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IN THE SUPREME COURT OF THE UNITED STATES

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NETCHOICE, LLC, DBA NETCHOICE,)

ET AL.,)

Petitioners,)

v.) No. 22-555

KEN PAXTON, ATTORNEY GENERAL)

OF TEXAS,)

Respondent.)

- - - - -

Washington, D.C.

Monday, February 26, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:29 p.m.

1 APPEARANCES:

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3 behalf of the Petitioners.

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9 behalf of the Respondent.

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P R O C E E D I N G S

(12:29 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 22-555, NetChoice versus Paxton.

Mr. Clement.

(Laughter.)

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

I don't want to proceed as if I wasn't here for the first argument --

(Laughter.)

MR. CLEMENT: -- so let me focus on what's different about Texas. One thing, fortunately, that's different -- that's different about Texas is its definition of "social media platforms" excludes websites. So we can just put that Gmail issue to one side for when we're talking about Texas.

The other thing it excludes, of course, is websites that are primarily focused on news, sports, and entertainment. In the First Amendment business, we call that

1 content-based discrimination, and that's just
2 one of the many reasons that this statute is,
3 dare I say it, facially unconstitutional.

4 The other thing that's different is,
5 in some respects, this statute operates more
6 simply because it forbids my clients from
7 engaging in viewpoint discrimination. Now we're
8 used to thinking that viewpoint discrimination
9 is a bad thing and that governments shouldn't do
10 it. And, of course, when governments do it, it
11 is a bad thing.

12 But, when editors or speakers engage
13 in viewpoint discrimination, that is their First
14 Amendment right. It is also absolutely vital to
15 the operation of these websites because, if you
16 have to be viewpoint-neutral, that means that if
17 you have materials that are involved in suicide
18 prevention, you also have to have materials that
19 advocate suicide promotion. Or, if you have
20 materials on your site that are pro-Semitic,
21 then you have to let on materials onto your site
22 that are anti-Semitic. And that is a formula
23 for making these websites very unpopular to both
24 users and advertisers. So it is absolutely
25 vital.

1 The other thing that makes Texas a
2 little different is, at least in passing the
3 law, Texas was even more explicit in relying on
4 the common carrier analogy, as if simply
5 labeling websites common carriers makes the
6 First Amendment problems go away.

7 And that is fundamentally wrong for
8 two basic reasons. One, these companies don't
9 operate actually as common carriers. They all
10 have terms of use that exclude varying degrees
11 of content. And, second, Texas can't simply
12 convert them into public common carriers by its
13 say-so.

14 I welcome the Court's questions.

15 CHIEF JUSTICE ROBERTS: Mr. Clement,
16 if these laws go into effect, what -- how would
17 your clients -- what steps would they take to
18 comply?

19 MR. CLEMENT: So, I mean, you know,
20 one thing that they would --

21 CHIEF JUSTICE ROBERTS: Including --
22 I'm sorry -- just in -- in particular,
23 addressing the situation of compliance in Texas
24 and Florida as opposed to nationwide.

25 MR. CLEMENT: Sure. So, I mean, you

1 know, one of the things that they would
2 contemplate at least, you know, with respect to
3 Texas in the first instance, is there some way
4 to just withdraw from the market in Texas and
5 Florida. And, of course, Texas had that in mind
6 in the statute and specifically said by -- we
7 essentially have to do business in Texas, and we
8 can't discriminate against users based on their
9 geographic location in Texas.

10 So, if we lose this, including, you
11 know, the idea that we can be forced to engage
12 in expressive activity in Texas, then I think we
13 would fundamentally have to change the way that
14 we provide our service in order to engage in
15 view -- in order to provide anything like the
16 service that we want to, while not engaging in
17 viewpoint discrimination, we'd basically have to
18 eliminate certain areas of speech entirely.

19 So we just couldn't talk about suicide
20 prevention anymore because we're not going to
21 talk about suicide promotion. I guess we
22 couldn't have pro-Semitic speech because we're
23 not going to have anti-Semitic speech. So we'd
24 have to figure out some way to try to engage in
25 even more content moderation or editorial

1 discretion to try to get us to a level where
2 we're more benign and somehow we -- we don't run
3 afoul of Texas's law.

4 And then, on the disclosure
5 provisions, the record here reflects that --
6 that, you know, YouTube would have to basically
7 increase its disclosure and appeal process
8 basically a hundred-fold in order to comply with
9 Texas law.

10 I mean, I'm happy to talk more about
11 the common carrier issue because I do think it's
12 a central part of their defense. There was an
13 allusion earlier about somehow Section 230
14 treats -- treats my clients, the websites, as
15 common carriers. To the contrary, Congress
16 specifically -- and this is 47 U.S.C. 223
17 subsection (6), which we cite in our briefs --
18 it specifically is a congressional provision in
19 the same Act of Congress that says that
20 interactive computer services should not be
21 treated as common carriers.

22 And I think, more broadly, the whole
23 thrust of 230 is don't just be a common carrier.
24 Don't just put through all of this material. We
25 don't want that. We want you to exercise

1 editorial discretion in order to keep some of
2 the worst of the worst off the site. Now --
3 JUSTICE GORSUCH: It does that,
4 though, only with respect -- all that's true,
5 and I -- I acknowledge all that, but it also
6 says that's true only if it's not your speech.
7 And that seems to be in tension a bit with your
8 suggestion that everything is your speech. And
9 I think Justice Barrett pointed out an
10 interesting feature of that, which is these
11 algorithms arrange, sort, promote certain --
12 certain posts by users and not others.

13 And is that not your -- not yours --
14 but your clients' speech?

15 MR. CLEMENT: So I don't think it's
16 our speech in the way that Section 230 talks
17 about the speech. And I think, for these
18 purposes, you have to distinguish between the
19 speech that is the editorial function and the
20 underlying user's speech.

21 JUSTICE GORSUCH: I understand that,
22 and I didn't mean to suggest otherwise. But
23 there is some editorial speech, your term, going
24 on, right?

25 MR. CLEMENT: I -- I -- I think that's

1 right. And I --

2 JUSTICE GORSUCH: And so the -- the
3 carrier would be liable for its editorial
4 speech?

5 MR. CLEMENT: I don't think so. I
6 mean, you know, I did actually reread the brief
7 that I filed at least in the Gonzalez case, and
8 I think that you could make a strong argument
9 based on the text of that statute that that kind
10 of editorial sort of functioning is not -- is
11 not something that causes you to lose your 230
12 protection.

13 JUSTICE GORSUCH: So it's speech for
14 purposes of the First Amendment, your speech,
15 your editorial control, but when we get to
16 Section 230, your submission is that that isn't
17 your speech?

18 MR. CLEMENT: Yes, as a matter of
19 statutory construction because, otherwise,
20 Section 230 ends up being self-defeating
21 because, again, the whole point of Section 230
22 was to promote that editorial discretion.

23 And this Court -- you know, this Court
24 wrestled with these issues. They're hard
25 issues. And I certainly applaud the instinct

1 that you shouldn't resolve them here, but I
2 don't think just by recognizing that my clients
3 are engaged in editorial discretion when they
4 make those decisions about what's going to
5 ultimately go to the individualized screen that
6 a user is going to see when they tap into their
7 -- their website or their application, I don't
8 think that's the kind of speech that is --
9 you're talking about in the 230 context.

10 And if you did, I think you would
11 defeat the fundamental purpose of 230 because
12 they wanted you, they wanted my clients and
13 others, to exercise that editorial discretion to
14 keep the bad material out.

15 JUSTICE GORSUCH: With respect to
16 other people's speech. So it seems like we have
17 speech and then we have speech.

18 MR. CLEMENT: You -- you -- you can't
19 -- you literally -- and this is -- again, I'm
20 happy to argue that case right now if we want
21 to, but you can't have Section 230 --

22 JUSTICE GORSUCH: Well, no, it's --
23 it's a really hard question for us, and it's
24 perfectly relevant here and very important
25 because, of course, 230 preempts things, and we

1 don't know how much of this law it preempts.

2 MR. CLEMENT: Absolutely. But this
3 law is unconstitutional in all its applications
4 and certainly in its -- it has no plainly
5 legitimate sweep. So you don't have to reach
6 the 230 question directly here.

7 And I would simply say that when
8 you're reading those statutory terms in 230, you
9 wouldn't sweep in editorial discretion because,
10 if you do, you will defeat the fundamental
11 purpose of Section 230 --

12 JUSTICE GORSUCH: What -- what do we
13 do about --

14 MR. CLEMENT: -- which is to empower
15 editorial discretion.

16 JUSTICE GORSUCH: Well, I just wanted
17 to raise with you the question I raised with the
18 -- with the Solicitor General, who offered a
19 thoughtful response.

20 But many of your clients' terms of
21 service, while reserving some editorial
22 discretion -- and I think about most of them as
23 -- as -- as speaking about the things covered by
24 230, obscenity, et cetera -- go out of their way
25 to promise an open forum to all members of the

1 public and go out of their way to say we don't
2 endorse what other people say on this site and
3 go out of their way to say all views shall
4 flourish.

5 Now that's not true for all of your
6 clients, but it's true for some of them and many
7 of them. What do we do about that?

8 MR. CLEMENT: So I would say that, you
9 know, it's true some of my clients and some more
10 than others, and I think all of those terms of
11 service, as the General said, go on to say, and
12 there are certain things, though, that are out
13 of bounds.

14 And I do think it's -- it's -- it's
15 just a factually true thing that my clients in
16 the main, as long as you kind of stay within the
17 lines, they actually do want to promote a -- an
18 open dialogue and a fair dialogue.

19 And if you look at the Center For
20 Growth and Opportunity brief, it shows you that
21 actually, some conservative voices have really
22 flourished on these websites. Ben Shapiro and
23 DailyWire are killing it on Facebook. And that
24 shows you that, you know, we do want a broad
25 discussion, but there's some stuff that is just,

1 you know, out of the lines.

2 And I don't think it's as simple to
3 say, well, that's just the 230 stuff because,
4 again, we had a debate about what "otherwise
5 objectionable" means, but I also think that my
6 clients are getting a lot of pressure to be
7 particularly careful about things that are
8 damaging to youths, and I think, in that
9 context, they want to sort of err on the side of
10 keeping some bad material off. But --

11 JUSTICE GORSUCH: Well, you've
12 mentioned that a few times. Let me just press
13 the other way, though.

14 Doesn't it also hold that on your
15 view, part of the editorial discretion of a
16 platform would be that it could use algorithms
17 designed specifically to try to attract teens to
18 addiction or suicide, depression, those kinds of
19 things as well, that would be part of their
20 editorial discretion too?

