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|----|------------------------------------|-------|
| 1 | C O N T E N T S | |
| 2 | ORAL ARGUMENT OF: | PAGE: |
| 3 | PAUL D. CLEMENT, ESQ. | |
| 4 | On behalf of the Petitioners | 4 |
| 5 | ORAL ARGUMENT OF: | |
| 6 | GEN. ELIZABETH B. PRELOGAR, ESQ. | |
| 7 | For the United States, as amicus | |
| 8 | curiae, supporting the Petitioners | 37 |
| 9 | ORAL ARGUMENT OF: | |
| 10 | AARON L. NIELSON, ESQ. | |
| 11 | On behalf of the Respondent | 48 |
| 12 | REBUTTAL ARGUMENT OF: | |
| 13 | PAUL D. CLEMENT, ESQ. | |
| 14 | On behalf of the Petitioners | 89 |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

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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 -- 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 we essentially have to do business in Texas, and
8 we can't discriminate against users based on
9 their 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 -- in order to provide anything like
16 the service that we want to, while not engaging
17 in viewpoint discrimination, we'd basically have
18 to 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 -- I mean, I'm happy to talk more
11 about the common carrier issue because I do
12 think it's a central part of their defense.
13 There was an allusion earlier about somehow
14 Section 230 treats -- treats my clients, the
15 websites, as common carriers. To the contrary,
16 Congress specifically -- and this is 47 U.S.C.
17 223 subsection (6), which we cite in our
18 briefs -- it specifically is a congressional
19 provision in the same Act of Congress that says
20 that 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: Does that, though,
4 only with respect -- all that's true, and I -- I
5 acknowledge all that, but it also says that's
6 true only if it's not your speech. And that
7 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 -- and I -- not
14 yours -- 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 -- I -- I didn't mean to suggest
23 otherwise. But there is some editorial speech,
24 your term, going 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 the -- 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 is not something that causes you to lose your
12 230 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's -- you know, this
24 Court wrestled with these issues. They're hard
25 issues. And I -- I certainly applaud the

1 instinct that you shouldn't resolve them here,
2 but I don't think just by recognizing that my
3 clients are engaged in editorial discretion when
4 they 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 -- I just
17 wanted to raise with you the question I raised
18 with the -- with the Solicitor General, who
19 offered a 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, and it's true of some of my clients and
10 some more than others, and I think all of those
11 terms of service, as the General said, go on to
12 say, and there are certain things, though, that
13 are out 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 Daily Wire are killing it on Facebook. And that
24 shows you that, you know, we -- we do want a
25 broad discussion, but there's some stuff that is

1 just, 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
10 of 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 -- I think it's a natural consequence of
2 your -- 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, as, 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 course -- 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 -- can I ask you
24 about a distinction between two possible kinds
25 of 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 -- to say that
11 they're a class of people we're not even going
12 to 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 -- it informs essentially all
23 of 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 -- 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: -- oh -- I -- I just
23 wanted to follow up on that because it seems to
24 me that Justice Kagan's question kind of gets to
25 the 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 that the implication of your answer to
7 Justice Kagan is that you could tell the
8 anti-Semite we're not open for business to you,
9 right?

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

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

21 JUSTICE BARRETT: Religion then, like
22 --

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

1 I want to -- I want to preserve --

2 (Laughter.)

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

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

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

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

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

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

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

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

1 like 10 percent of the wedding announcements,
2 you have to tell me. Even if you automize that
3 and sort of said, you know -- you know, well,
4 one, if, you know, you weren't rich enough; two,
5 if you weren't connected enough in New York --
6 social circles; and -- and three, we just didn't
7 like the way you looked. Even if you followed
8 that, it would --

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

18 MR. CLEMENT: We -- we did. There's a
19 --

20 JUSTICE ALITO: -- and why that would
21 be too much for these -- for these megaliths?

22 MR. CLEMENT: I mean, we -- we -- we
23 did. There's more of a record in the Texas case
24 than in the Florida case. Our -- you know, the
25 -- the witness for YouTube in their declaration

1 specifically said this would be a hundred times
2 more burdensome than their current process.

3 And so there is a record on this. It
4 is incredibly burdensome.

5 CHIEF JUSTICE ROBERTS: Justice
6 Thomas, anything further?

7 Justice Alito?

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

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

23 And even in Taamneh, the briefs I
24 think made quite clear that, you know, although
25 that at a certain point some of the algorithms

1 were neutral as between rice pilaf and
2 terrorism, there were other efforts to
3 affirmatively get terrorist stuff off of those
4 sites. And so --

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

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

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

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

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

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

25 JUSTICE ALITO: Well, I don't know how

1 you could be -- how a -- a publisher could be
2 liable for -- well, I -- I take that back for
3 fiction, but, certainly, if it was -- I -- I
4 mean, if you -- back in the day when some
5 written material was considered to be obscene,
6 you put together an anthology that included
7 obscene material, you could be sued.

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

12 MR. CLEMENT: I agree, I mean --

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

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

1 have 230.

2 JUSTICE ALITO: All right. I don't
3 want to -- I -- I don't want to belabor the
4 point. Let me just say something about the
5 analogies that both sides draw to the issues
6 that were presented in prior cases.

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

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

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

1 law.

2 MR. CLEMENT: Well, Justice Alito, let
3 me offer two thoughts. One, this isn't the
4 first time you're wrestling with the Internet.
5 You wrestled with it in Reno. You wrestled with
6 it last term in 303 Creative. And I think the
7 gist of those cases is this is more like the
8 newspaper or the parade organizer than it is
9 like a common carrier.

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

16 So I know you know this, but in
17 Tornillo, it -- you know, there was all this
18 language about it being a monopolist, and that
19 was in the context of a local political election
20 where, if you couldn't get into the Miami
21 Herald, like, where else were you going to go?
22 And yet this Court said that didn't matter. And
23 the -- the -- also, in Tornillo, this Court
24 said, yes, space constraints, there are some,
25 but our decision doesn't turn on that. And

1 then, in Hurley, there's a lot of language in
2 the -- in the Court's opinion that says, you
3 know, this is not like much of a message and
4 they let some people show up even if they get
5 there, like, the day of, and the only thing
6 they're doing is, like, excluding this group.

7 But, of course, the exclusion was the
8 message that they were sending, and it's the
9 message the state was trying to prohibit. And
10 that's kind of the same thing here, which is --

11 JUSTICE ALITO: I mean, if your -- if
12 -- if -- let's say YouTube were a newspaper, how
13 much would it weigh?

14 (Laughter.)

15 MR. CLEMENT: Well, I mean, it would
16 -- it would -- it would weigh an enormous
17 amount, which is why, in order to make it
18 useful, there's actually more editorial
19 discretion going on in these cases than any of
20 -- other case that you've had before you,
21 because it's -- you know, this -- people tend to
22 focus on the -- on the users that get knocked
23 off entirely and end up on the cutting room
24 floor, but both these statutes also regulate the
25 way that these social websites -- they -- they

1 sort of get you down to something that's
2 actually usable to an individual user.

3 And, in fact, if you tried to treat
4 these entities like a true common carrier, so
5 first in, first out, just order of, you'd open
6 up one of these websites and it would be
7 gobbledy-gook. Half the stuff wouldn't even be
8 in a language you understood. And even if you
9 controlled for that, you'd get all this garbage
10 you didn't want.

11 JUSTICE ALITO: All right. Thank you.

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

17 MR. CLEMENT: It did.

18 JUSTICE SOTOMAYOR: And it was the
19 circuit court who didn't?

20 MR. CLEMENT: Yeah.

21 JUSTICE SOTOMAYOR: So it was a
22 district court who looked at the amount of
23 material you submitted. And I know your
24 declaration, YouTube said it would be a burden,
25 a hundred times more than it does now.

1 I -- I don't know what the
2 quantification of that -- whether that was
3 quantified or not. Was it? What a hundred
4 percent more, a hundred percent --

5 MR. CLEMENT: A hundred percent --

6 JUSTICE SOTOMAYOR: -- more costly, a
7 hundred percent more what?

8 MR. CLEMENT: A hundred percent more
9 of its current effort, its current sort of, you
10 know, efforts --

11 JUSTICE SOTOMAYOR: Yeah.

12 MR. CLEMENT: -- that are dedicated to
13 --

14 JUSTICE SOTOMAYOR: But we -- we still
15 don't know what the cost of that is and what --

16 MR. CLEMENT: Yeah. I mean --

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

24 What do we do with that dispute?

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

1 JUSTICE SOTOMAYOR: Because it is a
2 facial challenge.

3 MR. CLEMENT: It -- it -- it is a
4 facial challenge. It is a preliminary
5 injunction. We've obviously been over some of
6 that. There -- this -- here, there was -- you
7 know, there wasn't just declarations. There
8 were depositions taken. There was a record that
9 was put together on all of this. And Texas was
10 taking a slightly different view of what the
11 burdens of the -- of Section 2 were there.

12 And so I think, on -- on that, if you
13 just look at the record that was before the
14 district court, you should affirm the district
15 court's preliminary injunction.

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

22 And what -- what they're basically
23 saying is, you know, you could change your
24 editorial policies a little bit to make it
25 easier to comply with this disclosure

1 obligation. And that seems just a lot easier.

2 JUSTICE SOTOMAYOR: That begs the
3 question, right?

4 MR. CLEMENT: Yeah. Exactly.

5 JUSTICE SOTOMAYOR: Because they're
6 affecting -- okay.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?
8 Justice Gorsuch?
9 Justice Kavanaugh?

10 JUSTICE JACKSON: I just have --

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 JUSTICE JACKSON: -- I just have a
14 quick question.

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

1 looking at this at a -- at a meta level.

2 So what caught my attention was your
3 response to the Chief Justice when you suggested
4 that your client couldn't withdraw from the
5 State of Texas because you read the provision
6 related to censorship and geography as ensuring
7 that you don't do so. I had not read that
8 provision in that way, so can you say more about
9 why that's your interpretation?

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

1 We can't do that in response to this
2 law. And I think the legislators in Texas were
3 able to tell their constituents, don't worry,
4 you know, if you like your website, you can keep
5 it. We're not going to threaten -- they
6 can't -- they can't pull out of here based on
7 the way that we're regulating them.

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

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

23 And so I guess I don't necessarily see
24 that in the same way. I mean, you can't just
25 automatically do that, I guess. I don't know.

1 MR. CLEMENT: It -- it -- it -- it
2 seems to me quite clear that it's designed
3 essentially as a poison pill or somebody
4 described it as the Hotel California provision,
5 that you can -- you can -- you can -- you can't
6 leave Texas even if you want to try to do that
7 as a way of showing that this is an
8 impermissible way of regulating our expressive
9 activities.

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

21 I should mention just for the sake of
22 completeness that, you know, in the lower
23 courts, not part of the preliminary injunction,
24 there are dormant commerce clause challenges to
25 these provisions and the way that this is just

1 kind of one state trying to regulate everybody
2 and so that's part of the case that will be
3 there.

4 JUSTICE JACKSON: But it's not here
5 yet?

6 MR. CLEMENT: But it's not here.

7 JUSTICE JACKSON: All right.

8 MR. CLEMENT: All that's here is a
9 preliminary injunction that runs to my clients.
10 So, I mean, you know, this -- this statute has a
11 smaller universe of people, but if there's
12 somebody else out there who, you know, isn't one
13 of my clients, who isn't covered by this
14 preliminary injunction, the statute could take
15 effect as to those people, and the same is true
16 in Florida.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 General Prelogar?

21 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
22 FOR THE UNITED STATES, AS AMICUS CURIAE,
23 SUPPORTING THE PETITIONERS

24 GENERAL PRELOGAR: Mr. Chief Justice,
25 and may it please the Court:

1 I want to pick up with the question
2 that Justice Alito asked in the seriatim round
3 to my friend about the idea that the social
4 media platforms don't perfectly fit into either
5 analogy or paradigm here, and I want to
6 acknowledge the force of that intuition.

7 They obviously operate at a massive
8 scale that goes beyond any particular parade or
9 beyond any particular newspaper. I think the
10 right thing to do with that intuition is to
11 recognize that it's not like you can just exempt
12 them from the First Amendment.

13 They are obviously creating something
14 that's inherently expressive in taking all of
15 this quantity of speech on their websites and
16 curating it and making selectivity decisions and
17 compiling it into a product that users are going
18 to consume.

19 So the First Amendment applies, but I
20 think that those kinds of concerns about how the
21 social media platforms and how they look
22 somewhat different from the other kinds of
23 expressive products this Court has reviewed in
24 prior cases can come in to the question of
25 whether the First Amendment is satisfied with

1 respect to any particular regulation.

2 Now, here, we think it's not satisfied
3 because of the way that Texas has designed this
4 law. I'd urge the Court to rule narrowly. It's
5 not necessary here to try to figure out how the
6 First Amendment applies to new technology in
7 general or to every possible website or the
8 Internet in particular. This law has a very
9 clear defect.

10 What Texas has done is tried to
11 countermand the protected editorial speech
12 decisions of the platform and the only
13 justification it's offered to the courts below
14 is that it wanted to essentially amplify the
15 voice of users on that platform by suppressing
16 the platform's own protected speech. That is a
17 defect that is clear under the First Amendment,
18 and the Court could say only that and resolve
19 this case.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: General, the -- when
22 I asked you about the differential -- the
23 difference in treatment of a private party as
24 opposed to the government engaged in similar
25 conduct, your answer was, of course, that it

1 would -- it would be different, the government
2 would be bound to comply with the First
3 Amendment.

4 What -- there was some discussion in a
5 number of the amicus briefs about instances in
6 which the government and the private party, say,
7 Petitioners or -- Petitioners here, and the
8 government coordinating efforts.

9 How would you respond to that?

10 GENERAL PRELOGAR: So let me respond
11 to that by saying I think the position we're
12 offering here and the position this Court will
13 consider next month in the Murthy case are
14 entirely consistent.

15 We, of course, acknowledge that if the
16 government actually coerces the platforms and
17 takes over their editorial decision-making, then
18 the platforms could be deemed a state actor and
19 that would be subject to First Amendment
20 scrutiny.

21 We vigorously dispute that that has
22 actually happened and the federal government has
23 engaged in that kind of coercive conduct and we
24 further dispute the legal standards that were
25 applied in that case.

1 But there's no inherent tension here.
2 You know, the federal government obviously can
3 act and criticize the social media platforms'
4 content moderation decisions. That's just using
5 the bully pulpit to express views.

6 And if -- if the states disagreed with
7 how the platforms were exercising their content
8 moderation standards, it could have done the
9 same. It could have criticized them, it could
10 have urged them or tried to influence them to
11 adopt separate standards. But, here, what the
12 State did is said, we're going to pass a law
13 that actually takes over their content
14 moderation and dictates that it has to be done
15 in a different way.

16 JUSTICE KAGAN: General, Texas's law
17 even more than Florida's can be understood as an
18 expansion of public accommodations laws. And
19 the United States is often in a position of
20 defending public accommodations laws and
21 insisting that they be vigorously enforced. And
22 how do you see what Texas is trying to do as
23 consistent with that broader stance about public
24 accommodations laws?

25 GENERAL PRELOGAR: Yes. So I want to

1 be very clear and stake out potentially some
2 separate ground from my friend representing the
3 platforms in this case with respect to generally
4 applicable public accommodations laws that
5 protect based on a -- a -- a particular status.

6 We think, of course, those laws are
7 valid on their face and that they serve
8 compelling governmental interests. And so, to
9 the extent that you're looking at how an
10 ordinary public accommodations law operates, the
11 refusal to deal, the refusal to serve, as
12 Justice Barrett said, we think that's a
13 regulation of conduct and that ordinarily there
14 would be no First Amendment problem with the
15 application of that law.

16 Now I acknowledge that it gets more
17 complicated when those laws are applied to a
18 business that is providing an expressive
19 product, and cases like Hurley or 303 Creative
20 show that in certain applications, sometimes the
21 public accommodations law has to give way to
22 First Amendment interests.

23 But I think the -- the Court has drawn
24 a clear line. It has never suggested that the
25 mere refusal to deal or serve based on status,

1 even with respect to an expressive association,
2 would fail under First Amendment scrutiny.

3 Instead, you know, you look at a case
4 like 303 Creative and, there, the concern was
5 about changing the message or a case like
6 Hurley, gay and lesbian individuals could march,
7 you just couldn't change the message by holding
8 up a particular sign. So we recognize that
9 there are going to be some applications where
10 you'd have to conduct that kind of First
11 Amendment analysis. But, if the question, the
12 relevant question, is could you just bar people
13 on the basis of a protected status from creating
14 an account and it's not going to affect your
15 message, they want to, you know, lurk on X and
16 read other people's posts, I think that that
17 kind of law would certainly be valid.

18 I want to briefly address, Justice
19 Gorsuch, the question you asked about the scope
20 of CDA preemption under Section 230. Just to be
21 clear on this one, I -- I want to say there are
22 unresolved issues here. I would warn the Court
23 away from trying to resolve exactly how much
24 conduct CDA 230 protects and exactly how that
25 interacts with the Texas law here.

1 The only point I would make is that,
2 you know, there are -- there are questions about
3 what it means to act in good faith, questions
4 about what it means for the platform to take
5 down content that -- that is otherwise
6 objectionable.

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

12 So I think what the Court could do,
13 not knowing exactly the scope of how that
14 preemption issue might be resolved, is to say
15 whatever exists in that category of speech that
16 Texas is prohibiting, the editorial decisions
17 it's countermanding on the one hand versus what
18 CDA 230 would authorize on the other hand,
19 whether that's a big category or a little
20 category, all of the things in that category
21 constitute protected decisions by the platform
22 that haven't been adequately justified. And I
23 think that's all you need to say about the
24 preemption issue in this case.

25 JUSTICE ALITO: If a legislative body

1 enacts a law requiring viewpoint neutrality in
2 some area and it does so because it has -- it is
3 concerned that people who express a particular
4 viewpoint are suffering discrimination, is that
5 law unconstitutional on the ground that the
6 intent of the legislative body was to benefit a
7 particular group?

8 GENERAL PRELOGAR: No, I don't think
9 that that kind of law would immediately be
10 unconstitutional. And, again, I think, if it's
11 structured like a generally applicable public
12 accommodations law, there might be important or
13 significant governmental interests in being able
14 to protect against that kind of discrimination.

