTA, (Aug. 2023), https://www.statista.com/statistics/265773/market-share-of-the-most-popular-social-media-websites-in-the-us/.

with YouTube don't switch to Facebook. If the big platforms had no market power, a user would laugh off his suspension. He would simply switch to a different platform and have just as much ad revenue as before. But for users, being banned is a major setback. This is a sufficient indication of market power.

*Amicus* Francis Fukuyama's middleware argument fails for similar reasons. In Fukuyama's usage, middleware is software that picks and chooses among pages on different websites to choose the mix a given user wants; a consumer might use middleware that selects all the webpages that talk favorably about nuclear power, for example. The user would see both posts on Twitter and posts by users Twitter had banned who set up their own blogs."[20] He writes:

> [T]he existence of common protocols for information can disrupt the control over speech that is currently "centralized among a small group of very powerful companies" … Given that social media platforms naturally create network effects, these effects can be limited by allowing users to choose the moderation regime most appropriate for them. … Regulation could take the form of interoperability requirements enforced by a government agency, as with phone companies and the Federal Communications Commission, rather than must-carry requirements, as with HB 20.[21]

[20] Brief of Francis Fukuyama *Amicus Curiae*, NetChoice v. Paxton, No. 22-555, 21 (2024).

[21] *Id.* at 11.

Fukuyama is correct that middleware would reduce network externalities. Indeed, this is how blogs work: the user manually chooses which pages to visit. Each user follows a different set of blogs and each blog has no more market power than an author has in the market for novels. But that's not a solution. Social media platforms replaced blogs for a reason. They create network externalities that blogs do not by making it easier to communicate with other users. Middleware is supposed to emulate the networks and convenience of social media platforms. But no such middleware exists at present. It does for shopping—though Amazon still has market power—-but it does not exist for social media. Dismissing HB 20 as unnecessary because of middleware is like dismissing antitrust law for energy company mergers because with the impending advent of cheap solar power, those companies will have no market power. Maybe eventually— but not now.

### B. Regulation such as that of common carriers helps solve the problem of natural monopoly.

Natural monopoly can be dealt with in a number of ways. Sometimes the government owns the natural monopoly, as with a city's water company. Sometimes the government sells the right to serve the market, as with privatization, airwave auctions, or contracts for garbage disposal. Sometimes the government establishes a regulatory agency, as with state public utility commissions. Any of these might help in the case of social media platforms; each has its own problems.

The legal doctrine behind natural monopoly regulation is the idea of the common carrier. One list of criteria for whether a firm is a common carrier is: (1) whether a firm exercises market power; (2) whether an industry is affected with "the public interest;" (3) whether the entity regulated is part of the transportation or communications industry; (4) whether the industry receives countervailing benefits from the government; or (5) whether the firm holds itself as providing a service to all. *See Biden*, 141 S. Ct. at 1222-23 (Thomas, J. concurring on denial of certiorari).

The idea of natural monopoly suggests that only the first criterion really matters and the rest are epiphenomena, distractions from the essential problem. The essence of a common carrier is that the customer is at its mercy, not that it has some special public interest (is electricity more important than food?), or is in communications or transportation (what do those two have in common?), or gets government benefits (what does an innkeeper get from the government?), or is open to all customers (openness is a result of common carrier status, not a cause). Rather, market power is what matters.

Whether a business is a natural monopoly depends not on its size but on its market power, its ability to raise price or reduce quality without losing customers. Common carrier doctrine recognizes that there can be monopoly even when sellers are small in size and there are many of them—so long as they are not all available at the same time and place. A medieval ferry was a small business, but it had a natural monopoly over crossing the river.[22] There were many stagecoaches in England, but only one for the time and route you want to travel. When Hale talks of "public interest," he means "the only seller."[23] When Blackstone talks of "an implied engagement to serve all persons," he really is worried about the customer having no other choice.[24] Bruce Wyman eloquently describes how a country inn is a natural monopoly:

> When the weary traveller reaches the wayside inn in the gathering dusk, if the host turn him away what shall he do? Go on to the next inn? It is miles away, and the roads are infested with robbers. The traveller would be at the mercy of the innkeeper, who might practise upon him any extortion, for the guest would submit to anything almost, rather than be put out into the night. . .But the case of a customer in a town is altogether different. There are shops in plenty and he has time to choose... No special law is required to meet this situation because, since the seller knows that the buyer may always do

[22] The Court of Common Pleas ruled that a ferryman is "required to maintain the ferry and to operate it and repair it for the convenience of the common people." *Trespass on the Case in regard to Certain Mills*, YB 22 Hen. VI, fol. 14 (C.P. 1444).

