No. 22-555

In the Supreme Court of the United States

NETCHOICE LLC, DBA NETCHOICE, ET AL.,
Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF LAW AND HISTORY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS IN NO. 22-555

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INTEREST OF AMICI CURIAE

This *amicus curiae* brief is jointly submitted by a group of law and history scholars and American Economic Liberties Project ("AELP").[1]

The Scholars have published extensively on the First Amendment, regulation of addictive technologies, digital product design laws, antitrust, and the history of business, technology, communications, and American political development. They share an interest in this case because it presents important and novel questions concerning the intersection of the First Amendment, public health and well-being, and laws regulating social media platforms and online businesses. The Scholars are:

- Richard John, Professor of History and Communications, Columbia Journalism School
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[1] No party or party's counsel authored this brief in whole or in part or contributed money intended to fund the preparation of this brief. AELP plans to contribute money intended to fund preparing and submitting the brief.

AELP is an independent nonprofit research and advocacy organization dedicated to addressing the problem of concentrated economic power in the United States. It advocates for policies that address today's crisis of concentration through legislative efforts and public policy debates. AELP is non-profit and non-partisan and does not accept any funding from corporations. AELP submits this amicus brief because the concentration in power over public discourse held by a handful of large social media companies will be virtually unlimited if the Court affords those companies special First Amendment protections.

SUMMARY OF THE ARGUMENT

Amici file this brief to encourage the Court to preserve a traditional state power—barring unreasonable discrimination by private industry in the exercise of its business operations. While the laws at issue in this case in certain ways do not represent the policy choices that Amici would make, the principle is important. The Court should reaffirm the power of democratic bodies to do what they have long done, regardless of whether they are doing so in new industries and communication technologies. To hold otherwise would risk granting a broad and unjustified immunity to social media platforms from nearly any regulation in the public interest, thereby redirecting enormous policymaking power away from democratic bodies in favor of the courts and platforms themselves.

Nondiscrimination laws applied to private industries are an essential feature of state police power. They have been upheld in numerous settings over the last 140 years and have often been applied to new industries raising public concerns, like the telephone or the railroad. States have applied

requirements that companies treat all contracting counterparties the same in a wide range of industries, including grain elevators, malls, railroads, meatpackers, and public communications infrastructure. They have thus remained at the forefront of efforts to counter emerging threats to the public interest arising from discriminatory practices in new industries. Now is not the time to rebalance the distribution of state regulatory authority at the expense of the police power. Amici support affirming the Fifth Circuit's determination that HB20 is constitutional. The law contains a facially neutral nondiscrimination provision—forbidding treating users differently in the commercial spaces that serve as modern-day public squares, which their owners open to anyone with access to the Internet.

The general authority to pass these laws is well established. In *PruneYard Shopping Center v. Robins*, this Court affirmed the States' power to enact laws requiring operators of a commercial enterprise held open to the public to provide equal access. 447 U.S. 74 (1980). *PruneYard* held that generally applicable, neutral nondiscrimination laws aimed at ensuring equal public access to commercial spaces that are open to the public do not infringe their operators' First Amendment rights and are thus presumptively valid and do not receive heightened First Amendment scrutiny. *See id.* at 85-88 (upholding—against First Amendment challenge and without applying heightened scrutiny—state constitutional provision protecting speech and petition rights in private shopping centers). This test recognizes it is within the States' regulatory authority (and consistent with the federal Constitution) to (1) enact nondiscrimination laws in private spaces opened to the public and (2)

regulate those spaces to establish rights beyond those provided for in the federal Constitution.

In furtherance of its mission to upend the balance between state regulatory power and the judiciary, NetChoice, LLC ("NetChoice") argues that the First Amendment forbids the use of nondiscrimination laws whenever an industry exercises what they characterize as "editorial discretion." It relies on "right-of-reply" cases, most notably, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). But in *PruneYard*, the Court already explained why *Miami Herald* precedent does not apply to commercial spaces open to the public.

NetChoice claims, that the practice of content moderation makes social media firms akin to a newspaper (or broadcaster). The social media firms are very different, from a First Amendment perspective, than a newspaper. The key difference, as *PruneYard*'s analysis reflects, is that newspapers are exclusive publications—the public cannot, at any moment, publish their views in the *New York Times*. By contrast, Facebook holds itself out as a site for everyone to connect with the world. One result of this difference is the public meaning attached to the content shared. No one doubts that a newspaper curates and thus exercises considerable editorial discretion when choosing the articles it carries—even in their editorial sections. By contrast, social media firms consistently and publicly proclaim that their platforms are places used by third parties for *public* discourse—as recently as last term, before this Court. *See, e.g.*, Brief for Petitioner at 5, *Twitter, Inc. v. Taamneh*, Case No. 21-1496 ("Twitter . . . . provides an Internet communications platform free of charge to

hundreds of millions of individuals who use the platform to share their views."); Brief for Meta Platforms, Inc. as Amicus Curiae in Support of Respondents at 29, *Gonzalez v. Google, LLC*, Case No. 21-1333 (platform speech "is particularly vital to the robust and uninhibited debate that the First Amendment is designed to foster"). NetChoice's argument thus relies on a category error: the blocking of objectionable content is simply not the same category as selecting what stories appear on the front page of a newspaper; it is more akin to the blocking of objectional fliers by a mall owner, or the censoring of objectional content by a cable operator.