15 CHIEF JUSTICE ROBERTS: Unless there
16 are any further questions?

17 JUSTICE KAGAN: Can I do one more?

18 CHIEF JUSTICE ROBERTS: Sure.

19 JUSTICE KAGAN: Government has spent a
20 lot of time defending net neutrality, so maybe I
21 should have asked you this with respect to
22 Florida's law just given the breadth of that
23 law. And why are Internet service providers, in
24 your view, so different and what if an Internet
25 service provider wanted to make certain content

1 distinctions?

2 GENERAL PRELOGAR: Internet service
3 providers are fundamentally different because
4 they are engaged in transmitting data in order
5 to make websites accessible, and that is not
6 inherently expressive.

7 They're certainly providing the -- the
8 infrastructure, the cable, the fiberoptics, and
9 the service to make sure that you can log in on
10 your home computer and access the Internet writ
11 large, but along the way, they're not compiling
12 that speech into any kind of expressive
13 compilation of their own. So we would put them
14 in the same category as telephone and telegraph
15 companies or UPS, where you could say, sure,
16 they're literally facilitating the transmission
17 of speech, but they're not creating an
18 expressive product that could implicate the
19 First Amendment principles at stake.

20 Now then you might ask, okay, well,
21 what if they want to start discriminating with
22 respect to the service they're providing for
23 particular types of websites? The kind of
24 quintessential example of this is an Internet
25 service provider that decides to slow down

1 service to a streaming site, let's say Netflix,
2 because it wants to direct Internet traffic to
3 some other website of its own choosing, maybe
4 its own streaming service. We think net
5 neutrality could come in there and -- and say
6 you're not allowed to discriminate based on
7 content in that way, but that's because, again,
8 there would be no expressive speech or -- or
9 compilation that you could attribute to the
10 Internet service provider itself.

11 People don't sign up with Comcast or
12 Verizon to give them some kind of limited,
13 curated access to the Internet. They're
14 engaging in service with those companies because
15 they need someone physically to transmit the
16 data so they can get access to the whole
17 Internet.

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

20 CHIEF JUSTICE ROBERTS: Sure.

21 JUSTICE KAVANAUGH: -- said to rule
22 for your position in this case, anything you
23 just said on net neutrality, right?

24 (Laughter.)

25 GENERAL PRELOGAR: You do not have to

1 agree with me, Justice Kavanaugh. I hope
2 someday, if it comes to it, to persuade you.

3 JUSTICE KAVANAUGH: I'm not --

4 GENERAL PRELOGAR: But -- but --

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

7 GENERAL PRELOGAR: -- nothing --

8 JUSTICE KAVANAUGH: Yeah. Yeah.

9 GENERAL PRELOGAR: -- about the
10 Court's decision in this case would at all
11 affect the net neutrality issue. You know, we
12 think that here, the platforms are engaging in
13 expressive activity. That's protected by the
14 First Amendment. And you can leave for another
15 day all of the kind of conduit questions that
16 come up in the net neutrality context.

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Nielson.

21 ORAL ARGUMENT OF AARON L. NIELSON

22 ON BEHALF OF THE RESPONDENT

23 MR. NIELSON: Thank you. It's been a
24 long day. Mr. Chief Justice, and may it please
25 the Court:

1 This is not the first time that new
2 technology has been used to stifle speech.
3 Telegraphs also discriminated based on
4 viewpoint, prompting a national -- a national
5 scandal. Yet, under the platforms' theory,
6 Western Union was just making editorial choices
7 not to transmit pro-union views.

8 Today, millions of Americans don't
9 visit friends or family or even go to work
10 online -- on person. Everybody is online. The
11 modern public square. Yet, if platforms that
12 passively host the speech of billions of people
13 are themselves the speakers and can
14 discriminate, there will be no public square to
15 speak of.

16 We know this because Twitter has
17 admitted that their theory of the First
18 Amendment would allow them to discriminate not
19 just based on what is said on the platform but
20 "on the basis of religion or gender or physical
21 disability."

22 That's not the First Amendment.
23 That's *Lochner* 2.0. And as more than 40 states
24 warned the Court, the implications are gravely
25 serious. For example, as New York explains, if

1 these algorithms are constitutionally protected,
2 platforms may be able to continue selling
3 advertisers the ability to discriminate based on
4 race. Or, as Professor Lawrence Lessig, Zephyr
5 Teachout, and Tim Wu, who do not typically file
6 briefs in support of Texas, cautioned, not just
7 states but Congress may be powerless to address
8 the social media crisis devastating the lives of
9 kids.

10 HB 20 is a modest effort to regulate
11 such power in the context of viewpoint
12 discrimination. Platforms can say anything they
13 want under HB 20 about anything. There's no
14 limit. They can say anything they want. Users
15 can block anything they don't want. There's no
16 limit on that. All that's left is voluntary
17 communications between people who want to speak
18 and people who want to listen.

19 This law is just nowhere near the
20 heartland of the First Amendment. Instead, this
21 is democracy and federalism, not a facial
22 pre-enforcement injunction.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: If you -- if this was
25 so clearly within a common law tradition, as you

1 suggest, why hasn't Congress seen fit to -- to
2 act as Texas has? And it appears Mr. Clement
3 suggests that actually Congress has acted in the
4 opposite direction. Would you comment on that?

5 MR. NIELSON: Yeah. I don't see
6 how -- with all respect to my friend, how their
7 reading of 230 is at all consistent with what
8 Congress said. They have all sorts of kind of
9 policy arguments about how 230 ought to work,
10 but if you actually just read the words of the
11 statute, it doesn't work.

12 So his suggestion that Congress
13 somehow has kicked out Texas or said that that's
14 not how he wants to be I don't think is
15 consistent with the text of the statute. I
16 didn't hear a lot of textual argument coming
17 from Mr. Clement there. So that would be my --
18 my first-line answer.

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

23 CHIEF JUSTICE ROBERTS: Counsel, you
24 began by saying, you know, the platforms, they
25 want to keep out this person and that person on

1 the basis of race or sex, and then you said
2 that's not the First Amendment.

3 Well, the First Amendment doesn't
4 apply to them. The First Amendment restricts
5 what the government can do, and what the
6 government's doing here is saying you must do
7 this, you must carry these people; you've got to
8 explain if you don't. That's not the First
9 Amendment.

10 MR. NIELSON: Well, respectfully, Your
11 Honor, the First Amendment is big and it applies
12 in a lot of different ways. So it's true, for
13 us, like, we're saying because this isn't
14 speech, it's conduct, we can require viewpoint
15 neutrality.

16 But, in other cases, the same
17 companies are saying -- when New York or some
18 other state says, hey, you can't have algorithms
19 that try to hook kids, they say, well, we have a
20 First Amendment right to do that. It's the same
21 First Amendment, the same First Amendment that
22 says -- I mean, if it's all First Amendment,
23 then I guess it's going to be hard for Texas to
24 say you -- you have to be viewpoint-neutral, but
25 it's also going to be hard for California and

1 Illinois or anybody else to say you can't have
2 an algorithm that hooks kids because it's all
3 the same First Amendment.

4 CHIEF JUSTICE ROBERTS: Yeah, I'm sure
5 it's the same for all the other -- the other
6 states. The question is they don't have the
7 obligation to act in the same way that you as
8 the state has the obligation to do.

9 They can discriminate against
10 particular groups that they don't like, whether
11 it's a group that encourages kids to take the
12 Tide POD contest or something else. And you
13 have different obligations.

14 MR. NIELSON: I -- I guess a couple
15 ways I could respond to that, Your Honor. The
16 -- the easiest one I'm going to talk about is,
17 if I may, common carriage. My reaction coming
18 to this case was the same as yours. My reaction
19 was: Well, wait a minute, it's their own
20 platform. You can't censor. Like, they're --
21 they're private.

22 But that's the exact same scenario
23 that came up with the telegraph. The idea the
24 telegraph was dumb pipes is not true. Instead,
25 what the telegraph was, they had the technologic

1 -- technological ability to say that we're not
2 going to let this type of speech through.

3 CHIEF JUSTICE ROBERTS: No, you're
4 absolutely right, but it's kind of begging the
5 question. You're assuming that they are like
6 the telegraph. It seems to me that that's a big
7 part of what the case -- case concerns.

8 And I'm just not sure that -- I mean,
9 the telegraph had a particular compelling type
10 of monopoly. I mean, if you didn't want to use
11 the telegraph that was there, you usually didn't
12 have an alternative choice, or whether you're
13 talking about railroads or other types of common
14 carriers, I'm not sure the same thing applies
15 with respect to social platforms.

16 MR. NIELSON: So I give you my theory
17 for why common carriage is important here. As I
18 look at the cases, and I agree, they're really
19 hard to figure out where conduct starts and
20 speech ends and all of that, and you look at all
21 the various cases this Court has said, some
22 commentators say they can't be reconciled. I'm
23 not sure about that.

24 But I think as a helpful way to think
25 about it is we know that there is a line between

1 speech and conduct, and we know that common
2 carriage has always been on the non-speech side
3 of the line, the conduct side of the line. So,
4 if this falls within the common law tradition of
5 what is common carriage, nobody has ever thought
6 that falls on the speech side of the line. So
7 we -- we can't make them, you know, say
8 something otherwise that they -- that they
9 didn't want to say.

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

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

14 CHIEF JUSTICE ROBERTS: Well, it seems
15 that it turns on whether you're saying who do
16 you want to leave the judgment about who can
17 speak or who can't speak on these platforms, and
18 do you want to leave it with the government,
19 with the state, or do you want to leave it with
20 the platforms, the different various platforms.

21 MR. NIELSON: Well --

22 CHIEF JUSTICE ROBERTS: The First
23 Amendment has a thumb on the scale when that
24 question is asked.

25 MR. NIELSON: It does, and that's why

1 it's important, I said, to go back to look at
2 the history on this, because, at some point, the
3 First Amendment has to end, or everything is
4 covered by the First Amendment.

5 This Court has said that the way that
6 we tell the difference is whether it's
7 inherently expressive. And the Court has said
8 what they mean by "inherently expressive." They
9 talked about in, you know, Miami Herald, you're
10 not a passive conduit. We talked about in
11 Hurley whether you're intimately connected.

12 Well, this Court last year had a case
13 in Taamneh where they talked about what these
14 platforms do, and they say that they are
15 passively connected to the speech on their
16 platforms and that they're agnostic about the
17 content. It's just one big algorithm that's
18 matching things together.

19 And I think that that's important.
20 But I also want to stress, if I may, again, this
21 is a facial posture. And if you look at the
22 breadth of our statute, there is the talk about,
23 you know, whether you have to host somebody's
24 speech. There's also about you just want to
25 read Facebook. That is one of the provisions of

1 our statute.

2 You go online in the morning and you
3 want to see what's going on in the world,
4 according to their theory, they can stop you
5 from doing that too.

6 And that's surely public accommodation
7 law. The idea that somebody -- they don't like
8 somebody because of their race or their
9 disability or something like that, and we're
10 going to say we're not going to allow you onto
11 our platform, that surely cannot be
12 constitutional. That's what I mean by that's
13 Lochner.

14 That's you've gone beyond any content
15 of this platforms themselves on their page to
16 saying we're not going to let people even look
17 at what we're selling. That's a bookstore
18 saying we won't sell you our book. That's
19 different from saying we won't publish your
20 book.

21 JUSTICE BARRETT: So --

22 JUSTICE KAGAN: Do you think that
23 there are any unconstitutional applications of
24 your law?

25 MR. NIELSON: I mean, that's a hard

1 question. I -- I suspect that there might be.

2 JUSTICE KAGAN: What would they look
3 like?

4 MR. NIELSON: So the one that comes to
5 mind would be imagine -- and this comes up in --
6 in their brief -- they picked, like, the most
7 vile example and they say: Imagine a publisher
8 didn't want to publish the book written by the
9 Proud Boys, was the example that they used.

10 I think you might very well have an
11 as-applied challenge to that, but the problem
12 for them is they picked the most vile example
13 when I think all of them would say: Well, wait
14 a minute, you -- surely, you can let them on
15 Facebook and you can't kick them off because
16 their grandma said something outrageous, right?

17 So there's got to be a limit there.
18 And that's why a facial resolution of this case
19 doesn't work. And if it is, you can't fix a --

20 JUSTICE KAGAN: And how do you
21 separate the one from the other? Where is the
22 line?

23 MR. NIELSON: I -- isn't -- that's
24 hard, right? I would say this Court struggled
25 with that in 303 Creative because it's really

1 hard to know when something becomes inherently
2 expressive. And the Court's cases like Dale,
3 about when does something that happen, all of
4 those are hard cases.

5 But, in all of them, this Court has
6 had facts. They've actually looked at the facts
7 of the case and tried to figure out as applied
8 whether that makes sense here.

9 In this situation, there's a million
10 applications of this law that are perfectly
11 fine. And they pick some of the most vile
12 possible hypotheticals, ignoring, by the way,
13 the provision of Texas law which they never
14 addressed, which says, under Texas law, if you
15 don't want to hear content, they are allowed to
16 make sure you never hear that content.

17 So all you have left -- I mean, again,
18 they -- they never mention at all, that's like
19 the focus point of our brief, they never respond
20 to it. But that means all that's left is I
21 don't want to hear this type of speech. I just
22 want to hear this type of speech. And it's just
23 -- voluntary communication. That's a telephone.

24 JUSTICE BARRETT: Mr. Nielson, we --
25 you -- you heard during the prior argument a lot

1 of conversation about how broad Florida's law
2 was. I read Texas's law to be more narrow in
3 its coverage, that it wouldn't sweep in some of
4 the examples we were using in the last argument
5 like Uber, Etsy. Is that -- am I correct?

6 MR. NIELSON: I think that's fair,
7 Your Honor.

8 JUSTICE BARRETT: So what platforms
9 does Texas's law cover? Am I right that it
10 covers only the classic social media platforms
11 like YouTube, Facebook?

12 MR. NIELSON: So that's what their
13 deponent has said, the only ones that they were
14 sure that was covered is Facebook, Twitter, and
15 YouTube.

16 JUSTICE BARRETT: But that's their
17 deponent. Presumably, Texas is the one who can
18 authoritarily -- if it was in the Texas --

19 MR. NIELSON: Yeah.

20 JUSTICE BARRETT: -- courts --

21 MR. NIELSON: Yeah.

22 JUSTICE BARRETT: -- I mean, if it's
23 not them, they're not the ones that get to
24 decide authoritarily what the scoop -- scope of
25 the law is?

1 MR. NIELSON: Well, correct. I mean,
2 we would have to prove it at trial, that they --

3 JUSTICE BARRETT: Well, what's --

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

5 JUSTICE BARRETT: -- Texas's position
6 about the scope of the law?

7 MR. NIELSON: Well, the law says that
8 it applies to any platform with more than 50
9 million active users per month. So I'm not sure
10 where some of the other platforms fall on that.
11 The ones, like I said, that we know are -- are
12 the three biggest ones fall within that.

13 JUSTICE BARRETT: So you're -- you're
14 making that judgment based on size. So it's
15 nothing about the definition. I mean, in the
16 last argument, we were pointing out that the
17 Florida law in defining what a platform does and
18 how it works would encompass Uber, for example.

19 MR. NIELSON: Oh, oh, oh --

20 JUSTICE BARRETT: But you're saying
21 that you're -- you're just distinguishing this
22 is based on numbers.

23 MR. NIELSON: No, I apologize, Your
24 Honor. There is also a separate provision which
25 defines "social media platform" as "a website

1 open to the public, allowing a user to create an
2 account and enables users to communicate with
3 other users for the primary purpose of posting
4 information, comments," and so on.

5 JUSTICE BARRETT: And so is it Texas's
6 position that that definition then covers the
7 classic social media sites? And by "classic
8 social" -- "social media sites," I mean sites
9 like Facebook and YouTube.

10 MR. NIELSON: Yes, Your Honor.

11 JUSTICE BARRETT: Okay. And that it
12 would not sweep more broadly to some of these
13 other things, like Etsy?

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

16 JUSTICE KAGAN: But the district court
17 thought it covered WhatsApp. Do you think that
18 it doesn't?

19 MR. NIELSON: I don't know the -- I --
20 don't know the answer. That's the answer --
21 that's the best I can give you. I don't know.
22 We don't have discovery into that. We have the
23 deponent, their own witness said these are the
24 three that we are sure are covered.

25 It might very well be. That's another

1 reason why it's hard to do this on a facial
2 basis, because it might very well be WhatsApp,
3 which sure looks like a telephone to me, would
4 be covered by our rule --

5 JUSTICE JACKSON: But what about -- I
6 mean, it's within the big three, there are some
7 email-looking functions, aren't there? I mean,
8 I -- I appreciate that it's hard to do this
9 because we don't have a record, but I understood
10 that face -- Facebook, for example, which you
11 say would be covered, has a messenger
12 function --

13 MR. NIELSON: Yes, Your Honor.

14 JUSTICE JACKSON: -- which looks like
15 email. So wouldn't we have to do this at the
16 level of the functionality of these various
17 platforms rather than at the kind of entity
18 level?

19 MR. NIELSON: Yes, Your Honor, I --
20 you would. And it's not just that. You'd also
21 have to go through the different types of verbs
22 included in our statute for censoring, including
23 the one that they keep ignoring, which is the
24 ability to receive the expression of somebody
25 else.

1 That's when I say you look at the text
2 of the statute, their theory would mean that
3 even if you just want to lurk and just listen
4 and see what other people are saying, they can
5 kick you off for any reason at all. So, if you
6 have somebody who had never posted anything or
7 their speech is identical to the speech of
8 somebody else, their theory is: Well, we can
9 kick you off.

10 That seems to be pretty far into the
11 world of public accommodations, like, you know,
12 303 was a narrow case. If that's what 303
13 means, like, boy, now we're really, really,
14 really big, you know, hence, Digital Lochner or
15 Lochner 2.0, the idea that everything can't be
16 protected by the First Amendment. At some
17 point, there's lines of content.

18 JUSTICE GORSUCH: Counsel, yeah,
19 during the prior argument, which I'm sure you
20 listened to attentively --

21 MR. NIELSON: Yes, Your Honor.

22 JUSTICE GORSUCH: -- there -- there
23 was some discussion about how difficult life
24 will be if these injunctions are dissolved and a
25 parade of horrors and expenses and -- and

1 difficulty geofencing Texas or Florida. Can you
2 address some of those concerns?