[23] When someone builds the only wharf in a port, "the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only." Matthew Hale, *De Portibus Maris*, in A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 77–78 (1787).

[24] A public innkeeper offers "an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler." William Blackstone, COMMENTARIES, 164 (1765-1769).

> this, he in fact will almost never repulse him; rather he will by a low price induce him to purchase. The processes of competition may be trusted in the case of the shop, they do not act with any certainty in the case of the inn.[25]

Common carrier law recognizes how difficult it is to measure market power precisely, but how easy it is to recognize situations where market power is likely.

Electricity distribution is so often a natural monopoly that we don't check every time to see whether the company could get away with raising prices. For social media platforms, HB 20 uses the simple bright-line rule of whether a social media platform has 50 million users active each month. Tex. Bus. & Com. Code §§ 120.001(1), .002(b). This is a practical rule, not an arbitrary one, similar to regulations that apply to companies with more than 50 employees. *See, e.g.* 26 U.S.C. § 498H(a)(1) (describing "any applicable large employer").

Geoffrey Manne, writing for *amicus*, International Center for Law & Economics objects to this saying:

> Revenue or user numbers do not show market power. It is, at the very least, market share (i.e., concentration) that could plausibly be instructive— and even then, market power entails a much more complex determination.[26]

Number of customers does not show market power, but it can be thought of as a safe harbor more likely to

[25] *Wyman*, *supra* note 14, at 159.

[26] International Center for Law & Economics, *supra* note 19, at 27.

exclude companies with market power than to include companies that are powerless. This is what an implementing regulation would do if the statute had simply said “large platforms with market power,” and it would be strange if a state legislature could not do what a state agency can do. Economics is all about tradeoffs, and so, in reality, is law. In defining "free speech," we trade off the value of spreading information against other good things. We prohibit vast quantities of speech by prohibiting fraud, defamation, breach of nondisparagement contracts, military censorship, espionage statutes, and copyright violation.

HB 20, however, is not like sacrificing a little free speech for reporters and government employees to gain a large amount of national security. The Eleventh Circuit, in its *NetChoice* decision, said that laws restricting content moderation trigger First Amendment scrutiny, describing its reasoning as a “commonsense conclusion.”*NetChoice LLC v. AG, Fla.*, 34 F.4th 1196, 1210 (11th Cir. 2023)

For the man on the street, there is nothing “commonsense” about that conclusion. Letting monopoly social media corporations censor the political views of millions of Americans  does not promote the free flow of political discussion. The argument works the same for  common carriers as it does for social media platforms. Can a bus company kick off a customer and refund his money if he quietly talks to a friend about his support for abortion?  The bus company could argue, in exactly the same way as Facebook, that to allow him on the bus is compelled speech, associating the bus company with abortion and disturbing other customers who think abortion is murder. Indeed, the argument makes more sense for a bus, since the customers must actually see and hear each other. If Facebook can kick abortion supporters off its servers, why can't Greyhound kick them off its buses?

### C. The Texas statute addresses market failure without becoming government failure.

Adam Smith showed that free markets maximize national wealth. Economists label the exceptions to the efficiency of free markets "market failure." This is not a rejection of free markets generally, but a list of exceptions such as spillover effects (e.g., pollution), information imperfections (fraud), unclear property rights (property law in developing countries), and market power (cartels). Natural monopoly results in market failure and justifies government regulation. Regulation reduces national wealth if applied randomly, increases it when directed to specific market failures.

In 1982, George Stigler won the economics Nobel Prize for his work on "government failure." He showed in detail that regulation may be a bad response even to market failure. The problem is government failure: governments don't always choose the right regulation. Policy is made by pressure from interest groups, which care for their own welfare, not the public's. If government failure is likely, the best policy is laissez faire even if the market is not working perfectly. In many circumstances, the cure is worse than the disease.