NetChoice's argument has no clear limiting principle that does not threaten all nondiscrimination laws. It argues that the exercise of "editorial discretion" triggers strict scrutiny. But that argument proves too much; by definition, nondiscrimination laws ban such selective blocking. Telephone companies under Title II of the Communications Act have a duty to serve all customers and may not edit content passing over their technologies because they are forbidden from engaging in "unjust or unreasonable discrimination" in favor of or against "any particular person, class of persons, or locality." 47 U.S.C. § 202(a). Privately owned malls in states with open mall access laws cannot edit the fliers of those who want to pamphleteer, even when they find the content of the pamphlet offensive.

Courts have rarely considered such nondiscrimination mandates to even raise First Amendment issues, let alone trigger strict scrutiny. Traditionally, Courts have instead deferred to legislative judgment, in the absence of a viewpoint

enforced by the state. The Court should retain that posture of judicial modesty and avoid wading into complex policy determinations. This is because NetChoice's argument, if successful, would have significant downstream effects.

A ruling for NetChoice could render the dozens of efforts to regulate child social media unconstitutional and chill further efforts. It would create a major barrier for nascent neutral Artificial Intelligence ("AI") regulations. And it would threaten new antitrust initiatives that include nondiscrimination provisions. Nondiscrimination laws are an especially important set of tools today, because of the flourishing of AI-shaped algorithmic targeting by large intermediaries such as TikTok and Amazon. If nondiscrimination laws are prohibited as regulatory tools to use against digital platforms—many of which build their businesses around some form of discrimination—then some of the most important industries in the modern world are off limits to government regulation, and completely in the hands of a few companies who have already been shown to engage in suppression of public expression in favor of its preferred speakers and messages.

The First Amendment does not mandate giving tech companies super-immunity when they open their digital properties for public use. Justice Breyer cautioned, "where strict scrutiny's harsh presumption of unconstitutionality is at issue, it is particularly important to avoid jumping to such presumptive conclusions without first considering whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives." *City of Austin, Tex. v.*

Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 77-78 (2022) (Breyer, J., concurring) (internal quotation marks omitted).

There are serious, legitimate public policy concerns with the law at issue in this case. They could lead to many forms of amplified hateful speech and harmful content. Amici would not support such laws if proposed in their respective states. But bad laws can make bad precedent, and the deregulatory standard proposed by NetChoice is not the answer. The standard would in fact do nothing to ensure an open and less harmful Internet; rather, they could stymie other regulatory efforts to address the real causes of harms, like amplification. The Court should therefore hold that the generally applicable non-censorship provision in Texas's law is facially constitutional and affirm the holding of the Fifth Circuit finding the content-neutral restrictions of HB20, Tex. Civ. Prac. & Rem. Code § 143A.002, constitutional.[2]

ARGUMENT

I. *PruneYard* controls these cases.

A. States may enact laws ensuring equal access to commercial spaces held open to the public.

HB20 prohibits social media platforms from "censoring" users or content based on viewpoint. Pet. App. 199a (HB20 Sec. 143A.002).[3] "Censoring" is

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[2] Amici do not take a position on the constitutionality of the exceptions to HB20's ban on content moderation, *see* Pet. App. 201a-202a (HB20 Sec. 143A.006), or Florida's law, SB7072.

[3] HB20 has four exceptions to its default prohibition on viewpoint censorship. Under the law, platforms may censor: (1) conduct flagged by organizations for the purpose of preventing sexual exploitation of children or protecting sexual abuse survivors from

defined to include a wide range of actions such as blocking, banning, deplatforming, demonetizing, de-boosting, or otherwise treating them or their content differently from other content. *Id.* HB20's nondiscrimination prohibition would, for example, prevent TikTok from suppressing criticism of the Chinese government's treatment of Uyghurs,[4] restrict Instagram from allowing pro-Israel speech while simultaneously suppressing pro-Palestinian speech,[5] and prohibit YouTube from choosing which Presidential candidate's supporters to promote, and which to deny.[6] It would also prohibit the platforms from removing Holocaust deniers, or anti-LGBTQ posts, or "great replacement" propagandists. The key is that this language is facially neutral. It does not impose the government's viewpoint on social media

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ongoing harassment, (2) conduct that directly incites criminal activity or which constitutes threats of violence against individuals based on certain characteristics (such as race, color, religion, ancestry, or sex), (3) content that is "unlawful expression," or (4) content that the platform "is specifically authorized to censor by federal law." Pet. App. 201a-202a (HB20 Sec. 143A.006).