3 MR. NIELSON: Yes. Two answers if I
4 may? First, there is some suggestion that the
5 prohibition on discrimination against Texas or a
6 part of Texas is somehow a trap to keep -- keep
7 companies in. That's not true.

8 If you read the statute, that's not
9 what it says. There's a separate provision in
10 the statute which is the jurisdictional hook,
11 which is, you know, if you're doing business in
12 Texas -- and, by the way, even if Texas tried to
13 do that, there's something called personal
14 jurisdiction that you can simply just leave a --
15 a forum. That's this Court's decision in Ford.

16 So that argument, it's just not true.
17 But the other part that I think is really
18 important about this is Texas's law, what is the
19 remedy here? It's an injunction. There's no
20 damages here. It's an injunction.

21 And, in fact, we know that it's not
22 going to flood the courts because the injunction
23 against the attorney general is limited to the
24 attorney general. There's private enforcement
25 of Section 7.

1 And we have a handful of cases because
2 you don't get damages. So it's hard unless you
3 have a really darn good case to be able to go to
4 court if nobody's going to get damages for
5 prevailing, which I think -- matters a lot in
6 terms of, like, what are the real-world
7 consequences here?

8 They're going to have some lawsuits by
9 the attorney general for injunctions. And if we
10 can't prove it, if we can't prove viewpoint
11 discrimination, they will prevail.

12 JUSTICE KAVANAUGH: Did you say they
13 could stop doing business in Texas under this
14 law?

15 MR. NIELSON: Yes, Your Honor, of
16 course. I mean, it's -- it's true under the
17 law, but it's also just true as a matter of
18 personal jurisdiction. Anybody can get out of
19 any jurisdiction that they want to.

20 JUSTICE KAVANAUGH: I just meant under
21 the law.

22 MR. NIELSON: Correct, yes, under the
23 law, yes, Your Honor.

24 CHIEF JUSTICE ROBERTS: How does that
25 -- how does that work if you're talking about

1 Facebook? I mean, if somebody -- or emailed and
2 all that. If they send something into Texas,
3 are they doing business in Texas?

4 MR. NIELSON: No, Your Honor, though
5 that would be a fun personal jurisdiction case.
6 The answer as I understand it is you have to
7 purposely avail yourself of the forum. So
8 merely because somebody can look at your
9 website, if you're not having some purposeful
10 direction towards the forum, that's generally
11 not sufficient.

12 CHIEF JUSTICE ROBERTS: Well, no,
13 these -- it's a worldwide sort of thing and
14 people are going to be sending stuff left and
15 right and you know that as -- as the -- as the
16 company. I'm not sure -- I don't see how they
17 can wall off Texas from the activities of the
18 social media platform.

19 MR. NIELSON: Well, I mean, two
20 answers. One, they can. They have the
21 technological ability. It's called geofencing,
22 which they can carve off. I mean, if they
23 wanted to, they can probably carve off this
24 building itself. They have the ability all the
25 way down to that granular level.

1 But -- but, again, more than that, it
2 isn't just it shows up there. If you want to
3 have a -- an account with Facebook or Twitter or
4 any of the others, like, there's a contractual
5 relationship between the two. So they have
6 customers that are in these places. And people
7 say, well, they don't have any customers because
8 they're not charging any money. Well, we know
9 that if they're not charging any money, like,
10 you're the -- you're the product.

11 So they're taking your data and
12 they're selling it to the advertisers, which is
13 why it's so important that we recognize that if
14 this algorithm is protected by the Constitution,
15 then they can take that data and sell it to
16 people and have highly targeted ads based on
17 socioeconomic characteristics.

18 The New York brief explains that on
19 page 12, which I think is important and doesn't
20 -- shouldn't get lost in this. They picked,
21 again, the most vile examples, which are the
22 fanciful things that we don't usually do in a
23 facial posture, and they try to say, well, that
24 means the whole law should fail. There's a
25 whole lot of perfectly fine applications that

1 the Court needs to remember and not lose sight
2 of here.

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

5 MR. NIELSON: Yeah. So a few ways.
6 The first response that I would have to that is
7 the provision of the statute that they ignore,
8 which is no user has to receive anything they
9 don't want.

10 JUSTICE KAVANAUGH: Right. That still
11 allows --

12 MR. NIELSON: Sure. Okay.

13 JUSTICE KAVANAUGH: -- the
14 communication of it. So that's not --

15 MR. NIELSON: All right. Let's --
16 let's go through that there. So now -- now
17 we're -- now we're -- most of the universe is
18 gone, but the next level of this, under Texas
19 law, if it's illegal, they don't have to do that
20 either. So I'm assuming that a lot of the
21 terrorism is going to be, you know, like we're
22 inciting you come join Hamas or something like
23 that.

24 JUSTICE KAVANAUGH: No, no, no, no.
25 Just the pro-Al-Qaeda kind of messages that were

1 common --

2 MR. NIELSON: Okay.

3 JUSTICE KAVANAUGH: -- pre-9/11,
4 post-9/11, not necessarily incitement but
5 advocating.

6 MR. NIELSON: Okay. Sure.

7 JUSTICE KAVANAUGH: Yeah.

8 MR. NIELSON: So we put aside the two
9 -- first two --

10 JUSTICE KAVANAUGH: Yeah.

11 MR. NIELSON: -- levels here. Third,
12 they're allowed under the statute to pick any
13 categories they want. So, if they want to keep
14 that category for which this speech falls in,
15 that's their choice. If they want to cut that
16 category out, they're free to do so. They just
17 can't do so on a viewpoint basis.

18 And at the end of the day --

19 JUSTICE KAVANAUGH: Though, in that
20 last clause, they can't do it on a viewpoint
21 basis, how does that work with terrorist speech?

22 MR. NIELSON: Sure. So it's hard to
23 say with terrorist speech because you'd have to
24 pick the category, but assume that it is, you
25 know, Al-Qaeda. You can't -- you could -- you

1 can't very well say you can have the, you know,
2 anti-Al-Qaeda but not the pro-Al-Qaeda. If you
3 just want to say no one's talking about Al-Qaeda
4 here, they can turn that off.

5 And then the last point, this is at
6 the very end of the game, so you've gone through
7 all of those things, all you have left are
8 voluntary people wanting to talk each other.
9 And, I mean, people say horrible things on the
10 telephone, and that's -- and I don't think we've
11 ever thought, well, you know what, we're going
12 to turn -- we're going to turn that off because
13 we don't want the telephones providers to be
14 able to say -- have that sort of right to -- to
15 censor.

16 If I may, I -- I mean, with some
17 hesitance, I want to talk about Orwell a little
18 bit, and I say that with some hesitance. But my
19 reaction coming to this case was very similar to
20 yours. I looked at this and I'm like: Wait a
21 minute. These are companies. They have their
22 own rights. We don't generally think of
23 censorship as something from the -- from private
24 people. That's the government.

25 Here's how I came around on this.

1 Maybe it'll persuade you. Maybe it won't. I
2 came around on this to say this is something
3 further up the food chain than that ordinary
4 level of political discourse. This is just the
5 type of infrastructure necessary to have any
6 kind of discourse at all. That's why I keep
7 going back to the telegraph.

8 This isn't, you know, the self -- the
9 level of discourse where they're making the
10 content decisions that we make our decisions
11 based on. This is the infrastructure that we
12 need to have any sort of discourse at all.

13 So, if we say we want to have that
14 type of infrastructure not have, you know,
15 censorship on it, that would mean we would have
16 to have a rapid -- a massively increased federal
17 government because it would have to control all
18 the infrastructure. And then we would have,
19 okay, now you can't discriminate based on this
20 kind of infrastructure of how things work.

21 That's not -- I mean, that is Orwell,
22 right? So, for me, the answer is, for these
23 kind of things like telephones or telegraphs or
24 voluntary communications on the next big
25 telephone/telegraph machine, those kind of

1 private communications have to be able to exist
2 somewhere. You know, the expression like, you
3 know, "sir, this is a Wendy's." There has to be
4 some sort of way where we can allow people to
5 communicate --

6 JUSTICE JACKSON: And is that just
7 because of the -- the modern public square? I
8 mean, Mr. Clement has said many, many, many
9 times that there's a distinction between public
10 and private and that that's sort of driving his
11 analysis as to when and under what circumstances
12 this kind of regulation can be done.

13 And -- and are you just rejecting that
14 because you're suggesting that they merge in
15 this situation given the nature of the
16 communications?

17 MR. NIELSON: I am not doing that.

18 JUSTICE JACKSON: Okay.

19 MR. NIELSON: And that's, again -- you
20 know, I'll -- I'll try again to be artful.
21 These are complicated concepts. But I think
22 about the common carrier as a really useful tool
23 for this Court because we know that there's hard
24 lines to draw. It's really hard to tell the
25 difference between FAIR and Miami Herald, like,

1 in the application, especially when you kind of
2 get down to the granular level. It's really
3 kind of hard to tell.

4 I think it would be helpful if the
5 Court had a compass that could kind of, like,
6 give us some direction of where to draw those
7 lines. And common law, common carriage is that
8 compass.

9 JUSTICE JACKSON: But are you
10 suggesting that a common carrier, as the SG
11 pointed out, could never have First Amendment
12 protected activity? I mean, that's why I keep
13 going back to doesn't this have to be not at the
14 level of entity but at the level of sort of what
15 exactly are they doing in a particular
16 circumstance? Because you just seem to say,
17 well, these are common carriers, so everything
18 they do is conduct and, therefore, we can
19 regulate it. And I don't know that that's the
20 way we've ever thought about this.

21 MR. NIELSON: Well, it is how the
22 Court thought about it with telegraphs, which I
23 think is a useful way of -- of thinking about
24 it. I mean, my friend in the government says,
25 well, you know, they're just transmitting

1 speech. But that's totally question-begging
2 because they have the technological ability not
3 just to do that.

4 The reason that cellphones don't,
5 like, screen your calls or telegraphs didn't
6 like --

7 JUSTICE GORSUCH: Well, Mr. Nielson,
8 I'm sorry to interrupt --

9 MR. NIELSON: Oh, sorry.

10 JUSTICE GORSUCH: -- but I -- I -- I
11 -- I -- I -- I think you'd agree with Justice
12 Jackson, though, that there might be some speech
13 that the -- these carriers, even as a common
14 carrier, would be their own.

15 MR. NIELSON: A hundred percent, yes,
16 Your Honor.

17 JUSTICE GORSUCH: And -- and you do
18 have to take that function by function.

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

23 So I'll kind of disaggregate the
24 functions of what's going on here. They have
25 the one function, which is they are creating a

1 message. We do nothing about that. They can
2 say whatever they want about specific posts or
3 anything, and that's fine.

4 But there's a separate thing that they
5 do, which is facilitate conversations between
6 two people, which is like a phone.

7 JUSTICE GORSUCH: I understand that.
8 Now -- now one of the things that we've
9 sometimes looked at in the past, this Court I
10 mean, in the common carrier world is market
11 power.

12 MR. NIELSON: Yes, Your Honor.

13 JUSTICE GORSUCH: And how do you
14 analyze that here? On the one hand, there are
15 network effects that one would take account of
16 in any analysis of -- of -- of market power, and
17 that might -- might help you. On the other
18 hand, this is a bit unlike a telegraph in the
19 sense that there might only be one right-of-way
20 to run the wires, and might be serious practical
21 barriers for more than one set of wires.

22 Here, one can start a new platform at
23 least in theory anytime.

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

25 JUSTICE GORSUCH: Fewer barriers to

1 entry but market effects.

2 MR. NIELSON: Sure. So the first
3 answer is, if we are not talking about speech,
4 if we're just in the world of conduct, then
5 we're not talking about market power at all.
6 And we know that because cellphones are
7 intensely competitive markets and yet they're
8 still all common carriers. But let's move that
9 aside.

10 Now we're saying that there's some
11 sort of, you know, reason to focus on market
12 power. It's true. This is not like the market
13 power of there's just one bridge. But, as an
14 economic matter, there's really no difference.

15 And I know this -- here's, like, a
16 simple kind of way to look at it: Twitter has
17 its -- its -- its platform. There's a lot of
18 competitors for Twitter, would-be competitors,
19 including Threads for Meta, which is backed by,
20 like, one of the largest companies in the world.
21 They invested massive amounts of money to try to
22 break up the Twitter monopoly, and they failed
23 miserably. I mean --

24 JUSTICE GORSUCH: So what -- what do
25 we do about -- I mean, there's some legislative

1 findings here about market power. What do we --
2 what deference do we owe those, if any?

3 MR. NIELSON: I would think
4 considerable deference, Your Honor. This is a
5 sovereign state. We don't usually treat states
6 like the FTC where we subject it to, you know,
7 arbitrary and capricious hard-look review. The
8 state is entitled to make determinations as a
9 matter of law as to how things are.

10 And, obviously, at some point, it
11 might be so far afield, but some -- I sure hope
12 that the states get, you know, some deference on
13 such important questions from this Court.

14 CHIEF JUSTICE ROBERTS: This may --

15 JUSTICE BARRETT: Mr. Nielson, can I
16 just -- oh, sorry. Go ahead, Chief. Oh --

17 CHIEF JUSTICE ROBERTS: This may be
18 the same question that Justice Gorsuch was
19 asking, but does the nature of the economy at
20 issue matter to us? I mean, the social media
21 platforms, the Internet, all of that stuff, an
22 incredibly dynamic market. You know, the
23 government maybe not so much.

24 And -- and it's -- it's -- and yet
25 it's -- it's sort of a inflection point to say

1 that the government has the authority, by
2 categorizing the members -- the participants in
3 this dynamic market as common carriers, to take
4 over extensive regulation of them, not with
5 respect to communication, but all sorts of
6 things.

7 I mean, when you're talking about
8 railroads or telegraphs, it's not just moving,
9 transportation, it's what the railroads look
10 like, what the safety things they have to have,
11 a whole range of things, that, you know, in the
12 wild west economy surrounding the social media
13 platforms and the Internet may be totally inapt.

14 Now, you know, I don't know if it
15 comes at a time when you -- you -- you need to
16 make that transition or not, but that is a very
17 big step when it comes to the extent of
18 government regulation.

19 MR. NIELSON: I -- I certainly think
20 that's fair. My reaction -- my response is
21 going to be this is a facial pre-enforcement
22 injunction. We should at least be able to make
23 our showing on the facts. We're quite confident
24 that we would be able to show not just market
25 power but durable, extensive market power here.

1 I -- I -- I actually don't think it
2 would be even all that difficult to make that
3 showing, so to the extent that market power is a
4 requirement, I think that they haven't shown
5 that -- that they're likely to -- they're likely
6 to prevail on the merits as to that, which is
7 another reason why a facial injunction is just
8 simply inappropriate.

9 Bring -- bring an as-applied case and
10 we're happy to litigate that. It's really hard
11 to -- to, what's facially, they can pick a few
12 examples, and then say the whole thing fails.

13 JUSTICE BARRETT: Mr. Nielson, what
14 besides market power -- I want to give you a
15 chance to elaborate on your definition of
16 "common carrier." I mean, you've said conduct,
17 market power, what else?

18 MR. NIELSON: Sure. So the main
19 requirement of common carrier, this is where
20 common carriage and public accommodation are, if
21 not, you know, cousins, maybe twins, is it has
22 to be open to the public, which means that it's
23 not a private associational group or something
24 like that. You hold their self out open to the
25 public with non-differentiated contracts. You

1 have this as the contract with everybody. So
2 that's the very first one.

3 The second is it has to be the type of
4 industry that has traditionally been regulated
5 as such. So, for public accommodation, that's
6 your inns and your restaurants. For common
7 carriage, that's where you're talking about
8 things like bridges and -- and
9 telecommunications.

10 JUSTICE BARRETT: But then you get
11 into the problem of having to draw the analogy,
12 right? I mean, the Chief just called the
13 Internet kind of like, you know, the wild west
14 of the Internet and the Internet looks a lot
15 different. Even each of these platforms has
16 different functionalities within it.

17 So, you know, when you extend common
18 -- when you -- when you call -- you've got grist
19 mills and then railroads and cable companies.

20 MR. NIELSON: Mm-hmm.

21 JUSTICE BARRETT: Each time you
22 encounter something new that might qualify as a
23 common carrier, you have to make a decision does
24 it -- does it fit the bill or not.

25 MR. NIELSON: Sure. So I guess I -- I

1 can keep going further. That's why some courts
2 have said, well, maybe there's additional
3 requirements that we put on common carriage.
4 One is market power, which is, not everybody
5 says, I don't know how that works with
6 cellphones, but they said, well, you need market
7 power, and the other was it has to be somehow
8 invested with a public interest.

9 And, here, under that, we know that if
10 it's state action to block somebody from your
11 Twitter account, how can that not be infected
12 with a public interest?

13 JUSTICE BARRETT: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas?

16 Justice Alito?

17 Justice Sotomayor?

18 JUSTICE SOTOMAYOR: I have a problem
19 with laws like this that are so broad that they
20 stifle speech just on their face, meaning I
21 think that's what the government's been trying
22 to say.

23 If you have a particular type of
24 speech that you want to protect against or -- or
25 promote, it would be one thing to have that kind

1 of law. But we have a company here, Discourse,
2 who's also a direct messaging app.

3 And there's no question that your law
4 covers them, but they tell us that their whole
5 business model is to promote themselves to a
6 particular message and groups of messages. So
7 they're not doing it indiscriminately. You're
8 basically saying to them, if they're out there
9 and they're a common carrier, they can't have
10 this -- this kind of business model.

11 MR. NIELSON: I mean, two responses if
12 I may, Your Honor. The first is, as to the
13 particular company, we're only talking about the
14 three largest -- maybe more depending on who
15 falls within the 50 million -- the largest
16 telecommunications companies on earth. We're
17 not talking everybody else.

18 JUSTICE SOTOMAYOR: Oh, so that -- so
19 you -- they -- okay.

20 MR. NIELSON: So -- but, as to the
21 second point --

22 JUSTICE SOTOMAYOR: You're agreeing
23 with them that -- that basically --

24 MR. NIELSON: Yeah.

25 JUSTICE SOTOMAYOR: -- this law is

1 aimed towards them?