21 MR. CLEMENT: So a website -- I don't
22 think my clients because my clients are working
23 hard --

24 JUSTICE GORSUCH: I'm not -- I don't
25 -- I don't mean to cast aspersions on anyone,

1 but I think it's a natural consequence of your
2 -- your position, isn't it?

3 MR. CLEMENT: There -- there would be
4 protected First Amendment activity with that
5 very different website with a business model
6 that I don't think would stay in business very
7 long. And it is possible, you know, as the --
8 as the United States has pointed out in its
9 brief, that if you have a different concern and
10 you identify a different government interest,
11 that maybe the government might be able to do
12 something particularly if it does it in a
13 content-neutral way to address some of those
14 concerns.

15 But, to get back to something Justice
16 Kavanaugh pointed out before, I mean, I actually
17 think that both Texas and Florida have been
18 pretty aggressive about their government
19 interest here being something that is not just
20 not a legitimate interest in the First Amendment
21 context but is affirmatively prohibited, which
22 is the idea that we're going to level the
23 playing -- we're going to amplify some voices
24 in -- we're going to make certain -- put burdens
25 on private parties so that some voices can be

1 louder than others or some people can get a
2 boost from what they're getting in the
3 marketplace of ideas.

4 And the only place this Court has ever
5 allowed that was in Turner. And, I mean,
6 Justice Kavanaugh, you pointed out that one of
7 the key things there was content neutral. But I
8 actually think the critical thing in Turner is
9 that bottleneck or chokehold on the content that
10 went into individual houses.

11 And I think that's what made what was
12 otherwise an impermissible government interest a
13 legitimate government interest in that narrow
14 context. And maybe you could say the same
15 thing -- I mean, I don't know if Red Lion is
16 still good law -- but that's the same idea that
17 there's like a scarcity rationale. But there's
18 no scarcity rationale on the Internet, and this
19 Court -- this Court said that in 1997 in the
20 Reno case, where --

21 JUSTICE KAGAN: Mr. -- I'm sorry.

22 MR. CLEMENT: No, no.

23 JUSTICE KAGAN: Can I ask you about a
24 distinction between two possible kinds of
25 applications of the Texas law?

1 So one is the application that
2 prevents you from keeping out certain speech
3 that you want to keep out. You said
4 anti-Semitic speech. It could be any of a
5 number of things.

6 As I understand it, the Texas law
7 also -- prevents you also from doing something
8 else, which is suppose you wanted to prevent
9 anti-Semites from posting anything, you know,
10 you want -- you just wanted to say that there
11 are a class of people we're not even going to
12 let them post cat videos.

13 Should we think about that set of
14 applications differently?

15 MR. CLEMENT: I don't think you should
16 think of it radically differently. I mean, it's
17 a different application, but I think it's the
18 same idea, which is there are some speakers --
19 and I think this is going to be, you know, very
20 few -- but there are some speakers where they
21 are so associated with a particular viewpoint
22 that there -- it informs essentially all of
23 their speech.

24 And it also affects the speech of
25 other people in the forum. If you have a white

1 supremacist on your speech forum and they're
2 posting there, it's going to cause a lot of
3 other people to say: What is that person doing?
4 What's going on here? Why are all the dog
5 photos white?

6 I mean, it's going to fundamentally
7 change the dynamic on the website. And I think
8 a website that's trying to promote a particular
9 discussion has a First Amendment right to
10 exclude those people. And in practice, this is,
11 you know, what -- what is used to exclude sort
12 of, you know, sexual predators, which is
13 something, again, that the government can't do,
14 Packingham, but -- but Facebook does.

15 And there are certain other people
16 with, you know, just very distinct viewpoints,
17 where it's in a sense we know -- we know the
18 viewpoint, the viewpoint is problematic, even if
19 the particular post is not.

20 JUSTICE BARRETT: But, Mr. Clement --

21 JUSTICE ALITO: Mr. --

22 JUSTICE BARRETT: -- I just wanted to
23 follow up on that because it seems to me that
24 Justice Kagan's question kind of gets to the
25 distinction in 303 Creative between turning

1 people away and the speech that you have.

2 And so, if you think about it as
3 silencing someone who you let on your platform,
4 then that seems more like speech or content
5 moderation to the extreme, for example, but I
6 assume the implication of your answer to Justice
7 Kagan is that you could tell the anti-Semite
8 we're not open for business to you, right?

9 MR. CLEMENT: You can tell that person
10 that our speech forum is not open to you. And I
11 think that's what makes it different, that Texas
12 is focused really on these speech-oriented
13 platforms.

14 And so I think, if you're in the
15 business of speech and you have somebody -- and,
16 again, this is not sort of other prohibited
17 statuses. This is viewpoint. And so you are a
18 notorious anti-Semite, we do not want you to
19 participate in this conversation.

20 JUSTICE BARRETT: Religion then, like
21 --

22 MR. CLEMENT: Sure. And -- and I want
23 to have a Catholic website. I can keep off
24 somebody who's a notorious Protestant. I mean,
25 I want to -- I want to preserve --

1 (Laughter.)

2 MR. CLEMENT: -- I want to preserve
3 the nature of the discussion on my forum. And
4 it's a private forum. And the government can't
5 tell me as a private party let the Protestant
6 into the Catholic party. I don't think so.

7 JUSTICE ALITO: Mr. Clement, can I ask
8 you about Section 2? I don't think anything has
9 been said about it so far.

10 So you say that Section 2's
11 individualized explanation requirements violate
12 the First Amendment because they impose a
13 massive burden, right? That's your argument?

14 I mean, I -- it seems to me that the
15 European Union has imposed exactly the same --
16 pretty much the same individualized explanation
17 requirement on anybody who operates there that
18 Texas has imposed. And I'm not saying that
19 whatever the European Union says is okay is
20 constitutional here, but just on the practical
21 question of whether it's too much of a burden,
22 if it's not too much of a burden for your
23 clients to do it in Europe, how can it be too
24 much of a burden for them to do it here?

25 MR. CLEMENT: So, as I understand the

1 requirements, they are different. They are
2 materially different. This, you know, the --
3 and -- and in a sense, the European Union
4 provision has sort of a built-in kind of, you
5 know, reasonably practical provision right into
6 what you have to do. You only have to do what's
7 reasonably practical.

8 This is an absolute requirement to
9 respond to every -- you know, every takedown,
10 and that's over a billion takedowns of comments
11 in a quarter for YouTube. And then there's also
12 this appeal process, which I don't think is
13 coextensive with the process in Europe.

14 So just as a practical matter, I think
15 this is more burdensome. But, as you said, the
16 First Amendment does not apply in Europe. And I
17 think that having this kind of disclosure
18 requirement on what is really an editorial
19 discretion decision is potentially, I mean,
20 hugely problematic.

21 I mean, if you took this and said, you
22 know, The New York Times, you have to -- you
23 have to tell us why you rejected my -- my
24 wedding announcement, I mean, they only take
25 like 10 percent of the wedding announcements,

1 you have to tell me. Even if you automize that
2 and sort of said, you know -- you know, well,
3 one, if, you know, you weren't rich enough; two,
4 if you weren't connected enough in New York
5 social circles; and -- and three, we just didn't
6 like the way you looked. Even if you followed
7 that, it would --

8 JUSTICE ALITO: I mean, your client --
9 some of -- some of your clients are humongous.
10 And if you want to say this is unduly
11 burdensome, didn't you have some obligation in
12 the district court to try to -- is it enough for
13 you to just say: This is a huge burden, so
14 knock this out? Didn't you have to provide
15 something to show how much -- what resources
16 would be required --

17 MR. CLEMENT: We did. There's a --

18 JUSTICE ALITO: And why that would be
19 too much for these -- for these megaliths?

20 MR. CLEMENT: I mean, we -- we -- we
21 did. There's more of a record in the Texas case
22 than in the Florida case. Our -- you know, the
23 witness for YouTube in their declaration
24 specifically said this would be a hundred times
25 more burdensome than their current process.

1 And so there is a record on this. It
2 is incredibly burdensome.

3 CHIEF JUSTICE ROBERTS: Justice
4 Thomas, anything further?

5 Justice Alito?

6 JUSTICE ALITO: The -- the 230
7 argument is intriguing to me, and it's -- the
8 distinctions that you're drawing somehow to some
9 degree escape me. So is it your position that
10 you are exercising editorial discretion as to
11 everything -- let's take YouTube -- as to every
12 video that is placed on YouTube, you have
13 exercised editorial discretion that you want
14 that on YouTube?

15 MR. CLEMENT: I would say that we have
16 exercised some editorial discretion to not sort
17 of eliminate that from the site entirely. And
18 as to an individual user, we've used what are
19 typically in many cases neutral algorithms, but
20 some of them are not neutral.

21 And even in Taamneh, the briefs I
22 think made quite clear that, you know, although
23 that at a certain point some of the algorithms
24 were neutral as between rice pilaf and
25 terrorism, there were other efforts to

1 affirmatively get terrorist stuff off those
2 sites. And so --

3 JUSTICE ALITO: But, I mean -- so if
4 you were a newspaper, and you published the
5 content that appears in every single one of the
6 videos on YouTube that you -- you allow to be
7 included, you would be liable, potentially, for
8 the content of that material. And I -- and I
9 don't understand the rationale for 230, if it
10 wasn't that you can't be held responsible for
11 that because this is really not your message.

12 Either it's your message or it's not
13 your message. I don't understand how it can be
14 both. It's your -- it's your message when you
15 want to escape state regulation, but it's not
16 your message when you want to escape liability
17 under state tort law.

18 MR. CLEMENT: So I don't really think
19 we're being inconsistent, and what I would -- I
20 would try to draw the analogy just to a good
21 old-fashioned anthology. If I put together an
22 anthology of 20 short stories, everybody
23 understands that the underlying short stories
24 are still the product of the -- of the
25 individual author, but as the anthologist, as

1 the editor of this compilation, who decided
2 which 20 got in, which ones didn't, I'm
3 responsible for those editorial discussions,
4 those decisions. Those are both protected First
5 Amendment decisions. You can distinguish
6 between the underlying material and the
7 editorial decisions.

8 Now, at common law, the publisher was
9 responsible for both, and so they were still
10 liable for what the -- the republishing the
11 authors' work. And that's precisely what
12 Congress wanted to get rid of in 230, and they
13 wanted to essentially give our clients an
14 incentive to weed out of the anthologies the
15 stuff that was harmful for children and
16 problematic.

17 And that's why I don't think it works
18 to say, oh, well, then that's your speech, so
19 you're liable under 230, because it's that
20 editorial control, the weeding out the bad
21 stuff, that was the whole point of 230, to
22 empower that.