With Claire Friedland, Stigler wrote Stigler and his colleague Claire Friedland took a classic example of natural monopoly–electric utilities–and argued that regulation had been "captured" by the regulated companies. State utility commissions had been created to help customers, but consumer inattention led to regulators actually helping the utility companies by preventing competition.[27]

Airline regulation is another example. Stephen Breyer, who was involved in ending FAA regulation before he became a judge, said, "People found that it often would hurt the consumers and the producers as well, compared to what would happen if you allowed the market to function on its own."[28] All economists now accept that market failure must be weighed against government failure.

The potential for government failure in the regulation of social media is obvious. Suppose Facebook discriminates against Republicans. One solution would be to nationalize the company. But would Republicans really benefit if Joe Biden controlled Facebook instead of Mark Zuckerberg? How about a federal agency to regulate Facebook? This would fare no better, whether it was directly under political control like the U.S. Department of Justice or less directly like the Federal Trade Commission.

[27] George Stigler & Claire Friedland, *What Can Regulators Regulate?*, *The Case of Electricity*, 5 J. L. & ECON. 1 (1962).

[28] *See generally* Stephen Breyer, *Why Regulation Rarely Achieves the Goals It Is Designed to Serve*, PBS-COMMANDING HEIGHTS, (2003), https://www.pbs.org/ wgbh/commanding heights/ shared/ minitext/ufd_ deregulation_ full.html.

Government failure is a powerful argument. Giving control of Facebook to Attorney General Paxton in place of shareholder Zuckerberg would be no improvement.

The policy in HB 20, however, *has* taken government failure into account. It neither nationalizes Facebook nor puts it under the control of an executive agency. Instead, it constrains Facebook with a law. It does not give Attorney-General Paxton the power to censor social media. Nor does it give that power to a new state agency. It does not even establish a new agency to enforce the new rules. HB 20 is merely a law, a government directive to be enforced by the Attorney-General in the same way he enforces laws against burglary of homes and the looting of nonprofits. This is what "narrow tailoring" is all about: finding a remedy for a problem narrow enough not to be abused.

Government failure must be addressed by good government design: careful choice of remedies and procedures.

Because the Attorney General of Texas does not have day-to-day control of social media platforms, government failure is minimized. Violations can only be enforced in court, thereby offering judicial safeguards.

### D. HB 20 limits the ability of government to pressure companies, thereby limiting censorship.

Ironically, the current *laissez faire* approach to social media platforms suffers from government failure because it is not truly *laissez faire*. The federal government has pressued social media platforms to censor in a way that if it were direct state action would be unlawful. Professor Rubenfeld explains how it happened:

> As the Supreme Court held in *Norwood v. Harrison* (1973), it is an 'axiomatic' principle of constitutional law that the government 'may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.' That's exactly what the Twitter Files show officials from the Federal Bureau of Investigation, the Centers for Disease Control and Prevention, the Central Intelligence Agency, the Department of Homeland Security and other federal agencies were doing-inducing and encouraging Twitter to censor constitutionally protected speech.[29]

[29] Jed Rubenfeld, *How to Take the Twitter Files to Court*, WALL STREET J., (Jan. 4, 2023), https://www.wsj.com/articles/how-to-take-the-twitter-files-to-court-class-action-federal-agents-censorship-monetary-damages-tech-11672846719; *see also* Brandon Gorrell, *The Twitter Files, Part Two: Twitter's Secret Blacklist Thread*, PIRATE WIRES, (Dec. 8, 2022), https://www.piratewires.com/p/readable-twitter-files-part-2; Ryan Tracey, *Facebook Bowed to White House Pressure, Removed Covid Posts*, WALL STREET J., (July 28, 2023), https://www.wsj.com/articles/facebook-bowed-to-white-house-pressure-removed-covid-posts-2df436b7?mod=hp_lead_pos2.

HB 20 would make it more difficult for the government to pressure a social media corporation, because it would prevent the corporation from censoring on the basis of viewpoint, as the government desires. Moreover, if the FBI said, "Do it anyway," the media platform could point out that with a requirement that their moderation algorith be public, any such viewpoint discrimination would be clearly detectable: "Our hands are tied!"

## Conclusion

For the foregoing reasons, this Court should reverse the decision of the Eleventh Circuit and affirm the decision of the Fifth Circuit.

January 22, 2024

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