2 MR. NIELSON: To -- to -- yes, to the
3 largest. We've never disputed that. But, even
4 if you agree with all of that, I -- I -- I -- I
5 disagree with you, but I understand that there's
6 still applications of this law that should be
7 allowed to go into effect.

8 I don't see how they can say that they
9 can kick somebody off for off-platform speech of
10 their grandmother. That can't be. Or because
11 they don't like it where you live in Texas, you
12 know, they -- you live in El Paso and not
13 Dallas, so you're not as valuable to the
14 advertisers, so we're going to kick you off.
15 Surely, that can't be okay.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?
17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: Two very quick
19 ones. On the deference to the legislative
20 findings point, my memory is that there was a
21 trial in Turner Broadcasting.

22 MR. NIELSON: Yes, Your Honor, that's
23 Turner II.

24 JUSTICE KAVANAUGH: Yeah --

25 MR. NIELSON: So, you know --

1 JUSTICE KAVANAUGH: -- that's a --

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

4 JUSTICE KAVANAUGH: Right. But there
5 wasn't just -- there wasn't just Congress said
6 this, that's good to go. There was a trial
7 about that, right?

8 MR. NIELSON: Sure, Your Honor.

9 JUSTICE KAVANAUGH: Yeah.

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

12 JUSTICE KAVANAUGH: That's all I
13 wanted to ask there.

14 MR. NIELSON: Oh, of course. Of
15 course.

16 JUSTICE KAVANAUGH: And then, on -- on
17 common carrier, if a company says we're not a
18 common carrier, we don't want to be a common
19 carrier, we're carrying a lot, but we're not a
20 common carrier, can the state make them into a
21 common carrier?

22 MR. NIELSON: The state -- that's --
23 that's a great question, and that was the first
24 question I had when I came to this case. The
25 answer is no, if you are not a common carrier,

1 you can't suddenly become a common carrier.
2 That's why I think it's important to think of it
3 as a compass to kind of tell you where the line
4 is.

5 But I would urge the Court, if you're
6 interested, again, we've heard, you know, read
7 Professor Volokh's article.

8 One thing that really struck me as
9 strange was, well, wait a minute, they have
10 terms of service, so how can they be a common
11 carrier? Because if you have terms of service
12 saying you can't do this.

13 And this Court addressed that very
14 problem. The case -- the case that he cited is
15 New York Central v. Lockwood from 1873 where the
16 Court said you can't just get out of the duties
17 of common carriage by contract. If you're a
18 common carrier, you're a common carrier unless
19 you stop opening yourself up to the public.

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

22 MR. NIELSON: Sure.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: I just want to get a

1 clarification. So you said that Facebook could
2 geofence and just pull out of Texas? Was that
3 correct?

4 MR. NIELSON: Of course, of course,
5 Your Honor. Yes.

6 JUSTICE BARRETT: Okay. Because I --
7 I was just confused. Mr. Clement was pointing
8 out, you know, that according to the provisions
9 of the law, you couldn't. And I'm looking at
10 143A.002.

11 MR. NIELSON: Mm-hmm.

12 JUSTICE BARRETT: And it says, you
13 know, that you can't censor users' expression,
14 ability to receive information, et cetera, based
15 on a user's geographic location in this state or
16 any part of the state.

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

20 MR. NIELSON: Your Honor, this is one
21 of the prohibitions of the law, that -- that
22 they can't -- let me state it a different way if
23 I -- if I may.

24 There's a provision of the law which
25 is the jurisdictional hook that says who is

1 subject to this law at all. If you choose to do
2 business in Texas, then this provision kicks in,
3 and you can't discriminate against people after
4 you've chosen to do business in Texas based on
5 the status that they're in Texas.

6 But, if you don't want to do business
7 in Texas at all, that's a separate provision,
8 and you can get out of Texas. This is the
9 prohibition on what you can't do. If you choose
10 to do business in Texas, you can't darn well
11 discriminate against somebody because they're in
12 El Paso.

13 JUSTICE BARRETT: And doing business
14 in Texas is -- is what, just allowing Facebook
15 users to sign up in Texas, or is it, you know,
16 Facebook accepting ad money from Texas
17 corporations?

18 MR. NIELSON: That question has not
19 been resolved by any of the Texas courts because
20 none of them have been. But, as I read it, it
21 is you have to have, you know, customers in
22 Texas. You've entered into contractual
23 relationships with Texans.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: Yeah. So Justice
3 Barrett had exactly my same thought, and I'm --
4 I just want to clarify. So this doesn't speak
5 in your view to a business decision not to offer
6 services in Texas because, for example, their
7 requirements are too burdensome.

8 Instead, this is you're offering
9 business in Texas and everywhere else, but you
10 are prohibiting them from discriminating against
11 people on the basis of their geography, meaning
12 they're in Texas?

13 MR. NIELSON: Yes, Your Honor.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Rebuttal, Mr. Clement?

18 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

19 ON BEHALF OF THE PETITIONERS

20 MR. CLEMENT: Thank you, Mr. Chief
21 Justice. Just a few points in rebuttal.

22 First of all, as to the common
23 carrier. The two classic elements of common
24 carrier status are -- it -- missing here. One
25 is that you just put -- transmitted or carried

1 messages from point A to point B. That's not
2 what's going on here.

3 We use the word in our -- our brief
4 and from this Court's cases "disseminate."
5 "Disseminate" means to spread broadly. That
6 means you're in the expressive enterprise
7 business. There's zero tradition of treating
8 entities in the expressive enterprise business
9 as common carriers.

10 And then the -- the other factor is
11 there really is like an essential facility. You
12 know, the telephone wires used to go, the copper
13 wire, the last mile to every house in America.
14 So, if you were kicked off Ma Bell, you were
15 really out of luck. This is the opposite
16 situation in the Internet where you have lots of
17 other choices.

18 This is just not a common carrier.
19 Not that that really is talismanic under the
20 First Amendment anyways. Justice Thomas made
21 that point back in Denver telephone -- carrier
22 case and he had it exactly right there.

23 Now, second, public accommodation. I
24 wouldn't be worried about any other
25 accommodation law -- public accommodation law.

1 No other public accommodation law prohibits
2 discrimination on the basis of viewpoint and
3 applies exclusively to speakers.

4 That is a First Amendment red flag
5 that you're trying to limit speakers' ability to
6 discriminate on the basis of viewpoint. That's
7 just a frontal assault on editorial discretion.
8 Every other public accommodation law that I'm
9 aware of works differently.

10 Third point, protecting kids. If
11 you're at all concerned about protecting kids on
12 the Internet, that should be a vote in our favor
13 in this case because, if you can't do viewpoint
14 discrimination, that disables us from doing many
15 of the things that our companies try to do to
16 protect youths online. I mean, the -- the idea
17 that, okay, we're going to have to choose
18 between having -- if we have suicide prevention,
19 we have to have suicide promotion to avoid
20 viewpoint discrimination, that should be a
21 non-starter.

22 And protecting kids is important even
23 as to the disclosure provision. There is a
24 record on this case at page 161 of the Joint
25 Appendix, a witness from Stop Child Predators

1 testified and said these disclosure provisions
2 give a roadmap to predators to figure out why
3 their messages aren't getting to children so
4 they can figure out why they got bounced and
5 they can try again and sort of work their way
6 around.

7 So the last point, and I think this is
8 an important one to end on, this idea that
9 somehow we're in -- in -- you know, behind the
10 eight ball because we brought a facial
11 challenge, there is a -- a proud tradition of
12 facial challenges to vindicate First Amendment
13 rights in this country. That's how many of
14 these cases have been brought. There's an
15 equally proud tradition of getting a preliminary
16 injunction against a law that is chilling
17 speech.

18 And as the -- the General pointed out,
19 I mean, the party presentation rules have to be
20 foundational here. If we had gone into the
21 district court and said this is unconstitutional
22 on its face, and they said no, it's not because
23 of Gmail, we could have had a fair debate about
24 that. We could have modified our complaint if
25 necessary. That's a difficult issue. As I

1 said, the only court that I've seen that -- that
2 deals with it directly said Gmail is not a
3 common carrier. But, in all events, we could
4 have litigated all of that. But the Plaintiffs'
5 burden is not to think of any theory the
6 government could come up with on appeal and then
7 foreclose it in the district court.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel, all counsel.

11 The case is submitted.

12

13 (Whereupon, at 1:49 p.m., the case was
14 submitted.)

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|----------|---|---|---|---|
| 1 | 80:20 81:5 90:23,25,25 91:1,8 accommodations [8] 41:18,20,24 42:4,10,21 45:12 64:11 according [2] 57:4 87:8 account [5] 43:14 62:2 68:3 76:15 82:11 acknowledge [4] 9:5 38:6 40:15 42:16 Act [6] 8:19 26:21 41:3 44:3 51:2 53:7 acted [1] 51:3 action [1] 82:10 active [1] 61:9 activities [2] 36:9 67:17 activity [4] 7:12 15:4 48:13 74:12 actor [1] 40:18 actually [15] 6:9 10:6 13:17,16,20,21 11:9,11,21,25 12:6,8,11,24 14:3 23:8 24:11 25:14,21,23 26:17 27:1 43:20,24 44:11,18 51:7,9 26 [1] 1:13 | allow [4] 24:8 49:18 57:10 73:4 allowed [6] 16:5 35:16 47:6 59:15 70:12 84:7 allowing [2] 62:1 88:14 allows [1] 69:11 allusion [1] 8:13 alternative [1] 54:12 although [1] 23:24 Amendment [44] 4:25 5:14 6:6 10:14 15:4,20 18:9 20:13 21:17 25:7 38:12,19,25 39:6,17 40:3,19 42:14,22 43:2,11 46:19 48:14 49:18,22 50:20 52:2,3,4,9,11,20,21,21,22 53:3 55:23 56:3,4 64:16 74:11 90:20 91:4 92:12 America [2] 36:16 90:13 Americans [1] 49:8 amicus [4] 2:6 3:7 37:22 40:5 amount [2] 29:17 30:22 amounts [1] 77:21 amplify [2] 15:23 39:14 analogies [1] 27:5 analogy [4] 6:4 24:22 38:5 81:11 analysis [3] 43:11 73:11 76:16 analyze [1] 76:14 announcement [1] 21:25 announcements [1] 22:1 another [4] 35:21 48:14 62:25 80:7 answer [10] 19:6 39:25 51:18,19 62:20,20 67:6 72:22 77:3 85:25 answers [2] 65:3 67:20 anthologies [1] 25:16 anthologist [1] 25:2 anthology [4] 24:23,24 26:6,9 anti-Al-Qaeda [1] 71:2 anti-Semite [2] 19:8,19 anti-Semites [1] 17:9 anti-Semitic [3] 5:22 7:23 17:4 anybody [3] 20:18 53:1 66:18 anytime [1] 76:23 anyways [1] 90:20 apologize [1] 61:23 app [1] 83:2 appeal [3] 8:7 21:13 93:6 APPEARANCES [1] 2:1 appears [2] 24:7 51:2 Appendix [1] 91:25 applaud [1] 10:25 applicable [2] 42:4 45:11 application [6] 11:7 17:1,17 35:12 42:15 74:1 applications [9] 12:3 16:25 17:14 42:20 43:9 57:23 | 59:10 68:25 84:6 applied [3] 40:25 42:17 59:7 applies [6] 38:19 39:6 52:11 54:14 61:8 91:3 apply [2] 21:17 52:4 appreciate [1] 63:8 arbitrary [1] 78:7 area [1] 45:2 areas [1] 7:18 aren't [2] 63:7 92:3 argue [1] 11:20 argument [20] 1:16 3:2,5,9,12 4:4,8,13 10:8 20:14 23:9 37:21 48:21 51:16 59:25 60:4 61:16 64:19 65:16 89:18 arguments [3] 28:12,13 51:9 around [3] 71:25 72:2 92:6 arrange [1] 9:11 artful [1] 73:20 article [1] 86:7 as-applied [2] 58:11 80:9 aside [3] 27:18 70:8 77:9 aspersions [1] 14:25 assault [1] 91:7 associated [1] 17:21 association [1] 43:1 associational [1] 80:23 assume [2] 19:6 70:24 assuming [2] 54:5 69:20 attention [1] 34:2 attentively [1] 64:20 ATTORNEY [4] 1:7 65:23,24 66:9 attract [1] 14:17 attribute [1] 47:9 Austin [1] 2:8 author [1] 25:2 authoritarily [2] 60:18,24 authority [1] 79:1 authorize [1] 44:18 authors' [1] 25:13 automatically [1] 35:25 automize [1] 22:2 avail [1] 67:7 avoid [2] 26:20 91:19 aware [1] 91:9 away [4] 6:6 19:1 27:13 43:23 | 21 82:13 86:24,25 87:6,12 88:13,24 89:3 barriers [2] 76:21,25 based [18] 7:8 10:9 35:6,20 42:5,25 47:6 49:3,19 50:3 61:14,22 68:16 72:11,19 87:14,18 88:4 basic [1] 6:8 basically [8] 7:17 8:6,8 27:8 32:22 34:18 83:8,23 basis [12] 35:17,19,19 43:13 49:20 52:1 63:2 70:17,21 89:11 91:2,6 become [1] 86:1 becomes [1] 59:1 began [1] 51:24 begging [1] 54:4 begs [1] 33:2 behalf [8] 2:3,9 3:4,11,14 4:9 48:22 89:19 behind [1] 92:9 belabor [1] 27:3 Bell [1] 90:14 below [1] 39:13 Ben [1] 13:22 benefit [1] 45:6 benign [1] 8:2 besides [1] 80:14 best [1] 62:21 between [12] 9:18 16:24 18:25 24:1 25:8 50:17 54:25 68:5 73:9,25 76:5 91:18 beyond [3] 38:8,9 57:14 big [8] 44:19 52:11 54:6 56:17 63:6 64:14 72:24 79:17 biggest [1] 61:12 bill [1] 81:24 billion [1] 21:11 billions [1] 49:12 bit [5] 9:7 26:23 32:24 71:18 76:18 block [2] 50:15 82:10 body [2] 44:25 45:6 book [3] 57:18,20 58:8 bookstore [1] 57:17 boost [1] 16:2 both [8] 5:23 15:17 24:16 25:6,11 27:5,13 29:24 bottleneck [1] 16:9 bounced [1] 92:4 bound [1] 40:2 bounds [1] 13:13 boy [1] 64:13 Boys [1] 58:9 breadth [2] 45:22 56:22 break [1] 77:22 bridge [1] 77:13 bridges [1] 81:8 brief [8] 10:6 13:20 15:9 32:18 58:6 59:19 68:18 90:3 briefly [1] 43:18 briefs [4] 8:18 23:23 40:5 50:6 |
| 2 | 2 [2] 20:9 32:11 2's [1] 20:11 2.0 [2] 49:23 64:15 20 [4] 24:24 25:4 50:10,13 2024 [1] 1:13 22-555 [1] 4:4 223 [1] 8:17 230 [29] 8:14,23 9:16 10:12,16,20,21 11:9,11,21,25 12:6,8,11,24 14:3 23:8 24:11 25:14,21,23 26:17 27:1 43:20,24 44:11,18 51:7,9 26 [1] 1:13 | | | |
| 3 | 303 [7] 18:25 28:6 42:19 43:4 58:25 64:12,12 365 [1] 27:21 37 [1] 3:8 | | | |
| 4 | 4 [1] 3:4 40 [1] 49:23 44 [1] 32:17 47 [1] 8:16 48 [1] 3:11 | | | |
| 5 | 50 [2] 61:8 83:15 | | | |
| 6 | 6 [1] 8:17 | | | |
| 7 | 7 [1] 65:25 | | | |
| 8 | 89 [1] 3:14 | | | |
| A | AARON [3] 2:8 3:10 48:21 ability [9] 50:3 51:21 54:1 63:24 67:21,24 75:2 87:14 91:5 able [9] 15:11 35:3 45:13 50:2 66:3 71:14 73:1 79:22,24 above-entitled [1] 1:15 absolute [1] 21:9 absolutely [4] 5:14,24 12:2 54:4 accepting [1] 88:16 access [3] 46:10 47:13,16 accessible [1] 46:5 accommodation [8] 57:6 | | | |