23 JUSTICE ALITO: Well, I don't know how
24 you could be -- how a publisher could be liable
25 for -- well, I -- I take that back for fiction,

1 but certainly if it was -- I mean, if you --
2 back in the day when some written material was
3 considered to be obscene, you put together an
4 anthology that included obscene material, you
5 could be sued.

6 Today, if you put together an
7 anthology of essays, non-fiction writing, and
8 there's defamation in there, then the publisher
9 could be sued. Even a publisher --

10 MR. CLEMENT: I agree --

11 JUSTICE ALITO: Well, we exercised
12 editorial discretion. That doesn't shield you
13 from liability.

14 MR. CLEMENT: Not at common law, and
15 that's why Congress had to come in with 230.
16 But what Congress did is it looked at the common
17 law and it said is said, oh, this is
18 problematic. Because the only way you can avoid
19 liability at common law is if you act as a
20 conduit and let everything out. And once you
21 start keeping out a little bit of porn, then
22 you're responsible for the porn that slips
23 through. And that's not practical on the
24 Internet, and that's why we have 230.

25 JUSTICE ALITO: All right. I don't

1 want to -- I -- I don't want to belabor the
2 point. Let me just say something about the
3 analogies that both sides draw to the issues
4 that were presented in prior cases.

5 So you say this is just like a
6 newspaper, basically. It's like the Miami
7 Herald. And the states say no, this is like
8 Western Union. It's like a telegraph company.

9 And I -- I think -- I look at this and
10 I say it's really not like either of those.
11 It's worlds away from -- from both of those.
12 It's nothing like a newspaper. A newspaper has
13 space limitations, no matter how powerful it is.
14 It doesn't necessarily have the same power as --
15 as some of your clients. But put that aside.

16 Newspapers overtly send messages.
17 They typically have an editorial. They may have
18 an editorial 365 days a year or more than one.
19 But that's not the situation with even the most
20 prominent of your clients. So I don't know how
21 we could decide this case by saying -- by
22 jumping to one side or the other of this case
23 law.

24 MR. CLEMENT: Well, Justice Alito, let
25 me offer two thoughts. One, this isn't the

1 first time you're wrestling with the Internet.
2 You wrestled with it in Reno. You wrestled with
3 in last term in 303 Creative. And I think the
4 gist of those cases is this is more like the
5 newspaper or the parade organizer than it is
6 like a common carrier.

7 And then as to the cases, whether you
8 think that this is different from a newspaper, I
9 mean, the arguments that you're pointing to say
10 this is different are the arguments that those
11 cases wrestled with and said didn't matter.

12 So I know you know this, but in
13 Tornillo, it -- you know, there was all this
14 language about it being a monopolist, and that
15 was in the context of a local political election
16 where if you couldn't get into the Miami Herald,
17 like, where else were you going to go? And yet,
18 this Court said that didn't matter. And the --
19 the -- also in Tornillo this Court said, yes,
20 face the constraints, there are some, but our
21 decision doesn't turn on that. And then in
22 Hurley, there's a lot of language in the -- in
23 the Court's opinion that says, you know, this is
24 not like much of a message and they let some
25 people show up even if they get their, like, the

1 day of, and the only thing they're doing is,
2 like, excluding this group.

3 But, of course, the exclusion was the
4 message that they were sending, and it's the
5 message the state was trying to prohibit. And
6 that's kind of the same thing here, which is --

7 JUSTICE ALITO: I mean, if your -- if
8 -- let's say YouTube were a newspaper, how much
9 would it weigh?

10 (Laughter.)

11 MR. CLEMENT: Well, I mean, it would
12 -- it would -- it would weigh an enormous
13 amount, which is why, in order to make it
14 useful, there's actually more editorial
15 discretion going on in these cases than any of
16 -- other case that you've had before you.

17 Because, you know, people tend to
18 focus on the -- on the users that get knocked
19 off entirely and end up on the cutting room
20 floor, but both these statutes also regulate the
21 way that these social websites -- they -- they
22 sort of get you down to something that's
23 actually usable to an individual user.

24 And, in fact, if you tried to treat
25 these entities like a true common carrier, so

1 first in, first out, just order of, you'd open
2 up one of these websites and it would be
3 gobble-dy-gook. Half of the stuff wouldn't even
4 be in a language you understood. And even if
5 you controlled for that, you'd get all this
6 garbage you didn't want.

7 JUSTICE ALITO: All right. Thank you.

8 JUSTICE SOTOMAYOR: I'd like to go
9 back to the individualized explanation
10 requirement. And please remind me, what did the
11 district court do here? Did it grant you an
12 injunction here?

13 MR. CLEMENT: It did.

14 JUSTICE SOTOMAYOR: And it was the
15 circuit court who didn't.

16 MR. CLEMENT: Yeah.

17 JUSTICE SOTOMAYOR: So it was a
18 district court who looked at the amount of
19 material you submitted. And I know your
20 declaration, YouTube said it would be a burden,
21 100 times more than it does now.

22 I -- I don't know what the
23 quantification of that -- whether that was
24 quantified or not. Was it? What 100 percent
25 more, 100 percent --

1 MR. CLEMENT: 100 percent --

2 JUSTICE SOTOMAYOR: -- more costly,
3 100 percent more what?

4 MR. CLEMENT: 100 percent more of its
5 current effort, its current sort of -- you know,
6 efforts --

7 JUSTICE SOTOMAYOR: Yeah.

8 MR. CLEMENT -- that it dedicated to --

9 JUSTICE SOTOMAYOR: But we -- we still
10 don't know what the cost of that is, and what --

11 MR. CLEMENT: Yeah. I mean --

12 JUSTICE SOTOMAYOR: There's a lot of
13 unknowns. But this was a facial challenge with
14 respect to that. And Texas seems to say you
15 don't need to do much. You just need to have
16 the computer spit out one through 10 reasons.
17 And if you have a few individualized ones, you
18 could just explain those individualized.

19 What do we do with that dispute?

20 MR. CLEMENT: So, first of all --

21 JUSTICE SOTOMAYOR: Because it is a
22 facial challenge.

23 MR. CLEMENT: It -- it -- it is a
24 facial challenge. It is a preliminary
25 injunction. We've obviously been over some of

1 that. There -- here there was -- you know,
2 there wasn't just declarations. There were
3 depositions taken. There was a record that was
4 put together on all of this. And Texas was
5 taking a slightly different view of what the
6 burdens of the -- of Section 2 were there.

7 And so I think on -- on that if you
8 just look at the record that was before the
9 district court, you should have affirm the
10 district court's preliminary injunction.

11 What I would say, though, is I also
12 think that even -- even what they say on page 44
13 of their red brief is that, you know, you can do
14 this in a relatively less burdensome way as long
15 as your editorial policies are sufficiently
16 specific and particularized.

17 And what -- what they're basically
18 saying is, you know, you could change your
19 editorial policies a little bit to make it
20 easier to comply with this disclosure
21 obligation. And that seems quite a bit easier.

22 JUSTICE SOTOMAYOR: That begs the
23 question, right?

24 MR. CLEMENT: Yeah. Exactly.

25 JUSTICE SOTOMAYOR: Because they're

1 affecting -- okay.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 Justice Gorsuch?

4 Justice Kavanaugh?

5 JUSTICE JACKSON: I just have --

6 CHIEF JUSTICE ROBERTS: Justice

7 Jackson?

8 JUSTICE JACKSON: I just have a quick

9 question.

10 So part of the dynamic that I think is
11 going on in these cases is the fact that this
12 regulation is enacted by the sort of
13 democratically elected representatives of a
14 state. And I suppose that if the state's
15 regulation of these platforms gets too
16 burdensome, then presumably the platforms can
17 say forget it, we're not going to operate in
18 your state. And then the citizens of the state
19 would have the chance to determine if that's
20 what they really wanted. That's sort of how I'm
21 looking at this at a -- at a meta level.

22 So what caught my attention was your
23 response to the Chief Justice when you suggested
24 that your client couldn't withdraw from the
25 state of Texas because you read the provision

1 related to censorship and geography as ensuring
2 that you don't do so. I had not read that
3 provision in that way. So can you say more
4 about why that's your interpretation?

5 MR. CLEMENT: Sure. I think that's
6 the obvious interpretation of that provision,
7 particularly when it talks about -- you know,
8 this isn't -- this isn't like, you know, don't
9 -- don't discriminate against Texans or Texans
10 wherever they are. The fact that it's
11 particularly preventing us from discriminating
12 on somebody with a geographic location in Texas
13 is basically telling us that we can't try to
14 geofence our service and try to essentially, you
15 know, explain to the people -- you know,
16 sometimes, like, if you get -- like, your cable
17 service has a dispute with a provider and you
18 can't get your football game and they tell you
19 if you're hacked off about this, you know, call
20 this number and complain.

21 We can't do that in response to this
22 law. And I think the legislators in Texas were
23 able to tell their constituents, don't worry,
24 you know, if you like your website, you can keep
25 it. We're not going to threaten, they can't --

1 they can't pull out of here based on the way
2 that we're regulating them.

3 JUSTICE JACKSON: So even if we could
4 read it a different way -- you're saying this
5 necessarily -- I mean, I guess this dovetails
6 with my concern about us not having sort of
7 state interpretations or an application here to
8 really understand, because I could read this
9 differently.

10 It seems to me it's fitting into the
11 whole set of things you're not allowed to do.
12 You can't censor people on the basis of the
13 viewpoint of the user. You can't censor them
14 based -- on the basis of the viewpoint that that
15 is being expressed and you can't censor them
16 based on their location in your state or another
17 part of the state.

18 And so I guess I don't necessarily see
19 that in the same way. I mean, you can't just
20 automatically do that, I guess. I don't know.

21 MR. CLEMENT: It -- it -- it -- it
22 seems to me quite clear that it's designed
23 essentially as a poison pill or somebody
24 described it as the Hotel California provision,
25 that you can -- you can -- you can't leave Texas

1 even if you want to try to do that as a way of
2 showing that this is an impermissible way of
3 regulating our expressive activities.

4 And, you know, so -- so I -- I do
5 think that is the right reading. I do think the
6 fact that it's geographical location in Texas is
7 kind of a clue to that. So this is not
8 something where, you know, if you're a -- you
9 know, if you're a Texas fan, you're protected no
10 matter where you go in America. This really is
11 designed to sort of say that you can't do the
12 kind of geofencing that you might otherwise do
13 to comply with an idiosyncratic state law.

14 I should mention just for the sake of
15 completeness, that, you know, in the lower
16 courts, not part of the preliminary injunction,
17 there are dormant commerce clause challenges to
18 these provisions and the way this is just kind
19 of one state trying to regulate everybody and so
20 that's part of the case that will be there.