[4] See generally Network Contagion Research Institute, Miller Center on Policing & Community Resilience, Rutgers Univ., *A Tik-Tok-ing Timebomb: How TikTok's Global Platform Anomalies Align with the Chinese Communist Party's Geostrategic Objectives* (2023), https://perma.cc/HL2M-BXQL.

[5] *See generally* Human Rights Watch, *Meta's Broken Promises: Systemic Censorship of Palestine Content on Instagram and Facebook* (2023, https://perma.cc/6ZS7-HRQG.

[6] *See* Paul Lewis & Erin McCormick, *How an ex-YouTube insider investigated its secret algorithm*, Guardian (Feb. 2, 2018), https://perma.cc/475R-6XJX (discussing study showing that YouTube's recommendation algorithm disproportionately promoted conspiracy videos and videos supporting one candidate during the 2016 election period).

platforms, but rather ensures that all viewpoints are treated equally.

In *PruneYard,* this Court squarely addressed whether the operator of a commercial enterprise that holds itself open to the public may be required to provide a right of access to the general public. Its answer was clear and unanimous: yes. The Court was tasked with reviewing the constitutionality of a California law protecting the right to engage in speech and petition activities on the grounds of a privately owned shopping center. 447 U.S. at 76-77. The law gave members of the public the right to use malls for speaking to others on matters of their own choice, and freedom from mall owners' ability to shape or censor the content of their message. The shopping mall owner claimed the law violated the owners' property rights under the Fifth and Fourteenth amendments and free speech rights under the First and Fourteenth Amendments. *Id.* at 76-77.

The Court upheld the law in all respects. *Id.* at 81. Writing for a unanimous Court, Chief Justice Rehnquist observed the well-established right of states to adopt liberties more expansive than those found in the Federal Constitution. He specifically explained why California's right-of-access did not impermissibly infringe on the shopping center owner's First Amendment rights. "Most important," the mall operator through its own choice opened its facility to the public. *Id.* at 87. The views expressed by members of the public, thus, could not reasonably be associated with the property owner. *Id.* No particular message was compelled by the state, so there was "no danger of governmental discrimination for or against a particular message." *Id.* And the business operator

could easily "disavow any connection with the message." *Id.* Accordingly, the Court held that a state law recognizing a right "to exercise state-protected rights of expression and petition" on private property infringes neither "federally recognized property rights nor their First Amendment rights." *Id.* at 88.

While *PruneYard* is 43 years old, it is very much alive and well as precedent. This Court recently reaffirmed *PruneYard*'s rubric for analyzing state authority to regulate private spaces held open for public use in *Cedar Point Nursery v. Hassid*. Writing for the majority, Chief Justice Roberts explained that state restrictions "on how a business generally open to the public may treat individuals on the premises" (like the one in *PruneYard*) are "readily distinguishable from regulations granting a right to invade property closed to the public." 141 S. Ct. 2063, 2066 (2021).

PruneYard therefore stands for the precedent that a business owner's right to exclude the public is subject to reasonable restrictions by the state—even if those restrictions force a company to platform speech it finds abhorrent. Said another way, "if a business chooses to profit from the public market, which is established and maintained by the state, the state may require the business to abide by a legal norm of nondiscrimination." *303 Creative LLC v. Elenis*, 600 U.S. 570, 609 (2023) (Sotomayor, J., dissenting).

PruneYard controls here because social media platforms are digital commercial "properties" made open by their owners for public use. Just as the First Amendment did not alter California's authority to ensure equal public access in *PruneYard*, it does not alter Texas's authority to do the same here. So long as the laws are viewpoint neutral, states have the

authority to require equal access to those commercial spaces, even if they create state rights of access beyond those protected in the federal constitution.

Like the shopping center in *PruneYard*, the operators of social media platforms choose not to limit their properties to their own "personal use"; instead, a social media site is "a business establishment that is open to the public to come and go as they please." *Id.* at 87. Like the law in *PruneYard*, a neutral nondiscrimination law does not dictate a specific message on those platforms, so there is "no danger of governmental discrimination for or against a particular message." Further, there is no serious argument that the "views expressed by members of the public" on such platforms will be "identified with those of the owner." *Id.* And social media platforms are free to disavow any connection to content posted by users: they, too, could "disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." *Id.* Thus, the Court should confirm that *PruneYard* controls here with respect to HB20's main nondiscrimination provision.