Official

| | | | | |
|---|--|---|--|--|
| <p>Bring [2] 80:9,9 broad [3] 13:25 60:1 82:19 Broadcasting [1] 84:21 broader [1] 41:23 broadly [3] 8:22 62:12 90:5 brought [2] 92:10,14 building [1] 67:24 built-in [1] 21:5 bully [1] 41:5 burden [7] 20:14,22,23,25 22:14 30:24 93:5 burdens [2] 15:24 32:11 burdensome [7] 21:16 22: 12 23:2,4 32:19 33:21 89: 7 business [21] 4:25 7:7 15: 5,6 19:8,16 42:18 65:11 66:13 67:3 83:5,10 88:2,4, 6,10,13 89:5,9 90:7,8 buy [1] 47:19</p> | <p>categories [1] 70:13 categorizing [1] 79:2 category [8] 44:15,19,20, 20 46:14 70:14,16,24 Catholic [2] 19:24 20:7 caught [1] 34:2 cause [1] 18:2 causes [1] 10:11 cautioned [1] 50:6 CDA [4] 43:20,24 44:11,18 cellphones [3] 75:4 77:6 82:6 cancel [6] 35:17,18,20 53: 20 71:15 87:13 censoring [1] 63:22 censorship [3] 34:6 71:23 72:15 Center [1] 13:19 central [2] 8:12 86:15 certain [10] 7:18 9:11,12 13:12 15:24 17:2 18:15 23: 25 42:20 45:25 certainly [6] 10:25 12:4 26: 3 43:17 46:7 79:19 cetera [2] 12:24 87:14 chain [1] 72:3 challenge [5] 31:18 32:2,4 58:11 92:11 challenges [2] 36:24 92: 12 chance [2] 33:24 80:15 change [4] 7:13 18:7 32:23 43:7 changing [1] 43:5 characteristics [1] 68:17 charging [2] 68:8,9 CHIEF [33] 4:3,10 6:15,21 23:5 33:7,11 34:3 37:18, 24 45:15,18 47:20 48:18, 24 51:23 53:4 54:3 55:14, 22 66:24 67:12 78:14,16, 17 81:12 82:14 84:16 86: 23 88:25 89:15,20 93:9 Child [1] 91:25 children [2] 25:17 92:3 chilling [1] 92:16 choice [2] 54:12 70:15 choices [2] 49:6 90:17 chokehold [1] 16:9 choose [3] 88:1,9 91:17 choosing [1] 47:3 chosen [1] 88:4 circles [1] 22:6 circuit [1] 30:19 circular [1] 86:21 circumstance [1] 74:16 circumstances [1] 73:11 cite [1] 8:17 cited [1] 86:14 citizens [1] 33:23 clarification [1] 87:1 clarify [1] 89:4 class [1] 17:11 classic [4] 60:10 62:7,7 89:</p> | <p>23 clause [2] 36:24 70:20 clear [7] 23:24 36:2 39:9, 17 42:1,24 43:21 clearly [1] 50:25 CLEMENT [56] 2:2 3:3,13 4:6,8,10,15 6:15,19,25 9: 15,25 10:5,18 11:18 12:2, 14 13:8 14:21 15:3 16:22 17:15 18:20 19:10,23 20:3, 8 21:1 22:18,22 23:17 24: 20 26:12,16 28:2 29:15 30: 17,20 31:5,8,12,16,25 32:3 33:4 34:10 36:1 37:6,8 51: 2,17 73:8 87:7 89:17,18,20 client [2] 22:9 34:4 clients [18] 5:6 6:17 8:14 11:3,12 13:6,9,15 14:6,22, 22 20:24 22:10 25:15 27: 17,23 37:9,13 clients' [2] 9:14 12:20 clue [1] 36:13 coerces [1] 40:16 coercive [1] 40:23 coextensive [1] 21:14 Comcast [1] 47:11 come [6] 26:17 38:24 47:5 48:16 69:22 93:6 comes [5] 48:2 58:4,5 79: 15,17 coming [3] 51:16 53:17 71: 19 comment [1] 51:4 commentators [1] 54:22 comments [2] 21:11 62:4 commerce [1] 36:24 common [55] 6:4,5,9,12 8: 11,15,21,23 25:10 26:16, 18,21 28:9 30:4 50:25 53: 17 54:13,17 55:1,4,5 70:1 73:22 74:7,10,17 75:13 76:10 77:8 79:3 80:16,19, 20 81:6,17,23 82:3 83:9 85:17,18,18,20,21,25 86:1, 10,17,18,18 89:22,23 90:9, 18 93:3 communicate [2] 62:2 73: 5 communication [3] 59:23 69:14 79:5 communications [4] 50: 17 72:24 73:1,16 companies [10] 6:8 46:15 47:14 52:17 65:7 71:21 77: 20 81:19 83:16 91:15 company [5] 27:10 67:16 83:1,13 85:17 compass [3] 74:5,8 86:3 compelling [2] 42:8 54:9 competitive [1] 77:7 competitors [2] 77:18,18 compilation [3] 25:3 46: 13 47:9 compiling [2] 38:17 46:11</p> | <p>complain [1] 34:25 complaint [1] 92:24 completeness [1] 36:22 compliance [1] 6:23 complicated [2] 42:17 73: 21 comply [5] 6:18 8:8 32:25 36:19 40:2 computer [3] 8:20 31:21 46:10 concepts [1] 73:21 concern [3] 15:9 35:11 43: 4 concerned [2] 45:3 91:11 concerns [4] 15:14 38:20 54:7 65:2 conduct [18] 39:25 40:23 42:13 43:10,24 52:14 54: 19 55:1,3 74:18 77:4 80: 16 conduit [3] 26:21 48:15 56: 10 confident [1] 79:23 confused [1] 87:7 Congress [12] 8:16,19 25: 14 26:17,18 50:7 51:1,3,8, 12,20 85:5 congressional [1] 8:18 connected [3] 22:5 56:11, 15 consequence [1] 15:1 consequences [1] 66:7 conservative [1] 13:21 consider [1] 40:13 considerable [1] 78:4 considered [1] 26:5 consistent [4] 40:14 41:23 51:7,15 constituents [1] 35:3 constitute [1] 44:21 Constitution [1] 68:14 constitutional [2] 20:21 57:12 constitutionally [1] 50:1 constraints [1] 28:24 construction [1] 10:19 consume [1] 38:18 contemplate [1] 7:2 content [20] 6:11 7:25 16:7, 9 19:4 24:7,10 41:4,7,13 44:5 45:25 47:7 56:17 57: 14 59:15,16 64:17 72:10 87:19 content-based [1] 5:1 content-neutral [1] 15:13 contest [1] 53:12 context [7] 11:9 14:9 15:21 16:14 28:19 48:16 50:11 continue [1] 50:2 contract [2] 81:1 86:17 contracts [1] 80:25 contractual [2] 68:4 88:22 contrary [1] 8:15 control [3] 10:15 25:22 72:</p> | <p>17 controlled [1] 30:9 conversation [2] 19:20 60: 1 conversations [1] 76:5 convert [1] 6:12 coordinating [1] 40:8 copper [1] 90:12 corporations [1] 88:17 correct [4] 60:5 61:1 66:22 87:3 cost [1] 31:15 costly [1] 31:6 couldn't [6] 7:19,22 28:20 34:4 43:7 87:9 counsel [7] 37:19 48:19 51: 23 64:18 89:16 93:10,10 countermand [1] 39:11 countermanding [1] 44: 17 country [1] 92:13 couple [1] 53:14 course [14] 4:23 5:10 7:5 11:25 16:19 29:7 39:25 40: 15 42:6 66:16 85:14,15 87: 4,4 COURT [46] 1:1,16 4:11 10: 24 16:4,19 22:13 28:22,23 30:15,19,22 32:14 37:25 38:23 39:4,18 40:12 42:23 43:22 44:12 48:25 49:24 54:21 55:11,11 56:5,7,12 58:24 59:5 62:16 66:4 69: 1 73:23 74:5,22 76:9 78: 13 85:11 86:5,13,16 92:21 93:1,7 Court's [10] 6:14 10:23 29: 2 32:15 39:20 48:10 50:23 59:2 65:15 90:4 courts [6] 36:23 39:13 60: 20 65:22 82:1 88:19 cousins [1] 80:21 cover [1] 60:9 coverage [1] 60:3 covered [8] 12:23 37:13 56:4 60:14 62:17,24 63:4, 11 covers [3] 60:10 62:6 83:4 create [1] 62:1 creating [4] 38:13 43:13 46:17 75:25 Creative [5] 18:25 28:6 42: 19 43:4 58:25 crisis [1] 50:8 critical [1] 16:8 criticize [1] 41:3 criticized [1] 41:9 curated [1] 47:13 curating [1] 38:16 curiae [3] 2:6 3:8 37:22 current [3] 23:2 31:9,9 customers [3] 68:6,7 88: 21 cut [1] 70:15</p> |
|---|--|---|--|--|

Official

| | | | | |
|--|---|---|--|---|
| <p>cutting [1] 29:23</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C. [2] 1:12 2:5 Daily [1] 13:23 Dale [1] 59:2 Dallas [1] 84:13 damages [3] 65:20 66:2,4 damaging [1] 14:8 dare [1] 5:3 darn [2] 66:3 88:10 data [4] 46:4 47:16 68:11, 15 day [5] 26:4 29:5 48:15,24 70:18 days [1] 27:21 DBA [1] 1:3 deal [2] 42:11,25 deals [1] 93:2 debate [2] 14:4 92:23 decide [2] 27:24 60:24 decided [1] 25:3 decides [1] 46:25 decision [6] 21:20 28:25 48:10 65:15 81:23 89:5 decision-making [1] 40:17 decisions [11] 11:4 25:6,7, 9 38:16 39:12 41:4 44:16, 21 72:10,10 declaration [2] 22:25 30:24 declarations [1] 32:7 dedicated [1] 31:12 deemed [1] 40:18 defamation [1] 26:10 defeat [2] 11:11 12:10 defect [2] 39:9,17 defending [2] 41:20 45:20 defense [1] 8:12 deference [4] 78:2,4,12 84:19 defines [1] 61:25 defining [1] 61:17 definition [4] 4:18 61:15 62:6 80:15 degree [1] 23:11 degrees [1] 6:10 democracy [1] 50:21 democratically [1] 33:18 Denver [1] 90:21 Department [1] 2:5 depending [1] 83:14 deponent [3] 60:13,17 62:23 depositions [1] 32:8 depression [1] 14:18 described [1] 36:4 designed [4] 14:17 36:2, 17 39:3 determinations [1] 78:8 determine [1] 33:24 devastating [1] 50:8 dialogue [2] 13:18,18</p> | <p>dictates [1] 41:14 difference [4] 39:23 56:6 73:25 77:14 different [29] 4:16,17,18 5:4 6:2 15:5,9,10 17:17 19:12 21:2,3 28:11,13 32:10 35:9 38:22 40:1 41:15 45:24 46:3 52:12 53:13 55:20 57:19 63:21 81:15,16 87:22 differential [1] 39:22 differently [4] 17:14,16 35:14 91:9 difficult [3] 64:23 80:2 92:25 difficulty [1] 65:1 Digital [1] 64:14 direct [2] 47:2 83:2 direction [3] 51:4 67:10 74:6 directly [2] 12:6 93:2 disability [2] 49:21 57:9 disables [1] 91:14 disaggregate [1] 75:23 disagree [1] 84:5 disagreed [1] 41:6 disclosure [6] 8:4,7 21:18 32:25 91:23 92:1 discourse [5] 72:4,6,9,12 83:1 discovery [1] 62:22 discretion [17] 8:1 9:1 10:22 11:3,13 12:9,15,22 14:15,20 21:20 23:12,15,18 26:14 29:19 91:7 discriminate [1] 7:8 34:14 47:6 49:14,18 50:3 53:9 72:19 88:3,11 91:6 discriminated [1] 49:3 discriminating [3] 34:16 46:21 89:10 discrimination [13] 5:1,7, 8,13 7:17 45:4,14 50:12 65:5 66:11 91:2,14,20 discussion [5] 13:25 18:9 20:4 40:4 64:23 discussions [1] 25:5 dispute [4] 31:24 34:22 40:21,24 disputed [1] 84:3 disputes [1] 44:8 disseminate [2] 90:4,5 dissolved [1] 64:24 distinct [1] 18:16 distinction [3] 16:24 18:25 73:9 distinctions [2] 23:10 46:1 distinguish [2] 9:18 25:7 distinguishing [1] 61:21 district [8] 22:13 30:15,22 32:14,14 62:16 92:21 93:7 dog [1] 18:4 doing [13] 17:7 18:3 29:6</p> | <p>52:6 57:5 65:11 66:13 67:3 73:17 74:15 83:7 88:13 91:14 done [5] 39:10 41:8,14 51:22 73:12 dormant [1] 36:24 dovetails [1] 35:11 down [5] 30:1 44:5 46:25 67:25 74:2 draw [5] 24:22 27:5 73:24 74:6 81:11 drawing [1] 23:10 drawn [1] 42:23 driving [1] 73:10 dumb [1] 53:24 durable [1] 79:25 during [2] 59:25 64:19 duties [1] 86:16 dynamic [4] 18:7 33:15 78:22 79:3</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [3] 71:8 81:15,21 earlier [1] 8:13 earth [1] 83:16 easier [2] 32:25 33:1 easiest [1] 53:16 economic [1] 77:14 economy [2] 78:19 79:12 editor [1] 25:3 editorial [39] 7:25 9:1,19, 23 10:3,10,15,22 11:3,13 12:9,15,21 14:15,20 21:19 23:12,15,18 25:5,9,22 26:14 27:20,21 29:18 32:20, 24 39:11 40:17 44:16 49:6 91:7 editors [1] 5:12 effect [4] 6:16 37:15 44:10 84:7 effects [2] 76:15 77:1 effort [2] 31:9 50:10 efforts [3] 24:2 31:10 40:8 eight [1] 92:10 Either [4] 24:14 27:12 38:4 69:20 EI [2] 84:12 88:12 elaborate [1] 80:15 elected [1] 33:18 election [1] 28:19 elements [1] 89:23 eliminate [2] 7:18 23:19 ELIZABETH [3] 2:4 3:6 37:21 email [1] 63:15 email-looking [1] 63:7 emailed [1] 67:1 empower [2] 12:14 25:24 enables [1] 62:2 enacted [1] 33:17 enacts [1] 45:1 encompass [1] 61:18 encounter [1] 81:22 encourages [1] 53:11</p> | <p>end [6] 29:23 56:3 70:18 71:6 86:21 92:8 endorse [1] 13:2 ends [2] 10:20 54:20 enforced [1] 41:21 enforcement [1] 65:24 engage [4] 5:12 7:11,14,24 engaged [4] 11:3 39:24 40:23 46:4 engaging [4] 5:7 7:16 47:14 48:12 enormous [1] 29:16 enough [3] 22:4,5,13 ensuring [1] 34:6 entered [1] 88:22 enterprise [2] 90:6,8 entertainment [1] 4:24 entire [1] 44:9 entirely [4] 7:18 23:19 29:23 40:14 entities [2] 30:4 90:8 entitled [1] 78:8 entity [2] 63:17 74:14 entry [1] 77:1 equally [1] 92:15 err [1] 14:9 escape [3] 23:11 24:17,18 especially [1] 74:1 ESQ [4] 3:3,6,10,13 ESQUIRE [1] 2:2 essays [1] 26:9 essential [1] 90:11 essentiality [6] 7:7 17:22 25:15 34:19 36:3 39:14 ET [3] 1:4 12:24 87:14 Etsy [2] 60:5 62:13 Europe [3] 20:24 21:14,17 European [3] 20:16,20 21:4 even [27] 6:3 7:25 17:11 18:18 22:2,7 23:23 26:11 27:22 29:4 30:7,8 32:17,17 35:8 36:6 41:17 43:1 49:9 57:16 64:3 65:12 75:13 80:2 81:15 84:3 91:22 events [1] 93:3 everybody [6] 24:24 37:1 49:10 81:1 82:4 83:17 everything [6] 9:8 23:13 26:22 56:3 64:15 74:17 everywhere [1] 89:9 exact [1] 53:22 exactly [8] 20:16 33:4 43:23,24 44:13 74:15 89:3 90:22 example [9] 19:5 46:24 49:25 58:7,9,12 61:18 63:10 89:6 examples [3] 60:4 68:21 80:12 exclude [3] 6:10 18:10,11 excludes [2] 4:19,22 excluding [1] 29:6 exclusion [1] 29:7</p> | <p>exclusively [1] 91:3 exempt [1] 38:11 exercise [2] 8:25 11:13 exercised [3] 23:15,18 26:13 exercising [2] 23:12 41:7 exist [1] 73:1 exists [1] 44:15 expansion [1] 41:18 expenses [1] 64:25 explain [3] 31:23 34:20 52:8 explains [2] 49:25 68:18 explanation [3] 20:12,17 30:13 explicit [1] 6:3 express [2] 41:5 45:3 expressed [1] 35:20 expression [3] 63:24 73:2 87:13 expressive [16] 7:12 36:8 38:14,23 42:18 43:1 46:6, 12,18 47:8 48:13 56:7,8 59:2 90:6,8 extend [1] 81:17 extensive [2] 79:4,25 extent [3] 42:9 79:17 80:3 extreme [1] 19:5</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face [4] 42:7 63:10 82:20 92:22 Facebook [13] 13:23 18:14 56:25 58:15 60:11,14 62:9 63:10 67:1 68:3 87:1 88:14,16 facial [12] 31:18 32:2,4 50:21 56:21 58:18 63:1 68:23 79:21 80:7 92:10,12 facially [2] 5:3 80:11 facilitate [1] 76:5 facilitating [1] 46:16 facility [1] 90:11 fact [5] 30:3 33:16 34:15 36:12 65:21 factor [1] 90:10 facts [3] 59:6,6 79:23 factually [1] 13:15 fail [2] 43:2 68:24 failed [1] 77:22 fails [1] 80:12 fair [5] 13:18 60:6 73:25 79:20 92:23 faith [1] 44:3 fall [2] 61:10,12 falls [4] 55:4,6 70:14 83:15 family [1] 49:9 fan [1] 36:15 fanciful [1] 68:22 far [3] 20:10 64:10 78:11 favor [1] 91:12 feature [1] 9:10 February [1] 1:13 federal [3] 40:22 41:2 72:</p> |
|--|---|---|--|---|