21 JUSTICE JACKSON: But it's not here.

22 MR. CLEMENT: But it's not here. All
23 that's here is a preliminary injunction that
24 runs to my clients. So, I mean, you know, this
25 -- this statute has a smaller universe of people

1 but if there's somebody else out there who, you
2 know, isn't one of my clients, who isn't covered
3 by this preliminary injunction, the statute
4 could take effect as to those people and the
5 same is true in Florida.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 General Prelogar?

10 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
11 FOR THE UNITED STATES, AS AMICUS CURIAE,
12 SUPPORTING THE PETITIONERS

13 GENERAL PRELOGAR: Mr. Chief Justice
14 and may it please the Court:

15 I want to pick up with the question
16 that Justice Alito asked in the seriatim round
17 to my friend about the idea that the social
18 media platforms don't perfectly fit into either
19 analogy or paradigm here. And I want to
20 acknowledge the force of that intuition.

21 They obviously operate at a massive
22 scale that goes beyond any particular parade or
23 beyond any particular newspaper. I think the
24 right thing to do with that intuition is to
25 recognize that it's not like you can just exempt

1 them from the First Amendment.

2 They are obviously creating something
3 that's inherently expressive in taking all of
4 this quantity of speech on their web sites and
5 curating it and making selectivity decisions and
6 compiling it into a product that users are going
7 to consume.

8 So the First Amendment applies, but I
9 think that those kinds of concerns about how the
10 social media platforms and how they look
11 somewhat different from the other kinds of
12 expressive products this Court has reviewed in
13 prior cases can come in to the question of
14 whether the First Amendment is satisfied with
15 respect to any particular regulation.

16 Now here we think it's not satisfied
17 because of the way that Texas has designed this
18 law. I'd urge the Court to rule narrowly. It's
19 not necessary here to try to figure out how the
20 First Amendment applies to new technology in
21 general or to every possible website or the
22 Internet in particular. This law has a very
23 clear defect.

24 What Texas has done is tried to
25 countermand the protected editorial speech

1 decisions of the platform and the only
2 justification it's offered to the courts below
3 is that it wanted to essentially amplify the
4 voice of users on that platform by suppressing
5 the platform's own protected speech. That is a
6 defect that is clear under the First Amendment
7 and the Court could say only that and resolve
8 this case.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: All right. General,
11 the -- when I asked you about the
12 differential -- the difference in treatment of
13 private party as opposed to the government
14 engaged in similar conduct, your answer was, of
15 course, that it would -- it would be different,
16 the government would be bound to comply with the
17 First Amendment.

18 What -- there was some discussion in a
19 number of the amicus briefs about instances in
20 which the government and the private party, say,
21 Petitioners -- Petitioners here, and the
22 government coordinating efforts.

23 How would you respond to that?

24 GENERAL PRELOGAR: So let me respond
25 to that by saying I think the position we're

1 offering here and the position this Court will
2 consider next month in the Murthy case are
3 entirely consistent.

4 We of course acknowledge that if the
5 government actually coerces the platforms and
6 takes over their editorial decision making, then
7 the platforms could be deemed a state actor and
8 that would be subject to First Amendment
9 scrutiny.

10 We vigorously dispute that that has
11 actually happened and the federal government has
12 engaged in that kind of coercive conduct and we
13 further dispute the legal standards that were
14 applied in that case.

15 But there's no inherent tension here.
16 You know, the federal government obviously can
17 act and criticize the social media platforms'
18 content moderation decisions. That's just using
19 the bully pulpit to express views.

20 And if -- if the states disagreed with
21 how the platforms were exercising their content
22 moderation standards, it could have done the
23 same. It could have criticized them, it could
24 have urged them or tried to influence them to
25 adopt separate standards. But here what the

1 state did is said, we're going to pass a law
2 that actually takes over their content
3 moderation and dictates that it has to be done
4 in a different way.

5 JUSTICE KAGAN: General, Texas's law
6 even more than Florida's can be understood as an
7 expansion of public accommodations laws. And
8 the United States is often in a position of
9 defending public accommodations laws and
10 insisting that they be vigorously enforced. And
11 how do you see what Texas is trying to do as
12 consistent with that broader stance about public
13 accommodations laws?

14 GENERAL PRELOGAR: Yes. So I want to
15 be very clear and stake out potentially some
16 separate ground from my friend representing the
17 platforms in this case with respect to generally
18 applicable public accommodations laws that
19 protect based on a -- a -- a particular status.

20 We think of course those laws are
21 valid on their face and that they serve
22 compelling governmental interests. And so to
23 the extent that you're looking at how an
24 ordinary public accommodations law operates, the
25 refusal to deal, the refusal to serve, as

1 Justice Barrett said, we think that's a
2 regulation of conduct and that ordinarily there
3 would be no First Amendment problems with the
4 application of that law.

5 Now, I acknowledge that it gets more
6 complicated when those laws are applied to a
7 business that is providing an expressive product
8 and cases like Hurley or 303 Creative show that
9 in certain applications, sometimes the public
10 accommodations law has to give way to First
11 Amendment interests.

12 But I think the -- the Court has drawn
13 a clear line. It has never suggested that the
14 mere refusal to deal or serve based on status,
15 even with respect to an expressive association,
16 would fail under First Amendment scrutiny.

17 Instead, you know, you look at a case
18 like 303 Creative and there the concern was
19 about changing the message or a case like
20 Hurley, gay and lesbian individuals could march,
21 you just couldn't change the message by holding
22 up a particular sign. So we recognize that
23 there are going to be some applications where
24 you'd have to conduct that kind of First
25 Amendment analysis. But if the question, the

1 relevant question is could you just bar people
2 on the basis of a protected status from creating
3 an account. And it's not going to affect your
4 message. They want to, you know, lurk on X and
5 read other people's posts. I think that that
6 kind of law would certainly be valid.

7 I want to briefly address Justice
8 Gorsuch the question you asked about the scope
9 of CDA preemption under Section 230. Just to be
10 clear on this one, I -- I want to say there are
11 unresolved issues here. I would warn the Court
12 away from trying to resolve exactly how much
13 conduct CDA 230 protects and exactly how that
14 interacts with the Texas law here.

15 The only point I would make is that,
16 you know, there are -- there are questions about
17 what it means to act in good faith, questions
18 about what it means for the platform to take
19 down content that -- that is otherwise
20 objectionable.

21 But however those interpretive
22 disputes might shake out in a particular case,
23 surely Texas here isn't saying that its entire
24 law is preempted and it has no effect whatsoever
25 and CDA 230 fully takes care of the problem.

1 So I think what the Court could do,
2 not knowing exactly the scope of how that
3 preemption issue might be resolved, is to say
4 whatever exists in that category of speech that
5 Texas is prohibiting, the editorial decisions
6 it's countermanding on the one hand versus what
7 CDA 230 would authorize on the other hand,
8 whether that's a big category or little
9 category, all of the things in that category
10 constitute protected decisions by the platform
11 that haven't been adequately justified. And I
12 think that's all you need to say about the
13 preemption issue in this case.

14 JUSTICE ALITO: If a legislative body
15 enacts a law requiring viewpoint neutrality in
16 some area and it does so because it has -- it is
17 concerned that people who express a particular
18 viewpoint are suffering discrimination, is that
19 law unconstitutional on the ground that the
20 intent of the legislative body was to benefit a
21 particular group?

22 GENERAL PRELOGAR: No, I don't think
23 that that kind of law would immediately be
24 unconstitutional. And, again, I think if it's
25 structured like a generally applicable public

1 accommodations law, there might be important or
2 significant governmental interests in being able
3 to protect against that kind of discrimination.

4 CHIEF JUSTICE ROBERTS: Unless there
5 are any further questions?

6 JUSTICE KAGAN: Can I do one more?

7 CHIEF JUSTICE ROBERTS: Sure.

8 JUSTICE KAGAN: The government has
9 spent a lot of time defending net neutrality, so
10 maybe I should have asked you this with respect
11 to Florida's law just given the breadth of that
12 law. And why are Internet service providers, in
13 your view, so different and what if an Internet
14 service provider wanted to make certain content
15 distinctions?

16 GENERAL PRELOGAR: Internet service
17 providers are fundamentally different because
18 they are engaged in transmitting data in order
19 to make websites accessible, and that is not
20 inherently expressive.

21 They're certainly providing the -- the
22 infrastructure, the cable, the fiberoptics, and
23 the service to make sure that you can log in on
24 your home computer and access the Internet writ
25 large, but along the way, they're not compiling

1 that speech into any kind of expressive
2 compilation of their own. So we would put them
3 in the same category as telephone and telegraph
4 companies or UPS, where you could say, sure,
5 they're literally facilitating the transmission
6 of speech, but they're not creating an
7 expressive product that could implicate the
8 First Amendment principles at stake.

9 Now then you might ask, okay, well,
10 what if they want to start discriminating with
11 respect to the service they're providing for
12 particular types of websites? The kind of
13 quintessential example of this is an Internet
14 service provider that decides to slow down
15 service to a streaming site, let's say Netflix,
16 because it wants to direct Internet traffic to
17 some other website of its own choosing, maybe
18 its own streaming service. We think net
19 neutrality could come in there and -- and say
20 you're not allowed to discriminate based on
21 content in that way, but that's because, again,
22 there would be no expressive speech or -- or
23 compilation that you could attribute to the
24 Internet service provider itself.

25 People don't sign up with Comcast or

1 Verizon to give them some kind of limited,
2 curated access to the Internet. They're
3 engaging in service with those companies because
4 they need someone physically to transmit the
5 data so they can get access to the whole
6 Internet.

7 JUSTICE KAVANAUGH: Can I ask one? I
8 don't have to buy anything you just --

9 CHIEF JUSTICE ROBERTS: Sure.

10 JUSTICE KAVANAGUH: -- said to rule
11 for your position in this case, anything you
12 just said on net neutrality, right?

13 (Laughter.)

14 GENERAL PRELOGAR: You do not have to
15 agree with me, Justice Kavanaugh. I hope some
16 day, if it comes to it, to persuade you.

17 JUSTICE KAVANAUGH: I'm not --

18 GENERAL PRELOGAR: But -- but --

19 JUSTICE KAVANAUGH: -- I'm not saying,
20 but I just want to make sure that's walled off.

21 GENERAL PRELOGAR: Nothing --

22 JUSTICE KAVANAUGH: Yeah. Yeah.

23 GENERAL PRELOGAR: -- about the
24 Court's decision in this case would at all
25 affect the net neutrality issue. You know, we

1 think that here, the platforms are engaging in
2 expressive activity. That's protected by the
3 First Amendment. And you can leave for another
4 day all of the kind of conduit questions that
5 come up in the net neutrality context.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Nielson.