Official

| | | | | |
|---|---|---|--|---|
| <p>16 federalism [1] 50:21 few [6] 14:12 17:20 31:22 69:5 80:11 89:21 Fewer [1] 76:25 fiberoptics [1] 46:8 fiction [1] 26:3 figure [7] 7:24 39:5 54:19 55:12 59:7 92:2,4 file [1] 50:5 filed [1] 10:7 findings [2] 78:1 84:20 fine [3] 59:11 68:25 76:3 first [59] 4:13,25 5:13 6:6 7: 3 10:14 15:4,20 18:9 20: 13 21:17 25:6 28:4 30:5,5 31:25 38:12,19,25 39:6,17 40:2,19 42:14,22 43:2,10 46:19 48:14 49:1,17,22 50: 20 52:2,3,4,8,11,20,21,21, 22 53:3 55:22 56:3,4 64: 16 65:4 69:6 70:9 74:11 77:2 81:2 83:12 85:23 89: 22 90:20 91:4 92:12 first-line [1] 51:18 fit [3] 38:4 51:1 81:24 fitting [1] 35:15 fix [1] 58:19 flag [1] 91:4 flood [1] 65:22 floor [1] 29:24 Florida [7] 6:24 7:5 15:17 22:24 37:16 61:17 65:1 Florida's [3] 41:17 45:22 60:1 flourish [1] 13:4 flourished [1] 13:22 focus [4] 4:15 29:22 59:19 77:11 focused [2] 4:23 19:13 follow [1] 18:23 followed [1] 22:7 food [1] 72:3 football [1] 34:23 forbids [1] 5:6 force [1] 38:6 forced [1] 7:11 Ford [1] 65:15 foreclose [1] 93:7 forget [1] 33:22 formula [1] 5:22 fortunately [1] 4:17 forum [9] 12:25 17:25 18:1 19:11 20:4,5 65:15 67:7, 10 foundational [1] 92:20 free [1] 70:16 friend [4] 38:3 42:2 51:6 74:24 friends [1] 49:9 frontal [1] 91:7 FTC [1] 78:6 fully [1] 44:11 fun [1] 67:5</p> | <p>function [5] 9:19 63:12 75: 18,18,25 functionalities [1] 81:16 functionality [1] 63:16 functioning [1] 10:10 functions [2] 63:7 75:24 fundamental [2] 11:11 12: 10 fundamentally [4] 6:7 7: 13 18:6 46:3 further [5] 23:6 40:24 45: 16 72:3 82:1</p> <hr/> <p style="text-align: center;">G</p> <p>game [2] 34:23 71:6 garbage [1] 30:9 gay [1] 43:6 GEN [3] 2:4 3:6 37:21 gender [1] 49:20 GENERAL [22] 1:7 2:4,8 12:18 13:11 37:20,24 39:7, 21 40:10 41:16,25 45:8 46: 2 47:25 48:4,7,9 65:23,24 66:9 92:18 generally [4] 42:3 45:11 67:10 71:22 geofence [2] 34:19 87:2 geofencing [3] 36:18 65:1 67:21 geographic [3] 7:9 34:17 87:15 geographical [1] 36:12 geography [2] 34:6 89:11 gets [3] 18:24 33:20 42:16 getting [4] 14:6 16:2 92:3, 15 gist [1] 28:7 give [8] 25:15 42:21 47:12 54:16 62:21 74:6 80:14 92: 2 given [2] 45:22 73:15 Gmail [3] 4:20 92:23 93:2 gobbledy-gook [1] 30:7 Gonzalez [1] 10:7 GORSUCH [22] 9:3,21 10: 2,13 11:15,22 12:12,16 14: 11,24 33:8 43:19 64:18,22 75:7,10,17 76:7,13,25 77: 24 78:18 got [5] 25:4 52:7 58:17 81: 18 92:4 government [24] 15:10,11, 18 16:12,13 18:13 20:5 39: 24 40:1,6,8,16,22 41:2 45: 19 52:5 55:18 71:24 72:17 74:24 78:23 79:1,18 93:6 government's [2] 52:6 82: 21 governmental [2] 42:8 45: 13 governments [2] 5:9,10 grandma [1] 58:16 grandmother [1] 84:10 grant [1] 30:15</p> | <p>granular [2] 67:25 74:2 gravely [1] 49:24 great [1] 85:23 grist [1] 81:18 ground [2] 42:2 45:5 group [4] 29:6 45:7 53:11 80:23 groups [2] 53:10 83:6 Growth [1] 13:20 guess [8] 7:21 35:10,23,25 52:23 53:14 76:24 81:25</p> <hr/> <p style="text-align: center;">H</p> <p>hacked [1] 34:24 Half [1] 30:7 Hamas [1] 69:22 hand [4] 44:17,18 76:14,18 handful [1] 66:1 handled [1] 69:4 happen [1] 59:3 happened [1] 40:22 happy [4] 8:10 11:20 80:10 85:11 hard [18] 10:24 11:23 14:23 52:23,25 54:19 57:25 58: 24 59:1,4 63:1,8 66:2 70: 22 73:23,24 74:3 80:10 hard-look [1] 78:7 harmful [1] 25:17 HB [2] 50:10,13 hear [6] 4:3 51:16 59:15,16, 21,22 heard [2] 59:25 86:6 heartland [1] 50:20 held [1] 24:12 help [1] 76:17 helpful [2] 54:24 74:4 hence [1] 64:14 Herald [4] 27:9 28:21 56:9 73:25 hesitance [2] 71:17,18 highly [1] 68:16 history [1] 56:2 hold [2] 14:14 80:24 holding [1] 43:7 home [1] 46:10 Honor [21] 52:11 53:15 60: 7 61:24 62:10,15 63:13,19 64:21 66:15,23 67:4 75:16 76:12 78:4 83:12 84:22 85: 8 87:5,20 89:13 hook [3] 52:19 65:10 87:25 hooks [1] 53:2 hope [2] 48:1 78:11 horrible [1] 71:9 horribles [1] 64:25 host [2] 49:12 56:23 Hotel [1] 36:4 house [1] 90:13 houses [1] 16:10 however [1] 44:7 huge [1] 22:14 hugely [1] 21:21 humongous [1] 22:10</p> | <p>hundred [8] 23:1 30:25 31: 3,4,5,7,8 75:15 hundred-fold [1] 8:8 Hurley [4] 29:1 42:19 43:6 56:11 hypotheticals [1] 59:12</p> <hr/> <p style="text-align: center;">I</p> <p>idea [11] 7:11 15:22 16:16 17:18 38:3 51:20 53:23 57: 7 64:15 91:16 92:8 ideas [1] 16:3 identical [1] 64:7 identify [1] 15:10 idiosyncratic [1] 36:19 ignore [1] 69:7 ignoring [2] 59:12 63:23 Il [2] 84:23 85:3 illegal [1] 69:19 Illinois [1] 53:1 imagine [2] 58:5,7 immediately [1] 45:9 impermissible [2] 16:12 36:8 implicate [1] 46:18 implication [1] 19:6 implications [1] 49:24 important [14] 11:24 45:12 54:17 56:1,19 62:15 65:18 68:13,19 75:21 78:13 86:2 91:22 92:8 impose [1] 20:13 imposed [2] 20:16,19 inappropriate [1] 80:8 inapt [1] 79:13 incentive [1] 25:16 incitement [1] 70:4 inciting [1] 69:22 included [3] 24:9 26:6 63: 22 Including [4] 6:21 7:10 63: 22 77:19 inconsistent [1] 24:21 increase [1] 8:7 increased [1] 72:16 incredibly [2] 23:4 78:22 indiscriminately [1] 83:7 individual [4] 16:10 23:20 25:2 30:2 individualized [6] 11:5 20: 12,17 30:13 31:22,23 individuals [1] 43:6 industry [1] 81:4 infected [1] 82:11 infection [1] 78:25 influence [1] 41:10 information [2] 62:4 87:14 informs [1] 17:22 infrastructure [6] 46:8 72: 5,11,14,18,20 inherent [1] 41:1 inherently [5] 38:14 46:6 56:7,8 59:1 injunction [13] 30:16 32:5,</p> | <p>15 36:23 37:9,14 50:22 65: 19,20,22 79:22 80:7 92:16 injunctions [2] 64:24 66:9 inns [1] 81:6 insisting [1] 41:21 instance [1] 7:3 instances [1] 40:5 Instead [4] 43:3 50:20 53: 24 89:8 instinct [1] 11:1 intensely [1] 77:7 intent [1] 45:6 interactive [1] 8:20 interacts [1] 43:25 interest [7] 15:10,19,20 16: 12,13 82:8,12 interested [1] 86:6 interesting [1] 9:10 interests [3] 42:8,22 45:13 Internet [20] 16:18 26:25 28:4 39:8 45:23,24 46:2, 10,24 47:2,10,13,17 78:21 79:13 81:13,14,14 90:16 91:12 interpretation [2] 34:9,11 interpretations [1] 35:12 interpretive [1] 44:7 interrupt [1] 75:8 intimately [1] 56:11 intriguing [1] 23:9 intuition [2] 38:6,10 invested [2] 77:21 82:8 involved [1] 5:17 isn't [12] 10:16 15:2 28:3 34:13,13 37:12,13 44:9 52: 13 58:23 68:2 72:8 issue [7] 4:20 8:11 44:14, 24 48:11 78:20 92:25 issues [4] 10:24,25 27:5 43:22 it'll [1] 72:1 itself [2] 47:10 67:24</p> <hr/> <p style="text-align: center;">J</p> <p>JACKSON [16] 33:10,12, 13 35:8 37:4,7,17 63:5,14 73:6,18 74:9 75:12 89:1,2, 14 join [1] 69:22 Joint [1] 91:24 judgment [2] 55:16 61:14 jumping [1] 27:25 jurisdiction [4] 65:14 66: 18,19 67:5 jurisdictional [2] 65:10 87: 25 Justice [178] 2:5 4:3,10 6: 15,21 9:3,9,21 10:2,13 11: 15,22 12:12,16 14:11,24 15:15 16:6,21,23 18:20,21, 22,24 19:7,21 20:8 22:9,20 23:5,5,7,8 24:5 25:25 26: 13 27:2 28:2 29:11 30:11, 12,18,21 31:6,11,14,17 32:</p> |
|---|---|---|--|---|

Official

| | | | | |
|---|--|---|--|--|
| <p>1 33:2,5,7,8,9,10,11,11, 13 34:3 35:8 37:4,7,17,18, 24 38:2 39:21 41:16 42:12 43:18 44:25 45:15,17,18, 19 47:18,20,21 48:1,3,5,8, 17,18,24 50:24 51:23 53:4 54:3 55:13,14,22 57:21,22 58:2,20 59:24 60:8,16,20, 22 61:3,5,13,20 62:5,11,16 63:5,14 64:18,22 66:12,20, 24 67:12 69:3,10,13,24 70: 3,7,10,19 73:6,18 74:9 75: 7,10,11,17 76:7,13,25 77: 24 78:14,15,17,18 80:13 81:10,21 82:13,14,14,16, 17,18 83:18,22,25 84:16, 16,17,18,24 85:1,4,9,12,16 86:20,23,23,25 87:6,12 88: 13,24,25,25 89:2,2,14,15, 21 90:20 93:9 justification [1] 39:13 justified [1] 44:22</p> <hr/> <p style="text-align: center;">K</p> <p>KAGAN [12] 16:21,23 19:7 33:7 41:16 45:17,19 57:22 58:2,20 62:16 84:16 Kagan's [1] 18:24 Kavanaugh [29] 15:16 16: 6 33:9 47:18,21 48:1,3,5,8, 17 66:12,20 69:3,10,13,24 70:3,7,10,19 84:17,18,24 85:1,4,9,12,16 86:20 keep [13] 9:1 11:14 17:3 19: 24 35:4 51:25 63:23 65:6, 6 70:13 72:6 74:12 82:1 keeping [3] 14:10 17:2 26: 22 KEN [1] 1:7 key [1] 16:7 kick [5] 58:15 64:5,9 84:9, 14 kicked [2] 51:13 90:14 kicks [1] 88:2 kids [7] 50:9 52:19 53:2,11 91:10,11,22 killing [1] 13:23 kind [37] 10:9 11:8 13:16 18:24 21:5,18 29:10 36:13, 18 37:1 40:23 43:10,17 45: 9,14 46:12,23 47:12 48:15 51:8 54:4 63:17 69:25 72: 6,20,23,25 73:12 74:1,3,5 75:23 77:16 81:13 82:25 83:10 86:3 kinds [4] 14:18 16:24 38: 20,22 knock [1] 22:15 knocked [1] 29:22 knowing [1] 44:13</p> <hr/> <p style="text-align: center;">L</p> <p>labeling [1] 6:5 language [3] 28:18 29:1</p> | <p>30:8 large [1] 46:11 largest [4] 77:20 83:14,15 84:3 last [8] 28:6 56:12 60:4 61: 16 70:20 71:5 90:13 92:7 Laughter [5] 4:7,14 20:2 29:14 47:24 law [70] 6:3 8:3,9 12:1,3 16: 16,25 17:6 24:19 25:10 26: 16,19,21 28:1 35:2 36:20 39:4,8 41:12,16 42:10,15, 21 43:17,25 44:10 45:1,5,9, 12,22,23 50:19,25 55:4 57: 7,24 59:10,13,14 60:1,2,9, 25 61:6,7,17 65:18 66:14, 17,21,23 68:24 69:19 74:7 75:20 78:9 83:1,3,25 84:6 87:9,21,24 88:1 90:25,25 91:1,8 92:16 Lawrence [1] 50:4 laws [8] 6:16 41:18,20,24 42:4,6,17 82:19 lawsuits [1] 66:8 least [5] 6:2 7:2 10:7 76:23 79:22 leave [6] 36:6 48:14 55:16, 18,19 65:14 left [5] 50:16 59:17,20 67: 14 71:7 legal [1] 40:24 legislative [4] 44:25 45:6 77:25 84:19 legislators [1] 35:2 legitimate [3] 12:5 15:20 16:13 lesbian [1] 43:6 less [1] 32:19 Lessig [1] 50:4 level [12] 8:1 15:22 34:1 63: 16,18 67:25 69:18 72:4,9 74:2,14,14 levels [1] 70:11 liability [3] 24:18 26:15,20 liable [5] 10:3 24:9 25:12, 21 26:2 life [1] 64:23 likely [2] 80:5,5 limit [4] 50:14,16 58:17 91: 5 limitations [1] 27:15 limited [2] 47:12 65:23 line [8] 42:24 54:25 55:3,3, 6,12 58:22 86:3 lines [5] 13:17 14:1 64:17 73:24 74:7 Lion [1] 16:15 listen [2] 50:18 64:3 listened [1] 64:20 literally [2] 11:19 46:16 litigate [1] 80:10 litigated [1] 93:4 little [6] 6:2 26:23 32:24 44: 19 71:17 86:20</p> | <p>live [2] 84:11,12 lives [1] 50:8 LLC [1] 1:3 local [1] 28:19 location [6] 7:9 34:17 35: 21 36:13 87:15,18 Lochner [4] 49:23 57:13 64:14,15 Lockwood [1] 86:15 log [1] 46:9 long [4] 13:16 15:7 32:19 48:24 look [15] 13:19 27:11 32:13 38:21 43:3 54:18,20 56:1, 21 57:16 58:2 64:1 67:8 77:16 79:9 looked [6] 22:7 26:18 30: 22 59:6 71:20 76:9 looking [3] 34:1 42:9 87:9 looks [3] 63:3,14 81:14 lose [3] 7:10 10:11 69:1 lost [1] 68:20 lot [15] 14:6 18:2 29:1 31: 17 33:1 45:20 51:16 52:12 59:25 66:5 68:25 69:20 77: 17 81:14 85:19 lots [1] 90:16 louder [1] 16:1 lower [1] 36:22 luck [1] 90:15 lurk [2] 43:15 64:3</p> <hr/> <p style="text-align: center;">M</p> <p>Ma [1] 90:14 machine [1] 72:25 made [3] 16:11 23:24 90: 20 main [2] 13:16 80:18 many [9] 5:2 12:20 13:6 23: 21 73:8,8,8 91:14 92:13 march [1] 43:6 market [17] 7:4 76:10,16 77:1,5,11,12 78:1,22 79:3, 24,25 80:3,14,17 82:4,6 marketplace [1] 16:3 markets [1] 77:7 massive [3] 20:14 38:7 77: 21 massively [1] 72:16 matching [1] 56:18 material [8] 8:24 11:14 14: 10 24:10 25:8 26:5,7 30: 23 materially [1] 21:3 materials [4] 5:17,18,20,21 matter [11] 1:15 10:18 21: 15 27:15 28:15,22 36:16 66:17 77:14 78:9,20 matters [1] 66:5 mean [63] 6:19,25 8:10 9: 22 10:6 14:25 15:16 16:5, 15 17:16 18:6 19:25 20:15 21:20,22,25 22:9,22 24:5 26:4,12 28:12 29:11,15 31:</p> | <p>16 35:10,24 37:10 52:22 54:8,10 56:8 57:12,25 59: 17 60:22 61:1,15 62:8 63: 6,7 64:2 66:16 67:1,19,22 71:9,16 72:15,21 73:8 74: 12,24 76:10 77:23,25 78: 20 79:7 80:16 81:12 83:11 91:16 92:19 meaning [2] 82:20 89:11 means [10] 5:16 14:5 44:3, 4 59:20 64:13 68:24 80:22 90:5,6 meant [1] 66:20 media [12] 4:19 38:4,21 41: 3 50:8 60:10 61:25 62:7,8 67:18 78:20 79:12 megaliths [1] 22:21 members [2] 12:25 79:2 memory [1] 84:20 mention [2] 36:21 59:18 mentioned [1] 14:12 mere [1] 42:25 merely [1] 67:8 merge [1] 73:14 merits [1] 80:6 message [13] 24:13,14,15, 16,18 29:3,8,9 43:5,7,15 76:1 83:6 messages [5] 27:19 69:25 83:6 90:1 92:3 messaging [1] 83:2 messenger [1] 63:11 meta [2] 34:1 77:19 Miami [4] 27:8 28:20 56:9 73:25 might [17] 15:11 36:18 44: 8,14 45:12 46:20 58:1,10 62:25 63:2 75:12 76:17,17, 19,20 78:11 81:22 mile [1] 90:13 million [3] 59:9 61:9 83:15 millions [1] 49:8 mills [1] 81:19 mind [2] 7:5 58:5 minute [4] 53:19 58:14 71: 21 86:9 miserably [1] 77:23 missing [1] 89:24 Mm-hmm [2] 81:20 87:11 model [3] 15:5 83:5,10 moderation [5] 7:25 19:5 41:4,8,14 modern [2] 49:11 73:7 modest [1] 50:10 modified [1] 92:24 Monday [1] 1:13 money [4] 68:8,9 77:21 88: 16 monopolist [1] 28:18 monopoly [2] 54:10 77:22 month [2] 40:13 61:9 morning [1] 57:2 most [7] 12:22 27:22 58:6, 12 59:11 68:21 69:17</p> | <p>move [1] 77:8 moving [1] 79:8 much [12] 12:1 20:17,22,23, 25 22:16,21 29:3,13 31:20 43:23 78:23 Murthy [1] 40:13 must [2] 52:6,7</p> <hr/> <p style="text-align: center;">N</p> <p>narrow [3] 16:13 60:2 64: 12 narrowly [1] 39:4 national [2] 49:4,4 nationwide [1] 6:24 natural [1] 15:1 nature [3] 20:4 73:15 78:19 near [1] 50:19 necessarily [4] 27:16 35: 10,23 70:4 necessary [3] 39:5 72:5 92:25 need [7] 31:20,20 44:23 47: 15 72:12 79:15 82:6 needs [1] 69:1 net [5] 45:20 47:4,23 48:11, 16 NETCHOICE [3] 1:3,3 4:4 Netflix [1] 47:1 network [1] 76:15 neutral [4] 16:7 23:21,22 24:1 neutrality [7] 45:1,20 47:5, 23 48:11,16 52:15 never [8] 42:24 59:13,16, 18,19 64:6 74:11 84:3 New [10] 21:23 22:5 39:6 49:1,25 52:17 68:18 76:22 81:22 86:15 news [1] 4:24 newspaper [8] 24:6 27:8, 14,14 28:8,11 29:12 38:9 Newspapers [1] 27:19 next [4] 4:4 40:13 69:18 72: 24 NIELSON [77] 2:8 3:10 48: 20,21,23 51:5 52:10 53:14 54:16 55:21,25 57:25 58:4, 23 59:24 60:6,12,19,21 61: 1,4,7,19,23 62:10,14,19 63: 13,19 64:21 65:3 66:15,22 67:4,19 69:5,12,15 70:2,6, 8,11,22 73:17,19 74:21 75: 7,9,15,19 76:12,24 77:2 78: 3,15 79:19 80:13,18 81:20, 25 83:11,20,24 84:2,22,25 85:2,8,10,14,22 86:22 87:4, 11,20 88:18 89:13 nobody [1] 55:5 nobody's [1] 66:4 non-differentiated [1] 80: 25 non-fiction [1] 26:9 non-speech [1] 55:2 non-starter [1] 91:21</p> |
|---|--|---|--|--|

Official

| | | | | |
|--|--|--|--|---|
| <p>none ^[1] 88:20 nothing ^[4] 27:14 48:7 61:15 76:1 notorious ^[2] 19:19,25 nowhere ^[1] 50:19 number ^[3] 17:5 34:25 40:5 numbers ^[1] 61:22</p> | <p>ordinary ^[2] 42:10 72:3 organizer ^[1] 28:8 Orwell ^[2] 71:17 72:21 other ^[37] 4:22 5:4 6:1 11:16 13:2 14:13 17:25 18:3,15 19:17 24:2 27:25 29:20 38:22 43:16 44:18 47:3 52:16,18 53:5,5 54:13 58:21 61:10 62:3,13 64:4 65:17 71:8 75:20 76:17 82:7 90:10,17,24 91:1,8 others ^[5] 9:12 11:13 13:10 16:1 68:4 otherwise ^[7] 9:23 10:19 14:4 16:12 36:19 44:5 55:8 ought ^[1] 51:9 out ^[45] 7:24 9:9 11:14 12:24 13:1,3,13 14:1 15:8,16 16:6 17:2,3 22:15 25:16,22 26:22,22 30:5 31:21 35:6 37:12 39:5 42:1 44:8 51:13,25 54:19 55:12 59:7 61:16 66:18 70:16 74:11 80:24 83:8 85:3 86:16 87:2,8 88:8 90:15 92:2,4,18 outrageous ^[1] 58:16 over ^[5] 21:11 32:5 40:17 41:13 79:4 overtly ^[1] 27:19 owe ^[1] 78:2 own ^[8] 39:16 46:13 47:3,4 53:19 62:23 71:22 75:14</p> | <p>18 PAXTON ^[3] 1:7 4:5 85:3 people ^[33] 13:2 16:1 17:11,25 18:3,10,15 19:1 29:4,21 34:20 35:17 37:11,15 43:12 45:3 47:11 49:12 50:17,18 52:7 57:16 64:4 67:14 68:6,16 71:8,9,24 73:4 76:6 88:3 89:11 people's ^[2] 11:16 43:16 per ^[1] 61:9 percent ^[7] 22:1 31:4,4,5,7,8 75:15 perfectly ^[4] 11:24 38:4 59:10 68:25 person ^[5] 18:3 19:10 49:10 51:25,25 personal ^[3] 65:13 66:18 67:5 persuade ^[2] 48:2 72:1 Petitioners ^[11] 1:5 2:3,7 3:4,8,14 4:9 37:23 40:7,7 89:19 phone ^[1] 76:6 photos ^[1] 18:5 physical ^[1] 49:20 physically ^[1] 47:15 pick ^[5] 38:1 59:11 70:12,24 80:11 picked ^[3] 58:6,12 68:20 pilaf ^[1] 24:1 pill ^[1] 36:3 pipes ^[1] 53:24 place ^[1] 16:4 placed ^[1] 23:14 places ^[1] 68:6 plainly ^[1] 12:4 Plaintiffs ^[1] 93:4 platform ^[15] 14:16 19:3 39:12,15 44:4,21 49:19 53:20 57:11 61:8,17,25 67:18 76:22 77:17 platform's ^[1] 39:16 platforms ^[29] 4:19 19:14 33:20,21 38:4,21 40:16,18 41:7 42:3 48:12 49:11 50:2,12 51:24 54:15 55:17,20,20 56:14,16 57:15 60:8,10 61:10 63:17 78:21 79:13 81:15 platforms' ^[2] 41:3 49:5 playing ^[1] 15:23 plays ^[1] 85:3 please ^[4] 4:11 30:14 37:25 48:24 POD ^[1] 53:12 point ^[19] 10:21 23:25 25:23 27:4 44:1 55:10 56:2 59:19 64:17 71:5 78:10,25 83:21 84:20 90:1,1,21 91:10 92:7 pointed ^[6] 9:9 15:8,16 16:6 74:11 92:18 pointing ^[3] 28:12 61:16</p> | <p>87:7 points ^[1] 89:21 poison ^[1] 36:3 policies ^[2] 32:20,24 policy ^[1] 51:9 political ^[2] 28:19 72:4 porn ^[2] 26:23,24 position ^[8] 15:2 23:11 40:11,12 41:19 47:22 61:5 62:6 possible ^[4] 15:7 16:24 39:7 59:12 post ^[3] 17:12 18:19 87:19 post-9/11 ^[1] 70:4 posted ^[1] 64:6 posting ^[3] 17:9 18:2 62:3 posts ^[3] 9:12 43:16 76:2 posture ^[2] 56:21 68:23 potentially ^[3] 21:20 24:9 42:1 power ^[15] 27:16 50:11 76:11,16 77:5,12,13 78:1 79:25,25 80:3,14,17 82:4,7 powerful ^[1] 27:15 powerless ^[1] 50:7 practical ^[6] 20:21 21:6,8,15 26:25 76:20 practice ^[1] 18:10 pre-9/11 ^[1] 70:3 pre-enforcement ^[2] 50:22 79:21 precisely ^[1] 25:13 predators ^[3] 18:12 91:25 92:2 preempted ^[1] 44:10 preemption ^[3] 43:20 44:14,24 preempts ^[2] 11:25 12:1 preliminary ^[6] 32:4,15 36:23 37:9,14 92:15 PRELOGAR ^[13] 2:4 3:6 37:20,21,24 40:10 41:25 45:8 46:2 47:25 48:4,7,9 presentation ^[1] 92:19 presented ^[1] 27:6 preserve ^[2] 20:1,3 press ^[1] 14:12 pressure ^[1] 14:6 presumably ^[2] 33:21 60:17 pretty ^[3] 15:18 20:17 64:10 prevail ^[2] 66:11 80:6 prevailing ^[1] 66:5 prevent ^[1] 17:8 preventing ^[1] 34:16 prevention ^[3] 5:18 7:20 91:18 prevents ^[2] 17:2,7 primarily ^[1] 4:23 primary ^[1] 62:3 principles ^[1] 46:19 prior ^[4] 27:6 38:24 59:25 64:19</p> | <p>private ^[11] 15:25 20:5,6 39:23 40:6 53:21 65:24 71:23 73:1,10 80:23 pro-Al-Qaeda ^[2] 69:25 71:2 pro-Semitic ^[2] 5:20 7:22 pro-union ^[1] 49:7 probably ^[1] 67:23 problem ^[6] 42:14 44:11 58:11 81:11 82:18 86:14 problematic ^[4] 18:18 21:21 25:18 26:19 problems ^[1] 6:6 proceed ^[1] 4:12 process ^[4] 8:7 21:13,14 23:2 product ^[5] 25:1 38:17 42:19 46:18 68:10 products ^[1] 38:23 Professor ^[2] 50:4 86:7 prohibit ^[1] 29:9 prohibited ^[2] 15:21 19:17 prohibiting ^[2] 44:16 89:10 prohibition ^[2] 65:5 88:9 prohibitions ^[1] 87:21 prohibits ^[1] 91:1 prominent ^[1] 27:23 promise ^[1] 12:25 promote ^[6] 9:11 10:22 13:17 18:8 82:25 83:5 promotion ^[3] 5:19 7:21 91:19 prompting ^[1] 49:4 protect ^[5] 42:5 45:14 51:21 82:24 91:16 protected ^[12] 15:4 25:6 36:16 39:11,16 43:13 44:21 48:13 50:1 64:16 68:14 74:12 protecting ^[3] 91:10,11,22 protection ^[1] 10:12 protects ^[1] 43:24 Protestant ^[2] 19:25 20:6 Proud ^[3] 58:9 92:11,15 prove ^[3] 61:2 66:10,10 provide ^[3] 7:14,15 22:16 provider ^[4] 34:22 45:25 46:25 47:10 providers ^[3] 45:23 46:3 71:13 providing ^[3] 42:18 46:7,22 provision ^[15] 8:19 21:5,6 34:5,8,11 36:4 59:13 61:24 65:9 69:7 87:24 88:2,7 91:23 provisions ^[5] 8:5 36:25 56:25 87:8 92:1 public ^[27] 6:12 13:1 41:18,20,23 42:4,10,21 45:11 49:11,14 57:6 62:1 64:11 73:7,9 80:20,22,25 81:5 82:8,12 86:19 90:23,25 91:1,8</p> |
|--|--|--|--|---|

Official

| | | | | |
|---|---|---|--|--|
| <p>publish [2] 57:19 58:8 published [1] 24:6 publisher [5] 25:10 26:1, 10,11 58:7 pull [2] 35:6 87:2 pulpit [1] 41:5 purpose [3] 11:11 12:11 62:3 purposeful [1] 67:9 purposely [1] 67:7 purposes [2] 9:18 10:14 put [12] 4:20 8:24 15:24 24:23 26:6,8 27:17 32:9 46:13 70:8 82:3 89:25</p> <hr/> <p style="text-align: center;">Q</p> <p>qualify [1] 81:22 quantification [1] 31:2 quantified [1] 31:3 quantity [1] 38:15 quarter [1] 21:12 question [21] 11:23 12:6, 17 18:24 20:22 33:3,14 38:1,24 43:11,12,19 53:6 54:5 55:24 58:1 78:18 83:3 85:23,24 88:18 question-begging [1] 75:1 questions [8] 6:14 39:20 44:2,3 45:16 48:15 50:23 78:13 quick [2] 33:14 84:18 quintessential [1] 46:24 quite [3] 23:24 36:2 79:23</p> <hr/> <p style="text-align: center;">R</p> <p>race [3] 50:4 52:1 57:8 radically [1] 17:16 railroads [4] 54:13 79:8,9 81:19 raise [1] 12:17 raised [1] 12:17 range [1] 79:11 rapid [1] 72:16 rather [1] 63:17 rational [3] 16:17,18 24:11 reach [1] 12:5 reaction [4] 53:17,18 71:19 79:20 read [11] 34:5,7 35:9,13 43:16 51:10 56:25 60:2 65:8 86:6 88:20 reading [3] 12:8 36:11 51:7 real-world [1] 66:6 really [26] 11:23 13:21 19:13 21:19 24:13,20 27:12 33:25 35:13 36:17 54:18 58:25 64:13,13,14 65:17 66:3 73:22,24 74:2,7 77:14 80:10 86:8 90:11,15,19 reason [5] 63:1 64:5 75:4 77:11 80:7</p> | <p>reasonably [2] 21:6,8 reasons [3] 5:2 6:8 31:21 REBUTTAL [4] 3:12 89:17, 18,21 receive [3] 63:24 69:8 87:14 recognize [4] 38:11 43:8 68:13 75:21 recognizing [1] 11:2 reconciled [1] 54:22 record [7] 8:5 22:23 23:3 32:8,13 63:9 91:24 Red [3] 16:15 32:18 91:4 reflects [1] 8:5 refusal [3] 42:11,11,25 regulate [4] 29:24 37:1 50:10 74:19 regulated [1] 81:4 regulating [2] 35:7 36:8 regulation [8] 24:17 33:17, 20 39:1 42:13 73:12 79:4, 18 rejected [1] 21:24 rejecting [1] 73:13 related [1] 34:6 relationship [1] 68:5 relationships [1] 88:23 relatively [1] 32:19 relevant [2] 11:24 43:12 Religion [2] 19:21 49:20 relying [1] 6:3 remedy [1] 65:19 remember [1] 69:1 remind [1] 30:14 Reno [2] 16:20 28:5 representatives [1] 33:18 representing [1] 42:2 republishing [1] 25:12 require [1] 52:14 required [1] 22:17 requirement [6] 20:18 21:9,19 30:14 80:4,19 requirements [4] 20:12 21:2 82:3 89:7 requiring [1] 45:1 reread [1] 10:6 reserving [1] 12:21 resolution [1] 58:18 resolve [3] 11:1 39:18 43:23 resolved [2] 44:14 88:19 resources [1] 22:17 respect [12] 7:2 9:4 11:15 31:19 39:1 42:3 43:1 45:21 46:22 51:6 54:15 79:5 respectfully [1] 52:10 respects [1] 5:5 respond [5] 21:10 40:9,10 53:15 59:19 Respondent [4] 1:9 2:9 3:11 48:22 response [5] 12:19 34:3 35:1 69:6 79:20 responses [1] 83:11</p> | <p>responsible [4] 24:12 25:5,11 26:23 restaurants [1] 81:6 restricts [1] 52:4 review [1] 78:7 reviewed [1] 38:23 rice [1] 24:1 rich [1] 22:4 rid [1] 25:14 right-of-way [1] 76:19 rights [2] 71:22 92:13 roadmap [1] 92:2 ROBERTS [26] 4:3 6:15,21 23:5 33:7,11 37:18 45:15, 18 47:20 48:18 51:23 53:4 54:3 55:14,22 66:24 67:12 78:14,17 82:14 84:16 86:23 88:25 89:15 93:9 room [1] 29:23 round [1] 38:2 rule [3] 39:4 47:21 63:4 rules [1] 92:19 run [2] 8:2 76:20 runs [1] 37:9</p> <hr/> <p style="text-align: center;">S</p> <p>safety [1] 79:10 sake [1] 36:21 same [23] 8:19 16:14,16 17:18 20:16,17 27:16 29:10 35:24 37:15 41:9 46:14 52:16,20,21 53:3,5,7,18,22 54:14 78:18 89:3 satisfied [2] 38:25 39:2 say-so [1] 6:13 saying [20] 20:19 27:24 32:23 35:9 40:11 44:9 48:5 51:24 52:6,13,17 55:15 57:16,18,19 61:20 64:4 77:10 83:8 86:12 says [14] 8:19 9:5 20:20 29:2 52:18,22 59:14 61:7 65:9 74:24 82:5 85:17 87:12, 25 scale [2] 38:8 55:23 scandal [1] 49:5 scarcity [2] 16:17,18 scenario [1] 53:22 scoop [1] 60:24 scope [4] 43:19 44:13 60:24 61:6 screen [2] 11:5 75:5 scrutiny [2] 40:20 43:2 second [4] 6:11 81:3 83:21 90:23 second-line [1] 51:19 Section [12] 8:14 9:16 10:16,20,21 11:21 12:11 20:9, 11 32:11 43:20 65:25 see [8] 11:6 35:23 41:22 51:5 57:3 64:4 67:16 84:8 seem [1] 74:16 seems [13] 9:7 11:16 18:23 19:4 20:15 31:19 33:1 35:</p> | <p>15 36:2 54:6 55:14 64:10 86:20 seen [2] 51:1 93:1 selectivity [1] 38:16 self [2] 72:8 80:24 self-defeating [1] 10:20 sell [2] 57:18 68:15 selling [3] 50:2 57:17 68:12 send [2] 27:19 67:2 sending [2] 29:8 67:14 sense [4] 18:17 21:4 59:8 76:19 separate [7] 41:11 42:2 58:21 61:24 65:9 76:4 88:7 seriatim [1] 38:2 serious [2] 49:25 76:20 serve [3] 42:7,11,25 service [18] 7:14,16 12:21 13:11 34:19,22 45:23,25 46:2,9,22,25 47:1,4,10,14 86:10,11 services [2] 8:20 89:6 set [3] 17:13 35:16 76:21 sex [1] 52:1 sexual [1] 18:12 SG [1] 74:10 shake [1] 44:8 shall [1] 13:3 Shapiro [1] 13:22 shield [1] 26:14 short [2] 24:24,25 shouldn't [3] 5:9 11:1 68:20 show [4] 22:16 29:4 42:20 79:24 showing [3] 36:7 79:23 80:3 shown [1] 80:4 shows [3] 13:20,24 68:2 side [7] 4:20 14:9 27:25 55:2,3,6,12 sides [1] 27:5 sight [1] 69:1 sign [3] 43:8 47:11 88:15 signal [1] 55:11 significant [1] 45:13 silencing [1] 19:3 similar [2] 39:24 71:19 simple [2] 14:2 77:16 simply [6] 5:6 6:4,11 12:7 65:14 80:8 single [1] 24:7 sir [1] 73:3 site [6] 5:20,21 9:2 13:2 23:19 47:1 sites [4] 24:4 62:7,8,8 situation [5] 6:23 27:22 59:9 73:15 90:16 size [1] 61:14 slightly [1] 32:10 slips [1] 26:24 slow [1] 46:25 smaller [1] 37:11</p> | <p>social [16] 4:19 22:6 29:25 38:3,21 41:3 50:8 54:15 60:10 61:25 62:7,8,8 67:18 78:20 79:12 socioeconomic [1] 68:17 Solicitor [3] 2:4,8 12:18 somebody [15] 19:16,25 34:17 36:3 37:12 57:7,8 63:24 64:6,8 67:1,8 82:10 84:9 88:11 somebody's [1] 56:23 someday [1] 48:2 somehow [7] 8:2,13 23:10 51:13 65:6 82:7 92:9 someone [2] 19:3 47:15 sometimes [3] 34:21 42:20 76:9 somewhat [1] 38:22 somewhere [1] 73:2 sorry [5] 6:22 16:21 75:8,9 78:16 sort [23] 9:11 10:10 14:9 18:11 19:17 21:5 22:3 23:18 30:1 31:9 33:17,25 35:12 36:17 67:13 71:14 72:12 73:4,10 74:14 77:11 78:25 92:5 sorts [2] 51:8 79:5 SOTOMAYOR [16] 30:12, 18,21 31:6,11,14,17 32:1 33:2,5 55:13 82:17,18 83:18,22,25 sovereign [1] 78:5 space [2] 27:15 28:24 speakers [5] 5:12 17:18,20 49:13 91:3 speakers' [1] 91:5 speaking [1] 12:23 specific [2] 32:21 76:2 specifically [5] 7:6 8:16, 18 14:17 23:1 speech [60] 7:18,22,23 9:6, 8,14,16,17,19,20,23 10:4, 13,14,17 11:8,16,17,17 17:2,4,23,24 18:1 19:1,4,11, 16 25:20 38:15 39:11,16 44:15 46:12,17 47:8 49:2, 12 52:14 54:2,20 55:1,6 56:15,24 59:21,22 64:7,7 69:4 70:14,21,23 75:1,12 77:3 82:20,24 84:9 92:17 speech-oriented [1] 19:13 spent [1] 45:19 spit [1] 31:21 sports [1] 4:24 spread [1] 90:5 square [3] 49:11,14 73:7 stake [2] 42:1 46:19 stance [1] 41:23 standards [3] 40:24 41:8, 11 start [3] 26:22 46:21 76:22 starts [1] 54:19</p> |
|---|---|---|--|--|