10 ORAL ARGUMENT OF AARON L. NIELSON

11 ON BEHALF OF THE RESPONDENT

12 MR. NIELSON: Thank you. It's been a
13 long day. Mr. Chief Justice, and may it please
14 the Court:

15 This is not the first time that new
16 technology has been used to stifle speech.
17 Telegraphs also discriminated based on
18 viewpoint, prompting a national -- a national
19 scandal. Yet, under the platforms' theory,
20 Western Union was just making editorial choices
21 not to transmit pro-union views.

22 Today, millions of Americans don't
23 visit friends or family or even go to work
24 online -- on person. Everybody is online. The
25 modern public square. Yet, if platforms that

1 passively host the speech of billions of people
2 are themselves the speakers and can
3 discriminate, there will be no public square to
4 speak of.

5 We know this because Twitter has
6 admitted that their theory of the First
7 Amendment would allow them to discriminate not
8 just based on what is said on the platform but
9 "on the basis of religion or gender or physical
10 disability."

11 That's not the First Amendment.
12 That's Lochner 2.0. And as more than 40 states
13 warned the Court, the implications are gravely
14 serious. For example, as New York explains, if
15 these algorithms are constitutionally protected,
16 platforms may be able to continue selling
17 advertisers the ability to discriminate based on
18 race. Or, as Professor Lawrence Lessig, Zephyr
19 Teachout, and Tim Wu, who do not typically file
20 briefs in support of Texas, cautioned, not just
21 states but Congress may be powerless to address
22 the social media crisis devastating the lives of
23 kids.

24 HB 20 is a modest effort to regulate
25 such power in the context of viewpoint

1 discrimination. Platforms can say anything they
2 want under HB 20 about anything. There's no
3 limit. They can say anything they want. Users
4 can block anything they don't want. There's no
5 limit on that. All that's left is voluntary
6 communications between people who want to speak
7 and people who want to listen.

8 This law is just nowhere near the
9 heartland of the First Amendment. Instead, this
10 is democracy and federalism, not a facial
11 pre-enforcement injunction.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: If you -- if this was
14 so clearly within a common law tradition, as you
15 suggest, why hasn't Congress seen fit to -- to
16 act as Texas has? And it appears Mr. Clement
17 suggests that actually Congress has acted in the
18 opposite direction. Would you comment on that?

19 MR. NIELSON: Yeah. I don't see
20 how -- with all respect to my friend, how their
21 reading of 230 is at all consistent with what
22 Congress said. They have all sorts of kind of
23 policy arguments about how 230 ought to work,
24 but if you actually just read the words of the
25 statute, it doesn't work.

1 So his suggestion that Congress
2 somehow has kicked out Texas or said that that's
3 not how he wants it to be I don't think is
4 consistent with the text of the statute. I
5 didn't hear a lot of textual argument coming
6 from Mr. Clement there. So that would be my --
7 my first-line answer.

8 My second-line answer is I have no
9 idea why Congress does or does not do, but I do
10 know that Texas has the ability to protect
11 Texans, and that's what Texas has done here.

12 CHIEF JUSTICE ROBERTS: Counsel, you
13 began by saying, you know, the platforms, they
14 want to keep out this person and that person on
15 the basis of race or sex, and then you said
16 that's not the First Amendment.

17 Well, the First Amendment doesn't
18 apply to them. The First Amendment restricts
19 what the government can do, and what the
20 government's doing here is saying you must do
21 this, you must carry these people; you've got to
22 explain if you don't. That's not the First
23 Amendment.

24 MR. NIELSON: Well, respectfully, Your
25 Honor, the First Amendment is big. It applies

1 in a lot of different ways. So it's true, for
2 us, like, we're saying because this isn't
3 speech, it's conduct, we can require viewpoint
4 neutrality.

5 But, in other cases, the same
6 companies are saying -- when New York or some
7 other state says, hey, you can't have algorithms
8 that try to hook kids, they say, well, we have a
9 First Amendment right to do that. It's the same
10 First Amendment, the same First Amendment that
11 says -- I mean, if it's all First Amendment,
12 then I guess it's going to be hard for Texas to
13 say you have to be viewpoint-neutral, but it's
14 also going to be hard for California and
15 Illinois or anybody else to say you can't have
16 an algorithm that hooks kids because it's all
17 the same First Amendment.

18 CHIEF JUSTICE ROBERTS: Yeah, I'm sure
19 it's the same for all the other -- the other
20 states. The question is they don't have the
21 obligation to act in the same way that you as
22 the state has the obligation to do.

23 They can discriminate against
24 particular groups that they don't like, whether
25 it's a group that encourages kids to take the

1 Tide pod contest or something else. And you
2 have different obligations.

3 MR. NIELSON: I guess a couple ways I
4 could respond to that, Your Honor. The easiest
5 one I'm going to talk about is, if I may, common
6 carriage. My reaction coming to this case was
7 the same as yours. My reaction was: Well, wait
8 a minute, it's their own platform. You can't
9 censor. Like, they're private.

10 But that's the exact same scenario
11 that came up with the telegraph. The idea the
12 telegraph was dumb pipes is not true. Instead,
13 what the telegraph was they had the technologic
14 -- technological ability to say that we're not
15 going to let this type of speech through.

16 CHIEF JUSTICE ROBERTS: No, you're
17 absolutely right, but it's kind of begging the
18 question. You're assuming that they are like
19 the telegraph. It seems to me that that's a big
20 part of what the case -- case concerns.

21 And I'm just not sure that -- I mean,
22 the telegraph had a particular compelling type
23 of monopoly. I mean, if you didn't want to use
24 the telegraph that was there, you usually didn't
25 have an alternative choice, or whether you're

1 talking about railroads or other types of common
2 carriers, I'm not sure the same thing applies
3 with respect to social platforms.

4 MR. NIELSON: So I give you my theory
5 for why common carriage is important here. As I
6 look at the cases, and I agree, they're really
7 hard to figure out where conduct starts and
8 speech ends and all of that, and you look at all
9 the various cases this Court has said, some
10 commentators say they can't be reconciled. I'm
11 not sure about that.

12 But I think as a helpful way to think
13 about it is we know that there is a line between
14 speech and conduct, and we know that common
15 carriage has always been on the non-speech side
16 of the line, the conduct side of the line. So,
17 if this falls within the common law tradition of
18 what is common carriage, nobody has ever thought
19 that falls on the speech side of the line. So
20 we -- we can't make them, you know, say
21 something otherwise that they -- that they
22 didn't want to say.

23 The whole point of it is that's a
24 signal to the Court, that's a way that the Court
25 can figure out which side of the line are we on.

1 JUSTICE SOTOMAYOR: That -- that's --

2 CHIEF JUSTICE ROBERTS: Well, as you
3 said, it turns on whether you're saying who do
4 you want to leave the judgment about who can
5 speak or who can't speak on these platforms, and
6 do you want to leave it with the government,
7 with the state, or do you want to leave it with
8 the platforms, the different various platforms.

9 MR. NIELSON: Well --

10 CHIEF JUSTICE ROBERTS: The First
11 Amendment has a thumb on the scale when that
12 question is asked.

13 MR. NIELSON: It does, and that's why
14 it's important, as I said, to go back to look at
15 the history on this, because, at some point, the
16 First Amendment has to end, or everything is
17 covered by the First Amendment.

18 This Court has said that the way that
19 we tell the difference is whether it's
20 inherently expressive. And the Court has said
21 what they mean by "inherently expressive." They
22 talked about in, you know, Miami Herald, you're
23 not a passive conduit. We talked about in
24 Hurley whether you're intimately connected.

25 Well, this Court last year had a case

1 in Taamneh where they talked about what these
2 platforms do, and they say that they are
3 passively connected to the speech on their
4 platforms and that they're agnostic about the
5 content. It's just one big algorithm that's
6 matching things together.

7 And I think that that's important.
8 But I also want to stress, if I may, again, this
9 is a facial posture. And if you look at the
10 breadth of our statute, there is -- the talk
11 about, you know, whether you have to host
12 somebody's speech. There's also about you just
13 want to read Facebook. That is one of the
14 provisions of our statute.

15 You go online in the morning and you
16 want to see what's going on in the world,
17 according to their theory, they can stop you
18 from doing that too.

19 And that's surely public accommodation
20 law. The idea that somebody -- they don't like
21 somebody because of their race or their
22 disability or something like that, and we're
23 going to say we're not going to allow you onto
24 our platform, that surely cannot be
25 constitutional. That's what I mean by that's

1 Lochner.

2 That is, you have gone beyond any
3 content of the platforms themselves on their
4 page to saying we're not going to let people
5 even look at what we're selling. That's a book
6 store saying we won't tell you our book. That's
7 different from saying we won't publish your
8 book.

9 JUSTICE KAGAN: Do you think there are
10 any unconstitutional applications of your law?

11 MR. NIELSON: I mean, that's a hard
12 question. I suspect that there might be.

13 JUSTICE KAGAN: What would they look
14 like?

15 MR. NIELSON: So the one that comes to
16 mind would be, imagine -- and this comes up in
17 -- in their brief -- they picked, like, the most
18 vile example. And they say: Imagine a
19 publisher didn't want to publish the book
20 written by the Proud Boys, was the example that
21 they used.

22 I think you might very well have an
23 as-applied challenge to that, but the problem
24 for them is they picked the most vile example
25 when I think all of them would say: Well, wait

1 a minute, surely you can let them on Facebook
2 and you can't kick them off because their
3 grandma said something outrageous. Right?

4 So there's got to be a limit there.
5 And that's why a facial resolution of this case
6 doesn't work.

7 And if it is --

8 JUSTICE KAGAN: Then how do you
9 separate the one from the other? Where's the
10 line?

11 MR. NIELSON: That's hard, right? I
12 would say this Court struggled with that in 303
13 Creative because it's really hard to know when
14 something becomes inherently expressive. And
15 the Court's cases like Dale, about when does
16 something that happened, all of those are hard
17 cases.

18 But in all of them, this Court has had
19 facts. They have actually looked at the facts
20 of the case and tried to figure out as applied
21 whether that makes sense here.

22 In this situation there's a million
23 applications of this law that are perfectly
24 fine. And they pick some of the most vile
25 possible hypotheticals, ignoring, by the way,

1 the provision of Texas law which they never
2 addressed, which says under Texas law, if you
3 don't want to hear content, they are allowed to
4 make sure you never hear that content.

5 So all you have left -- I mean, again,
6 they never mention at all, that's like the focus
7 point of our brief, they never respond to it.
8 But that means all that's left is I don't want
9 to hear this type of speech. I just want to
10 hear this type of speech. And it's just
11 voluntary communication. That's a telephone.

12 JUSTICE BARRETT: Mr. Nielson, we --
13 you -- you heard during the prior argument a lot
14 of conversation about how broad Florida's law
15 was. I read Texas's law to be more narrow in
16 its coverage, that it wouldn't sweep in some of
17 the examples we were using in the last argument
18 like Uber, Etsy; is that -- am I correct?

19 MR. NIELSON: I think that's fair,
20 Your Honor.

21 JUSTICE BARRETT: So what platforms
22 does Texas's law cover? Am I right that it
23 covers only the classic social media platforms
24 like YouTube, Facebook?

25 MR. NIELSON: So that's what their

1 deponent has said, the only ones they were sure
2 that it was covered was Facebook, Twitter, and
3 YouTube.

4 JUSTICE BARRETT: But that's their
5 deponent. Presumably Texas is the one who can
6 authoritarily -- if it was in the Texas's --

7 MR. NIELSON: Yeah.

8 JUSTICE BARRETT: -- courts --

9 MR. NIELSON: Yeah.

10 JUSTICE BARRETT: -- if it's not them,
11 they are not the one that get to decide
12 authoritarily what the scope of the law is?

13 MR. NIELSON: Well, correct. I mean,
14 we would have to prove it at trial, that they're
15 --

16 JUSTICE BARRETT: Well, what is --

17 MR. NIELSON: -- are subject to it.

18 JUSTICE BARRETT: -- Texas's position
19 about the scope of the law?

20 MR. NIELSON: Well, the law says that
21 it applies to any platform with more than 50
22 million active users per month. So I'm not sure
23 where some of the other platforms fall on that.
24 The ones that we know are the three biggest ones
25 fall within that.

1 JUSTICE BARRETT: So you're making
2 that judgment based on size. So it is nothing
3 about the definition. I mean, in the last
4 argument we were pointing out that the Florida
5 law in defining what a platform does and how it
6 works would encompass Uber, for example.

7 MR. NIELSON: Oh, oh --

8 JUSTICE BARRETT: But you're saying
9 that you're just assuming this is based on
10 numbers.

11 MR. NIELSON: No, I apologize, Your
12 Honor. There is also a separate provision which
13 defines social media platform as a website open
14 to the public, allowing a user to create an
15 account and enables users to communicate with
16 other users for the primary purpose of posting
17 information, comments, and so on.

18 JUSTICE BARRETT: And so is it Texas's
19 position that that definition then covers the
20 classic social media sites? And by "classic
21 social" -- "social media sites" I mean sites
22 like Facebook and YouTube?

23 MR. NIELSON: Yes, Your Honor.

24 JUSTICE BARRETT: And that it would
25 not sweep more broadly to some of these other

1 things, like Etsy?

2 MR. NIELSON: I don't think so, Your
3 Honor, but the important --

4 JUSTICE KAGAN: But the district court
5 thought it covered WhatsApp. Do you think that
6 it doesn't?

7 MR. NIELSON: I don't know the -- I
8 don't know answer. That's the answer -- that's
9 the best I can give you. I don't know. We
10 don't have discovery into that. We have the
11 deponent, their own witness said these are the
12 three that we are sure are covered.

13 It might very well be. That's another
14 reason why it's hard to do this on a facial
15 basis, because it might very well be WhatsApp,
16 which sure looks like a telephone to me, would
17 be covered by --

18 JUSTICE JACKSON: But what about -- I
19 mean, within the big three, there are some
20 e-mail-looking functions, aren't there? I mean,
21 I -- I appreciate that it's hard to do this
22 because we don't have a record, but I understood
23 that face -- Facebook, for example, which you
24 say would be covered, has a messenger
25 function --

1 MR. NIELSON: Yes, Your Honor.

2 JUSTICE JACKSON: -- which looks like
3 e-mail. So wouldn't we have to do this at the
4 level of the functionality of these various
5 platforms, rather than at the kind of entity
6 level?

7 MR. NIELSON: Yes, Your Honor, you
8 would. And it's not just that. You'd also have
9 to go through the different types of verbs
10 included in our statute for censoring, including
11 the one that they keep ignoring, which is the
12 ability to receive the expression of somebody
13 else.

14 That's when I say you look at the text
15 of the statute, their theory would mean that
16 even if you just want to lurk and just listen
17 and see what other people are saying, they can
18 kick you off for any reason at all. So if you
19 have somebody who had never posted anything or
20 their speech is identical to the speech of
21 somebody else, their theory is: Well, we can
22 kick you off.

23 That seems to be pretty far into the
24 world of public accommodations, like now 303 was
25 a narrow case. If that's what 303 means, like,

1 boy, now we're really, really, really big, you
2 know, hence, Digital Lochner or Lochner 2.0, the
3 idea that everything can't be protected by the
4 First Amendment at some point, there's lines of
5 content.

6 JUSTICE GORSUCH: Counsel, yeah,
7 during the prior argument, which I'm sure you
8 listened to attentively --

9 MR. NIELSON: Yes, Your Honor.

10 JUSTICE GORSUCH: -- there -- there
11 was some discussion about how difficult life
12 will be if these injunctions are dissolved and a
13 parade of horrors and expenses and difficulty,
14 geofencing, Texas or Florida. Can you address
15 some of those concerns?

16 MR. NIELSON: Yes. Two answers, if I
17 may? First, there was some suggestion that the
18 prohibition on discrimination against Texas or a
19 part of Texas is somehow a trap to keep
20 companies in, that's not true.

21 If you read the statute, that's not
22 what it says. There's a separate provision in
23 the statute which is the jurisdictional hook,
24 which is, you know, if you're doing business in
25 Texas -- and, by the way, even if Texas tried to

1 do that, there's something called personal
2 jurisdiction that you can simply just leave a --
3 a forum. That's this Court's decision in Ford.

4 So that argument, it's just not true.
5 But the other part that I think is really
6 important about this is Texas's law, what is the
7 remedy here? It's an injunction. There's no
8 damages here. It's an injunction.

9 And, in fact, we know that it's not
10 going to flood the courts because the injunction
11 against the attorney general is limited to the
12 attorney general. There's private enforcement
13 of Section 7.

14 And we have a handful of cases,
15 because you don't get damages. So it's hard,
16 unless you have a really darn good case to be
17 able to go to court if nobody's going to get
18 damages for prevailing, which I think matters a
19 lot in terms of, like, what are the real world
20 consequences here?

21 They're going to have some lawsuits by
22 the attorney general for injunctions. And if we
23 can't prove it, if we can't prove viewpoint
24 discrimination, they will prevail.

25 JUSTICE KAVANAUGH: Did you say they

1 could stop doing business in Texas under this
2 law?

3 MR. NIELSON: Yes, Your Honor, of
4 course. I mean, it's -- it's true under the
5 law, but it's also just true as a matter of
6 personal jurisdiction. Anybody can get out of
7 any jurisdiction that they want to.

8 JUSTICE KAVANAUGH: I just meant under
9 the law.

10 MR. NIELSON: Correct, yes, under the
11 law, yes, Your Honor.

12 CHIEF JUSTICE ROBERTS: How does that
13 work, if you're talking about Facebook? I mean,
14 if somebody e-mailed and all that. If they send
15 something into Texas, are they doing business in
16 Texas?

17 MR. NIELSON: No, Your Honor, although
18 that would be a fun jurisdiction case. The
19 answer as I understand it is you have to
20 personally avail yourself of the forum.

21 So merely because somebody can look at
22 your website, if you're not having some
23 purposeful direction towards the forum, that's
24 generally not sufficient.

25 CHIEF JUSTICE ROBERTS: Well, no,

1 these -- it's a worldwide sort of thing and
2 people are going to be sending stuff left and
3 right and you know that as the -- as the
4 company. I'm not sure -- I don't see how they
5 can wall off Texas from the activities of the
6 social media platform.

7 MR. NIELSON: Two answers. One, they
8 can. They have the technological abilities.
9 It's called geofencing, which they can carve
10 off. I mean, if they wanted to, they can
11 probably carve off this building itself. They
12 have the ability all the way down to that
13 granular level.

14 But, again, more than that, it isn't
15 just it shows up there. If you want to have an
16 account with Facebook or Twitter or any of the
17 others, like, there is a contractual
18 relationship between the two.

19 So they have customers that are in
20 these places. And people say, well, they don't
21 have any customers because they're not charging
22 any money. Well, we know that if they're not
23 charging any money, like, you're the -- you're
24 the product.

25 So they're taking your data and

1 they're selling it to the advertisers, which is
2 why it's so important that we recognize that if
3 this algorithm is protected by the Constitution,
4 then they can take that data and sell it to
5 people and have highly targeted ads based on
6 socioeconomic characteristics.

7 The New York brief explains that on
8 page 12, which I think is important and doesn't
9 -- shouldn't get lost in this. They picked,
10 again, the most vile examples, which are the
11 fanciful things we don't do in a facial posture,
12 and they try to say, well, that means the whole
13 law should fail. There's a whole lot of
14 perfectly fine applications that the Court needs
15 to remember and not lose site of here.

16 JUSTICE KAVANAUGH: What -- what about
17 a terrorist's speech? How is that handled?

18 MR. NIELSON: Yeah. So a few ways.
19 The first response that I would have to that is
20 the provision of the statute that they ignore,
21 which is no user has to receive anything they
22 don't want.

23 JUSTICE KAVANAUGH: Right. That still
24 allows --

25 MR. NIELSON: Sure. Okay.

1 JUSTICE KAVANAUGH: -- the
2 communication of it. So that's not --

3 MR. NIELSON: All right. Let's go
4 through that there. So now we're -- now we're
5 -- most of the universe is gone, but the next
6 level of this, under Texas law, if it's illegal,
7 they don't have to do that either. So I'm
8 assuming that a lot of the terrorism is going to
9 be, you know, like we're inciting you come join
10 Hamas or something like that.

11 JUSTICE KAVANAUGH: No, no, no, no,
12 no, no, no. Just the pro-Al-Qaeda kind of
13 messages that were common --

14 MR. NIELSON: Okay.

15 JUSTICE KAVANAUGH: -- pre-9/11,
16 post-9/11, not necessarily incitement but
17 advocating.

18 MR. NIELSON: Okay. Sure.

19 JUSTICE KAVANAUGH: Yeah.

20 MR. NIELSON: So we put aside the two
21 -- first two --

22 JUSTICE KAVANAUGH: Yeah.

23 MR. NIELSON: -- levels here. Third,
24 they're allowed under the statute to pick any
25 categories they want. So if they want to keep

1 the category for which this speech falls in,
2 that's their choice. If they want to cut that
3 category out, they're free to do so. They just
4 can't do so on a viewpoint basis.

5 And At the end of the day --

6 JUSTICE KAVANAUGH: So when -- that
7 last clause, they can't do it on a viewpoint
8 basis, how does that work with terrorist speech?