Official

| | | | | |
|---|--|--|--|---|
| <p>state ^[25] 24:17,19 29:9 33:19,23,23 34:5 35:12,21,22 36:20 37:1 40:18 41:12 52:18 53:8 55:19 78:5,8 82:10 85:20,22 87:15,16,22</p> <p>state's ^[1] 33:19</p> <p>STATES ^[14] 1:1,17 2:6 3:7 15:8 27:9 37:22 41:6,19 49:23 50:7 53:6 78:5,12</p> <p>status ^[5] 42:5,25 43:13 88:5 89:24</p> <p>statuses ^[1] 19:18</p> <p>statute ^[16] 5:2,5 7:6 10:9 37:10,14 51:11,15 56:22 57:1 63:22 64:2 65:8,10 69:7 70:12</p> <p>statutes ^[1] 29:24</p> <p>statutory ^[2] 10:19 12:8</p> <p>stay ^[2] 13:16 15:6</p> <p>step ^[1] 79:17</p> <p>steps ^[1] 6:17</p> <p>stifle ^[2] 49:2 82:20</p> <p>still ^[7] 16:16 25:1,11 31:14 69:10 77:8 84:6</p> <p>stop ^[4] 57:4 66:13 86:19 91:25</p> <p>stories ^[2] 24:24,25</p> <p>strange ^[1] 86:9</p> <p>streaming ^[2] 47:1,4</p> <p>stress ^[1] 56:20</p> <p>strong ^[1] 10:8</p> <p>struck ^[1] 86:8</p> <p>structured ^[1] 45:11</p> <p>struggled ^[1] 58:24</p> <p>stuff ^[8] 13:25 14:3 24:3 25:17,23 30:7 67:14 78:21</p> <p>subject ^[4] 40:19 61:4 78:6 88:1</p> <p>submission ^[1] 10:16</p> <p>submitted ^[3] 30:23 93:11,14</p> <p>subsection ^[1] 8:17</p> <p>suddenly ^[1] 86:1</p> <p>sued ^[2] 26:7,11</p> <p>suffering ^[1] 45:4</p> <p>sufficient ^[1] 67:11</p> <p>sufficiently ^[1] 32:20</p> <p>suggest ^[2] 9:22 51:1</p> <p>suggested ^[2] 34:3 42:24</p> <p>suggesting ^[2] 73:14 74:10</p> <p>suggestion ^[3] 9:8 51:12 65:4</p> <p>suggests ^[1] 51:3</p> <p>suicide ^[7] 5:17,19 7:19,21 14:18 91:18,19</p> <p>support ^[1] 50:6</p> <p>supporting ^[3] 2:6 3:8 37:23</p> <p>suppose ^[2] 17:8 33:19</p> <p>suppressing ^[1] 39:15</p> <p>supremacist ^[1] 18:1</p> <p>SUPREME ^[2] 1:1,16</p> <p>surely ^[5] 44:9 57:6,11 58:</p> | <p>14 84:15</p> <p>surrounding ^[1] 79:12</p> <p>suspect ^[1] 58:1</p> <p>sweep ^[4] 12:5,9 60:3 62:12</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>Taamneh ^[2] 23:23 56:13</p> <p>takedown ^[1] 21:10</p> <p>takedowns ^[1] 21:11</p> <p>talismanic ^[1] 90:19</p> <p>talked ^[3] 56:9,10,13</p> <p>talks ^[2] 9:16 34:12</p> <p>tap ^[1] 11:6</p> <p>targeted ^[1] 68:16</p> <p>Teachout ^[1] 50:5</p> <p>technologic ^[1] 53:25</p> <p>technological ^[3] 54:1 67:21 75:2</p> <p>technology ^[2] 39:6 49:2</p> <p>teens ^[1] 14:17</p> <p>telecommunications ^[2] 81:9 83:16</p> <p>telegraph ^[10] 27:10 46:14 53:23,24,25 54:6,9,11 72:7 76:18</p> <p>Telegraphs ^[5] 49:3 72:23 74:22 75:5 79:8</p> <p>telephone ^[6] 46:14 59:23 63:3 71:10 90:12,21</p> <p>telephone/telegraph ^[1] 72:25</p> <p>telephones ^[2] 71:13 72:23</p> <p>tend ^[1] 29:21</p> <p>tension ^[2] 9:7 41:1</p> <p>term ^[2] 9:24 28:6</p> <p>terms ^[7] 6:10 12:8,20 13:11 66:6 86:10,11</p> <p>terrorism ^[2] 24:2 69:21</p> <p>terrorist ^[3] 24:3 70:21,23</p> <p>terrorist's ^[1] 69:4</p> <p>testified ^[1] 92:1</p> <p>Texans ^[4] 34:14,14 51:22 88:23</p> <p>TEXAS ^[73] 1:8 2:8 4:16,18,21 6:1,3,11,23 7:3,4,5,7,9,12 8:9 15:17 16:25 17:6 19:12 20:19 22:23 31:19 32:9 34:5,17 35:2 36:6,13,15 39:3,10 41:22 43:25 44:9,16 50:6 51:2,13,21,22 52:23 59:13,14 60:17,18 65:1,5,6,12,12 66:13 67:2,3,17 69:18 84:11 87:2,18 88:2,4,5,7,8,10,14,15,16,19,22 89:6,9,12</p> <p>Texas's ^[7] 8:3 41:16 60:2,9 61:5 62:5 65:18</p> <p>text ^[3] 10:9 51:15 64:1</p> <p>textual ^[1] 51:16</p> <p>themselves ^[3] 49:13 57:15 83:5</p> <p>theory ^[8] 49:5,17 54:16 57:</p> | <p>4 64:2,8 76:23 93:5</p> <p>there's ^[38] 13:25 16:17,17 21:12 22:18,23 26:10 29:1,18 31:17 37:11 41:1 50:13,15 56:24 58:17 59:9 64:17 65:9,13,19,24 68:4,24 73:9,23 76:4 77:10,13,14,17,25 92:14</p> <p>therefore ^[1] 74:18</p> <p>They've ^[1] 59:6</p> <p>thinking ^[2] 5:8 74:23</p> <p>Third ^[2] 70:11 91:10</p> <p>Thomas ^[5] 23:6 39:21 50:24 82:15 90:20</p> <p>though ^[7] 9:3 13:12 14:13 32:16 67:4 70:19 75:12</p> <p>thoughtful ^[1] 12:19</p> <p>thoughts ^[1] 28:3</p> <p>Threads ^[1] 77:19</p> <p>threaten ^[1] 35:5</p> <p>three ^[5] 22:6 61:12 62:24 63:6 83:14</p> <p>thrust ^[1] 8:23</p> <p>thumb ^[1] 55:23</p> <p>Tide ^[1] 53:12</p> <p>Tim ^[1] 50:5</p> <p>Today ^[2] 26:8 49:8</p> <p>together ^[5] 24:23 26:6,8 32:9 56:18</p> <p>took ^[1] 21:22</p> <p>tool ^[1] 73:22</p> <p>Tornillo ^[2] 28:17,23</p> <p>tort ^[1] 24:19</p> <p>totally ^[2] 75:1 79:13</p> <p>towards ^[2] 67:10 84:1</p> <p>tradition ^[5] 50:25 55:4 90:7 92:11,15</p> <p>traditionally ^[1] 81:4</p> <p>traffic ^[1] 47:2</p> <p>transition ^[1] 79:16</p> <p>transmission ^[1] 46:16</p> <p>transmit ^[2] 47:15 49:7</p> <p>transmitted ^[1] 89:25</p> <p>transmitting ^[2] 46:4 74:25</p> <p>transportation ^[1] 79:9</p> <p>trap ^[1] 65:6</p> <p>treat ^[2] 30:3 78:5</p> <p>treated ^[1] 8:21</p> <p>treating ^[1] 90:7</p> <p>treatment ^[1] 39:23</p> <p>treats ^[2] 8:14,14</p> <p>trial ^[4] 61:2 84:21 85:6,11</p> <p>tried ^[5] 30:3 39:10 41:10 59:7 65:12</p> <p>true ^[15] 9:4,6 13:5,6,9,15 30:4 37:15 52:12 53:24 65:7,16 66:16,17 77:12</p> <p>try ^[15] 7:24 8:1 14:17 22:13 24:22 34:18,19 36:6 39:5 52:19 68:23 73:20 77:21 91:15 92:5</p> <p>trying ^[7] 18:8 29:9 37:1 41:</p> | <p>22 43:23 82:21 91:5</p> <p>turn ^[4] 28:25 71:4,12,12</p> <p>Turner ^[4] 16:5,8 84:21,23</p> <p>turning ^[1] 18:25</p> <p>turns ^[1] 55:15</p> <p>twins ^[1] 80:21</p> <p>Twitter ^[7] 49:16 60:14 68:3 77:16,18,22 82:11</p> <p>two ^[13] 6:8 16:24 22:4 28:3 65:3 67:19 68:5 70:8,9 76:6 83:11 84:18 89:23</p> <p>type ^[8] 54:2,9 59:21,22 72:5,14 81:3 82:23</p> <p>types ^[3] 46:23 54:13 63:21</p> <p>typically ^[3] 23:21 27:20 50:5</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S.C ^[1] 8:16</p> <p>Uber ^[2] 60:5 61:18</p> <p>ultimately ^[1] 11:5</p> <p>unconstitutional ^[6] 5:3 12:3 45:5,10 57:23 92:21</p> <p>under ^[17] 24:19 25:21 39:17 43:2,20 49:5 50:13 59:14 66:13,16,20,22 69:18 70:12 73:11 82:9 90:19</p> <p>underlying ^[3] 9:20 24:25 25:8</p> <p>understand ^[10] 9:21 17:6 21:1 24:11,15 35:13 67:6 76:7 84:5 87:17</p> <p>understands ^[1] 24:25</p> <p>understood ^[3] 30:8 41:17 63:9</p> <p>unduly ^[1] 22:11</p> <p>Union ^[5] 20:16,20 21:4 27:10 49:6</p> <p>UNITED ^[7] 1:1,17 2:6 3:7 15:8 37:22 41:19</p> <p>universe ^[2] 37:11 69:17</p> <p>unknowns ^[1] 31:18</p> <p>Unless ^[3] 45:15 66:2 86:18</p> <p>unlike ^[1] 76:18</p> <p>unpopular ^[1] 5:23</p> <p>unresolved ^[1] 43:22</p> <p>up ^[17] 10:20 18:23 29:4,23 30:6 38:1 43:8 47:11 48:16 53:23 58:5 68:2 72:3 77:22 86:19 88:15 93:6</p> <p>UPS ^[1] 46:15</p> <p>urge ^[2] 39:4 86:5</p> <p>urged ^[1] 41:10</p> <p>usable ^[1] 30:2</p> <p>useful ^[3] 29:18 73:22 74:23</p> <p>user ^[6] 11:6 23:20 30:2 35:18 62:1 69:8</p> <p>user's ^[2] 9:20 87:15</p> <p>users ^[11] 5:24 7:8 9:12 29:22 38:17 39:15 50:14 61:9 62:2,3 88:15</p> <p>users' ^[1] 87:13</p> | <p>using ^[2] 41:4 60:4</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>valid ^[2] 42:7 43:17</p> <p>valuable ^[1] 84:13</p> <p>various ^[3] 54:21 55:20 63:16</p> <p>varying ^[1] 6:10</p> <p>verbs ^[1] 63:21</p> <p>Verizon ^[1] 47:12</p> <p>versus ^[2] 4:4 44:17</p> <p>video ^[1] 23:14</p> <p>videos ^[2] 17:12 24:8</p> <p>view ^[5] 7:15 14:15 32:10 45:24 89:5</p> <p>viewpoint ^[22] 5:7,8,13 7:17 17:21 18:18,18 19:18 35:18,19 45:1,4 49:4 50:11 52:14 66:10 70:17,20 91:2,6,13,20</p> <p>viewpoint-neutral ^[2] 5:16 52:24</p> <p>viewpoints ^[1] 18:16</p> <p>views ^[3] 13:3 41:5 49:7</p> <p>vigorously ^[2] 40:21 41:21</p> <p>vile ^[4] 58:7,12 59:11 68:21</p> <p>vindicate ^[1] 92:12</p> <p>violate ^[1] 20:12</p> <p>Virginia ^[1] 2:2</p> <p>visit ^[1] 49:9</p> <p>vital ^[2] 5:14,25</p> <p>voice ^[1] 39:15</p> <p>voices ^[3] 13:21 15:23,25</p> <p>Volokh's ^[1] 86:7</p> <p>voluntary ^[4] 50:16 59:23 71:8 72:24</p> <p>vote ^[1] 91:12</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait ^[4] 53:19 58:13 71:20 86:9</p> <p>wall ^[1] 67:17</p> <p>walled ^[1] 48:6</p> <p>wanted ^[13] 11:12,12 12:17 17:8,10 18:23 25:14,15 33:25 39:14 45:25 67:23 85:13</p> <p>wanting ^[1] 71:8</p> <p>wants ^[2] 47:2 51:14</p> <p>warn ^[1] 43:22</p> <p>warned ^[1] 49:24</p> <p>Washington ^[2] 1:12 2:5 24 13:1,3 14:13 15:13 22:7 26:20 29:25 32:19 34:8 35:7,9,24 36:7,8,25 39:3 41:15 42:21 46:11 47:7 53:7 54:24 55:11 56:5 59:12 65:12 67:25 73:4 74:20,23 77:16 87:22 92:5</p> <p>ways ^[3] 52:12 53:15 69:5</p> <p>website ^[1] 11:7 14:21 15:5 18:7,8 19:24 35:4 39:7 47:3 61:25 67:9</p> |
|---|--|--|--|---|

| | |
|---|--|
| <p>websites ^[12] 4:19,23 5:15, 23 6:5 8:15 13:22 29:25 30:6 38:15 46:5,23</p> <p>wedding ^[2] 21:25 22:1</p> <p>weed ^[1] 25:16</p> <p>weeding ^[1] 25:22</p> <p>weigh ^[2] 29:13,16</p> <p>welcome ^[3] 6:14 39:20 50:23</p> <p>Wendy's ^[1] 73:3</p> <p>west ^[2] 79:12 81:13</p> <p>Western ^[2] 27:10 49:6</p> <p>whatever ^[3] 20:20 44:15 76:2</p> <p>WhatsApp ^[2] 62:17 63:2</p> <p>whatsoever ^[1] 44:10</p> <p>Whereupon ^[1] 93:13</p> <p>wherever ^[1] 34:15</p> <p>whether ^[12] 20:22 28:10 31:2 38:25 44:19 53:10 54:12 55:15 56:6,11,23 59:8</p> <p>white ^[2] 17:25 18:5</p> <p>who's ^[2] 19:25 83:2</p> <p>whole ^[11] 8:22 10:21 25:23 35:16 47:16 55:10 68:24,25 79:11 80:12 83:4</p> <p>wild ^[2] 79:12 81:13</p> <p>will ^[8] 4:3 12:10 37:2 40:12 49:14 64:24 66:11 85:2</p> <p>Wire ^[2] 13:23 90:13</p> <p>wires ^[3] 76:20,21 90:12</p> <p>withdraw ^[2] 7:4 34:4</p> <p>within ^[7] 13:16 50:25 55:4 61:12 63:6 81:16 83:15</p> <p>witness ^[3] 22:25 62:23 91:25</p> <p>word ^[2] 75:22 90:3</p> <p>words ^[1] 51:10</p> <p>work ^[9] 25:13 49:9 51:9,11 58:19 66:25 70:21 72:20 92:5</p> <p>working ^[1] 14:22</p> <p>works ^[4] 25:19 61:18 82:5 91:9</p> <p>world ^[5] 57:3 64:11 76:10 77:4,20</p> <p>worlds ^[1] 27:13</p> <p>worldwide ^[1] 67:13</p> <p>worried ^[1] 90:24</p> <p>worry ^[1] 35:3</p> <p>worst ^[2] 9:2,2</p> <p>would-be ^[1] 77:18</p> <p>wrestled ^[4] 10:24 28:5,5,14</p> <p>wrestling ^[1] 28:4</p> <p>writ ^[1] 46:10</p> <p>writing ^[1] 26:9</p> <p>written ^[2] 26:5 58:8</p> <p>Wu ^[1] 50:5</p> <hr/> <p>Y</p> <hr/> <p>year ^[2] 27:21 56:12</p> <p>York ^[6] 21:23 22:5 49:25 52:17 68:18 86:15</p> | <p>yourself ^[2] 67:7 86:19</p> <p>youths ^[2] 14:8 91:16</p> <p>YouTube ^[12] 8:6 21:12 22:25 23:13,14,16 24:8 29:12 30:24 60:11,15 62:9</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>Zephyr ^[1] 50:4</p> <p>zero ^[1] 90:7</p> |
|---|--|