9 MR. NIELSON: Sure. So it's hard to
10 say with terrorist speech because you'd have to
11 pick the category, but assume that it is, you
12 know, Al-Qaeda. You can't -- you could -- you
13 can't very well say you can have the, you know,
14 anti-Al-Qaeda but not the pro-Al-Qaeda. If you
15 just want to say no one's talking about Al Qaeda
16 here, they can turn that off.

17 And then the last point, this is at
18 the very end of the game, so you've gone through
19 all of those things, all you have left are
20 voluntary people wanting to talk to each other.
21 And, I mean, people say horrible things on the
22 telephone, and that's -- and I don't think we've
23 ever thought, well, you know what, we're going
24 to turn -- we're going to turn that off because
25 we don't want the telephone providers to be able

1 to say -- have that sort of right to -- to
2 censor.

3 If I may, I mean, with some hesitance,
4 I want to talk about Orwell a little bit, and I
5 say that with some hesitance. But my reaction
6 coming to this case was very similar to yours.
7 I looked at this and I'm like: Wait a minute.
8 These are companies. They have their own
9 rights. We don't generally think of censorship
10 as something from the -- from private people.
11 That's the government.

12 Here's how I came around on this.
13 Maybe it'll persuade you. Maybe it won't. I
14 came around on this to say this is something
15 further up the food chain than that ordinary
16 level of political discourse. This is just the
17 type of infrastructure necessary to have any
18 kind of discourse at all. That's why I keep
19 going back to the telegraph.

20 This isn't, you know, the -- the level
21 of discourse where they're making the content
22 decisions that we make our decisions based on.
23 This is the infrastructure that we need to have
24 any sort of discourse at all.

25 So, if we say we want to have that

1 type of infrastructure not have, you know,
2 censorship on it, that would mean we would have
3 to have a rapid -- a massively increased federal
4 government because it would have to control all
5 the infrastructure. And then we would have,
6 okay, now you can't discriminate based on this
7 kind of infrastructure of how things work.

8 That's not -- I mean, that is Orwell,
9 right? So, for me, the answer is, for these
10 kind of things like telephones or telegraphs or
11 voluntary communications on the next big
12 telephone/telegraph machine, those kind of
13 private communications have to be able to exist
14 somewhere. You know, the expression like, you
15 know, sir, this is a Wendy's. There has to be
16 some sort of way where we can allow people to
17 communicate --

18 JUSTICE JACKSON: And is that just
19 because of the -- the modern public square? I
20 mean, Mr. Clement has said many, many, many
21 times that there's a distinction between public
22 and private and that that's sort of driving his
23 analysis as to when and under what circumstances
24 this kind of regulation can be done.

25 And are you just rejecting that

1 because you're suggesting that they merge in
2 this situation given the nature of the
3 communications?

4 MR. NIELSON: I am not doing that.

5 JUSTICE JACKSON: Okay.

6 MR. NIELSON: And that's, again -- you
7 know, I'll try again to be artful. These are
8 complicated concepts. But I think about the
9 common carrier as a really useful tool for this
10 Court because we know that there's hard lines to
11 draw. It's really hard to tell the difference
12 between FAIR and Miami Herald, like, in the
13 application, especially when you kind of get
14 down to the granular level. It's really kind of
15 hard to tell.

16 I think it would be helpful if the
17 Court had a compass that could kind of, like,
18 give us some direction of where to draw those
19 lines. And common law, common carriage is that
20 compass.

21 JUSTICE JACKSON: But are you
22 suggesting that a common carrier, as the SG
23 pointed out, could never have First Amendment
24 protected activity? I mean, that's why I keep
25 going back to doesn't this have to be not at the

1 level of entity but at the level of sort of what
2 exactly are they doing in a particular
3 circumstance? Because you just seem to say,
4 well, these are common carriers, so everything
5 they do is conduct and, therefore, we can
6 regulate it. And I don't know that that's the
7 way we've ever thought about this.

8 MR. NIELSON: Well, it is how the
9 Court thought about it with telegraphs, which I
10 think is a useful way of thinking about it. I
11 mean, my friend in the government says, well,
12 you know, they're just transmitting speech. But
13 that's totally question-begging because they
14 have the technological ability not just to do
15 that.

16 The reason that cellphones don't,
17 like, screen your calls or telegraphs didn't
18 like --

19 JUSTICE GORSUCH: Well, Mr. Nielson,
20 I'm sorry to interrupt --

21 MR. NIELSON: Oh, sorry.

22 JUSTICE GORSUCH: -- but I -- I -- I
23 think you'd agree with Justice Jackson, though,
24 that there might be some speech that these
25 carriers, even as a common carrier, would be

1 their own.

2 MR. NIELSON: A hundred percent, yes,
3 Your Honor.

4 JUSTICE GORSUCH: And -- and you do
5 have to take that function by function.

6 MR. NIELSON: Yes, and that's the
7 other part of this law, which I think is so
8 important is -- to recognize is we don't say one
9 word about what they can say.

10 So I'll kind of disaggregate the
11 functions of what's going on here. They have
12 the one function, which is they are creating a
13 message. We do nothing about that. They can
14 say whatever they want about specific posts or
15 anything, and that's fine.

16 But there's a separate thing that they
17 do, which is facilitate conversations between
18 two people, which is like a phone.

19 JUSTICE GORSUCH: I understand that.
20 Now one of the things that we've sometimes
21 looked at in the past, this Court, I mean, in
22 the common carrier world is market power.

23 MR. NIELSON: Yes, Your Honor.

24 JUSTICE GORSUCH: And how do you
25 analyze that here? On the one hand, there are

1 network effects that one would take account of
2 in any analysis of -- of market power, and that
3 might -- might help you. On the other hand,
4 this is a bit unlike a telegraph in the sense
5 that there might only be one right-of-way to run
6 the wires, and there might be serious practical
7 barriers for more than one set of wires.

8 Here, one can start a new platform at
9 least in theory anytime.

10 MR. NIELSON: Yeah. So I guess --

11 JUSTICE GORSUCH: Fewer barriers to
12 entry but market effects.

13 MR. NIELSON: Sure. So the first
14 answer is, if we are not talking about speech,
15 if we're just in the world of conduct, then
16 we're not talking about market power at all.
17 And we know that because cellphones are
18 intensely competitive markets and yet they're
19 still all common carriers. But let's move that
20 aside.

21 Now we're saying that there's some
22 sort of, you know, reason to focus on market
23 power. It's true. This is not like the market
24 power of there's just one bridge. But, as an
25 economic matter, there's really no difference.

1 And I know this -- here's, like, a simple kind
2 of a way to look at it: Twitter has its -- its
3 -- its platform. There's a lot of competitors
4 for Twitter, would-be competitors, including
5 Threads for Meta, which is backed by, like, one
6 of the largest companies in the world. They
7 invested massive amounts of money to try to
8 break up the Twitter monopoly, and they failed
9 miserably. I mean --

10 JUSTICE GORSUCH: So what do we do
11 about -- I mean, there's some legislative
12 findings here about market power. What do we --
13 what deference do we owe those, if any?

14 MR. NIELSON: I would think
15 considerable deference, Your Honor. This is a
16 sovereign state. We don't usually treat states
17 like the FTC where we subject it to, you know,
18 arbitrary and capricious hard-look review. The
19 state is entitled to make determinations as a
20 matter of law as to how things are.

21 And, obviously, at some point, it
22 might be so far afield, but some -- I sure hope
23 the states get, you know, some deference on such
24 important questions from the this Court.

25 CHIEF JUSTICE ROBERTS: This may --

1 JUSTICE BARRETT: Mr. Nielson, can I
2 just -- oh, sorry. Go ahead, Chief.

3 CHIEF JUSTICE ROBERTS: This may be
4 the same question that Justice Gorsuch was
5 asking, but does the nature of the economy at
6 issue matter to us? I mean, the social media
7 platforms, the Internet, all of that stuff, an
8 incredibly dynamic market. You know, the
9 government maybe not so much.

10 And -- and it's -- it's -- and yet
11 it's -- it's sort of an inflection point to say
12 that the government has the authority, by
13 categorizing the members -- the participants in
14 this dynamic market as common carriers, to take
15 over extensive regulation of them, not with
16 respect to communication, but all sorts of
17 things.

18 I mean, when you're talking about
19 railroads or telegraphs, it's not just moving,
20 transportation, it's what the railroads look
21 like, what the safety things they have to have,
22 a whole range of things, that, you know, in the
23 wild west economy surrounding the social media
24 platforms and the Internet may be totally inapt.

25 Now, you know, I don't know if it

1 comes at a time when you -- you -- you need to
2 make that transition or not, but that is a very
3 big step when it comes to the extent of
4 government regulation.

5 MR. NIELSON: I -- I certainly think
6 that's fair. My reaction -- my response is
7 going to be this is a facial pre-enforcement
8 injunction. We should at least be able to make
9 our showing on the facts. We're quite confident
10 that we would be able to show not just market
11 power but durable, extensive market power here.

12 I -- I -- I actually don't think it
13 would be even all that difficult to make that
14 showing, so to the extent that market power is a
15 requirement, I think that they haven't shown
16 that they're likely to -- they're likely to
17 prevail on the merits as to that, which is
18 another reason why a facial injunction is just
19 simply inappropriate.

20 Bring an as-applied case and we're
21 happy to litigate that. It's really hard to,
22 what's facially, they can pick a few examples,
23 and then say the whole thing fails.

24 JUSTICE BARRETT: Mr. Nielson, what
25 besides market power -- I want to give you a

1 chance to elaborate on your definition of common
2 carrier. I mean, you've said conduct, market
3 power, what else?

4 MR. NIELSON: Sure. So the main
5 requirement of common carrier, this is where
6 common carriage and public accommodation are if
7 not, you know, cousins, maybe twins, is it has
8 to be open to the public, which means that it is
9 not a private associational group or something
10 like that.

11 You hold yourself out open to the
12 public with non-differentiated contracts. You
13 have this as a contract with everybody. So
14 that's the very first one.

15 The second is it has to be the type of
16 industry that has traditionally been regulated
17 as such. So, for public accommodation, that's
18 your inns and your restaurants. For common
19 carriage, that's where you're talking about
20 things like bridges and -- and
21 telecommunications.

22 JUSTICE BARRETT: But then you get
23 into the problem of having to draw the analogy,
24 right? I mean, the Chief just called the
25 Internet kind of like the wild west of the

1 Internet and the Internet looks a lot different.
2 Even each of these platforms has different
3 functionalities within it.

4 So, you know, when you extend common
5 -- when you -- when you call -- you've got grist
6 mills and then railroads and cable companies.

7 MR. NIELSON: Mm-hmm.

8 JUSTICE BARRETT: Each time you
9 encounter something new that might qualify as a
10 common carrier, you have to make a decision does
11 it -- does it fit the bill or not.

12 MR. NIELSON: Sure. So I guess I can
13 keep going further. That's why some courts have
14 said, well, maybe there's additional
15 requirements that we can put on common carriage.
16 One is market power, which is, not everybody
17 says, I don't know how that works with
18 cellphones, but they said, well, you need market
19 power, and the other was it has to be somehow
20 invested with a public interest.

21 And, here, under that, we know that if
22 it's state action to block somebody from your
23 Twitter account, how can that not be infected
24 with a public interest?

25 JUSTICE BARRETT: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Thomas?

3 Justice Alito?

4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: I have a problem
6 with laws like this that are so broad that they
7 stifle speech just on their face, meaning I
8 think that's what the government's been trying
9 to say.

10 If you have a particular type of
11 speech that you want to protect against or -- or
12 promote, it would be one thing to have that kind
13 of law, but we have a company here, Discourse,
14 who's also a direct messaging app.

15 And there's no question that your law
16 covers them, but they tell us that their whole
17 business model is to promote themselves to a
18 particular message and groups of messages. So
19 they're not doing it indiscriminately. You're
20 basically saying to them, if they're out there
21 and they're a common carrier, they can't have
22 this -- this kind of business model.

23 MR. NIELSON: I mean, two responses if
24 I may, Your Honor.

25 The first is, as to the particular

1 company, we're only talking about the three
2 largest -- maybe more depending on who falls
3 within the 50 million -- the largest
4 telecommunications companies on earth. We're
5 not talking everybody else.

6 JUSTICE SOTOMAYOR: Oh, so that -- so
7 you -- they -- okay.

8 MR. NIELSON: So -- but, as to the
9 second point --

10 JUSTICE SOTOMAYOR: You're agreeing
11 with them that basically --

12 MR. NIELSON: Yeah.

13 JUSTICE SOTOMAYOR: -- this law is
14 aimed towards them?

15 MR. NIELSON: To -- to -- yes, to the
16 largest. We've never disputed that. But, even
17 if you agree with all of that, I -- I -- I
18 disagree with you, but I understand that there's
19 still applications of this law that should be
20 allowed to go into effect.

21 I don't see how they can say that they
22 can kick somebody off for off-platform speech of
23 their grandmother. That can't be. Or because
24 they don't like it where you live in Texas, you
25 know, you live in El Paso and not Dallas, so

1 you're not as valuable to the advertisers, so
2 we're going to kick you off. Surely, that can't
3 be okay.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?
5 Justice Kavanaugh?

6 JUSTICE KAVANAUGH: Two very quick
7 ones. On the deference to the legislative
8 findings point, my memory is that there was a
9 trial in Turner Broadcasting.

10 MR. NIELSON: Yes, Your Honor, that's
11 Turner II. So, you know --

12 JUSTICE KAVANAUGH: That's a --

13 MR. NIELSON: -- maybe there will be a
14 Paxton II. I'm not sure how that plays out.

15 JUSTICE KAVANAUGH: Right. But there
16 wasn't just -- there wasn't just Congress said
17 this, that's good to go. There was a trial
18 about that, right?

19 MR. NIELSON: Sure, Your Honor.

20 JUSTICE KAVANAUGH: Yeah.

21 MR. NIELSON: And like I said, we're
22 happy to -- to go to trial, but the Court --

23 JUSTICE KAVANAUGH: That's all I
24 wanted to ask there.

25 MR. NIELSON: Of course. Of course.

1 JUSTICE KAVANAUGH: And then, on -- on
2 common carrier, if a company says we're not a
3 common carrier, we don't want to be a common
4 carrier, we're carrying a lot, but we're not a
5 common carrier, can the state make them into a
6 common carrier?

7 MR. NIELSON: The state -- that's a
8 great question, and that was the first question
9 I had when I came to this case.

10 The answer is no, if you are not a
11 common carrier, you can't suddenly become a
12 common carrier. That's why I think it's
13 important to think of it as a compass to kind of
14 tell you where the line is.

15 But I would urge the Court, if you're
16 interested, again, we've heard, you know, read
17 Professor Volokh's article.

18 One thing that really struck me as
19 strange was, well, wait a minute, they have
20 terms of service, so how can they be a common
21 carrier? Because if you have terms of service
22 saying you can't do this.

23 And this Court addressed that very
24 problem. The case -- the case that he cited is
25 New York Central v. Lockwood from 1873 where the

1 Court said you can't just get out of the duties
2 of common carriage by contract. If you're a
3 common carrier, you're a common carrier unless
4 you stop opening yourself up to the public.

5 JUSTICE KAVANAUGH: Seems a little
6 circular, but I'll end there. Yeah.

7 MR. NIELSON: Sure.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 JUSTICE BARRETT: I just want to get a
11 clarification. So you said that Facebook could
12 geo-fence and just pull out of Texas? Was that
13 correct?

14 MR. NIELSON: Of course, of course,
15 Your Honor. Yeah.

16 JUSTICE BARRETT: Okay. Because I was
17 just confused. Mr. Clement was pointing out,
18 you know, that according to the provisions of
19 the law, you couldn't. And I'm looking at
20 143A.002.

21 MR. NIELSON: Mm-hmm.

22 JUSTICE BARRETT: And it says, you
23 know, that you can't censor users' expression,
24 ability to receive information, et cetera, based
25 on a user's geographic location in this state or

1 any part of the state.

2 So you don't understand that to say,
3 well, based on your location in Texas, we're not
4 going to let you post content?

5 MR. NIELSON: Your Honor, this is one
6 of the prohibitions of the law, that they can't
7 -- let me state it a different way if I -- if I
8 may.

9 There's a provision of the law which
10 is the jurisdictional hook that says who is
11 subject to this law at all. If you choose to do
12 business in Texas, then this provision kicks in,
13 and you can't discriminate against people after
14 you've chosen to do business in Texas based on
15 the status that they're in Texas.

16 But, if you don't want to do business
17 in Texas at all, that's a separate provision,
18 and you can get out of Texas. This is the
19 prohibition on what you can't do. If you choose
20 to do business in Texas, you can't darn well
21 discriminate against somebody because they're in
22 El Paso.

23 JUSTICE BARRETT: And doing business
24 in Texas is -- is what, just allowing Facebook
25 users to sign up in Texas, or is it, you know,

1 Facebook accepting ad money from Texas
2 corporations?

3 MR. NIELSON: That question has not
4 been resolved by any of the Texas courts because
5 none of them have been. But, as I read it, it
6 is you have to have, you know, customers in
7 Texas. You've entered into contractual
8 relationships with Texans.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

12 JUSTICE JACKSON: So Justice Barrett
13 had exactly my same thought, and I just want to
14 clarify. So this doesn't speak in your view to
15 a business decision not to offer services in
16 Texas because, for example, their requirements
17 are too burdensome.

18 Instead, this is you're offering
19 business in Texas and everywhere else, but you
20 are prohibiting them from discriminating against
21 people on the basis of their geography, meaning
22 they're in Texas?

23 MR. NIELSON: Yes, Your Honor.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Rebuttal, Mr. Clement?

3 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

4 ON BEHALF OF THE PETITIONERS

5 MR. CLEMENT: Thank you, Mr. Chief

6 Justice. Just a few points in rebuttal.

7 First of all, as to the common
8 carrier. The two classic elements of common
9 carrier status are missing here. One is that
10 you just transmitted or carried messages from
11 point A to point B. That's not what's going on
12 here.

13 We use the word in our -- our brief
14 and from this Court's cases "disseminate."
15 "Disseminate" means to spread broadly. That
16 means you're in the expressive enterprise
17 business. There's zero tradition of treating
18 entities in the expressive enterprise business
19 as common carriers.

20 And then the -- the other factor is
21 there really is like an essential facility. You
22 know, the telephone wires used to go, the copper
23 wire, the last mile to every house in America.
24 So, if you were kicked off Ma Bell, you were
25 really out of luck. This is the opposite

1 situation in the Internet where you have lots of
2 other choices.

3 This is just not a common carrier.
4 Not that that really is talismanic under the
5 First Amendment anyways. Justice Thomas made
6 that point back in Denver carrier case and he
7 had it exactly right there.

8 Now, second, public accommodation. I
9 wouldn't be worried about any other
10 accommodation law -- public accommodation law.
11 No other public accommodation law prohibits
12 discrimination on the basis of viewpoint and
13 applies exclusively to speakers.

14 That is a First Amendment red flag
15 that you're trying to limit speakers' ability to
16 discriminate on the basis of viewpoint. That's
17 just a frontal assault on editorial discretion.

18 Every other public accommodation law
19 that I'm aware of works differently.

20 Third point, protecting kids. If
21 you're at all concerned about protecting kids on
22 the Internet, that should be a vote in our favor
23 in this case, because if you can't do viewpoint
24 discrimination, that disables us from doing many
25 of the things that our companies try to do to

1 protect use online. I mean, the idea that,
2 okay, we're going to have to choose between
3 having -- if we have suicide prevention, we have
4 to have suicide promotion to avoid viewpoint
5 discrimination, that should be a non-starter.

6 And protecting kids is important even
7 as to the disclosure provision. There is a
8 record on this case at page 161 of the Joint
9 Appendix, a witness from Stop Child Predators
10 testified and said these disclosure provisions
11 give a roadmap to predators to figure out why
12 their messages aren't getting to children, so
13 they can figure out why they got bounced and
14 they can try again and sort of work their way
15 around.

16 So the last point, and I think this is
17 an important one to end on, this idea that
18 somehow we're in -- you know, behind the eight
19 ball because we brought a facial challenge,
20 there is a -- a proud tradition of facial
21 challenges to vindicate First Amendment rights
22 in this country. That's how many of these cases
23 have been brought. There's an equally proud
24 tradition of getting a preliminary injunction
25 against a law that is chilling speech.

1 And as the -- the General pointed out,
2 I mean, the party presentation rules have to be
3 foundational here. If we had gone into the
4 district court and said this is unconstitutional
5 on its face, and they said no, it's not because
6 of Gmail, we could have had a fair debate about
7 that. We could have modified our complaint if
8 necessary. That's a difficult issue. As I
9 said, the only court that I've seen that deals
10 with it directly said Gmail is not a common
11 carrier. But, in all events, we could have
12 litigated all of that. But the Plaintiff's
13 burden is not to think of any theory the
14 government could come up on appeal and then
15 foreclose it in the district court.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel, all counsel.

19 The case is submitted.

20 (Whereupon, at 1:49 p.m., the case was
21 submitted.)

22

23

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