To be clear, the Court should apply heightened scrutiny to any exceptions to otherwise generally applicable nondiscrimination laws. Exceptions treat certain content or users differently and thus by their nature are not content-neutral. They are thus far more susceptible to viewpoint discrimination by the state. Courts apply strict scrutiny to such laws. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Here, Amici have concerns that certain exceptions in HB20 may be interpreted in a way that promotes unequal access to social media by authorizing platforms to

discriminate in favor of favored speakers or viewpoints. However, such concerns are enforcement concerns, and should not be conflated with the facial neutrality of the general nondiscrimination provision.

B. Neutral nondiscrimination laws are essential features of the States' police power.

Although viewpoint nondiscrimination laws are relatively new in the digital space, they are certainly not new elsewhere. Nondiscrimination laws exist in numerous industries to protect market competition and free speech.

In the nineteenth and twentieth centuries, the Farmers' Alliance and the Grangers pushed for nondiscrimination laws for grain elevators and trains because the elevators and trains were treating farmers differently—often by charging them higher prices for transport or storage. *See, e.g.*, *Undue Preference in Railroad Rates: Texas & Pacific Ry. V. United States*, 47 Harv. L. Rev. 494, 494 (1934) (recounting "[t]he pages of American railroad history are filled with the story of the constant fight waged by shippers against carriers to wipe out prejudicial rates"). This inspired public outcry for laws protecting to combat rate discrimination. Ida Tarbell recounted, "The sentiment against discrimination on account of amount of freight or for any other reason has been strong in the country since its beginning." Ida M. Tarbell, *The History of the Standard Oil Company* 84-85 (1904). In response, four midwestern states led the way in passing measures aimed at curbing unfair treatment. Among other things, these laws (which came to be commonly known as the "Granger Laws") required that rates be charged uniformly within a given class of goods and regardless of distance. *See*

generally Charles Fairman, *The So-Called Granger Cases, Lord Hale, and Justice Bradley*, 5 Stan. L. Rev. 587, 597 (1953). Not long after, Congress enacted Section 3 of the Interstate Commerce Act, which prohibited carriers from giving undue preference or advantage to any person or locality in the carriage of goods. *Undue Preference*, *supra*, at 494.

Nondiscrimination laws are central to most utility regulation. For example, Title II of the Telecommunications Act of 1996 prevents telephone companies from refusing to grant any reasonable request for service, and broadly bars unjust and unreasonable discrimination. 47 U.S.C. §§ 201, 202; *see also* Thomas B. Nachbar, *The Public Network*, 17 CommLaw Conspectus 67, 126 (2008). And other utility industries, such as water, electricity, and natural gas, have nondiscrimination requirements. *See* Nachbar, *supra*, at 70.

Laws explicitly prohibiting viewpoint discrimination are also commonplace in other industries. For example, the SEC forbids companies from excluding shareholder proposals from proxy statements based on the views of the shareholder. *See* 17 C.F.R. § 240.14a-8 (enumerating a limited number of viewpoint-neutral reasons a company may exclude a shareholder proposal from a proxy statement). The Packer and Stockyards Act prohibits big meat packers from discriminating between farmers. *See* 7 U.S.C. § 192(a), (b) (making it unlawful for a packer or swine contractor to engage in an unjust discrimination). Several states, before and after *PruneYard*, have protected the right to engage in political activity in large shopping centers, and their precedents make clear that the law is applied in a viewpoint-neutral

way. *See Bock v. Westminster Mall Co.*, 819 P.2d 55, 56 (Colo. 1991) (protecting political leafletting in shopping mall); *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83, 84 (1983) (protecting political candidates soliciting signatures in shopping malls); *Alderwood Associates v. Washington Envtl. Council*, 96 Wash. 2d 230, 236 (Wash. 1981) (protecting right to solicit signatures in shopping malls); *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 760 (N.J. 1994) (protecting leafletting on "societal issues" in shopping malls).

At least a dozen states have laws prohibiting employers from discriminating on the basis of viewpoint. *See* Eugene Volokh, Private *Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 Tex. Rev. L. & Pol. 295, 313 (2012). California makes it illegal for employers to discriminate on the basis of political viewpoints. Cal. Lab. Code §§ 1101, 1102. South Carolina bans viewpoint discrimination in firing people. S.C. Code § 16-17-560. Seattle forbids all viewpoint discrimination in employment. Seattle Mun. Code Tit. 14, Sec. 14.04.040(A).

Courts repeatedly uphold these laws, recognizing state power to extend nondiscrimination rules beyond that which is constitutionally required. *See, e.g.*, *Bock*, 819 P.2d at 58, 59 (holding that, "[c]onsistent with the United States Constitution, we may find that our state constitution guarantees greater protections of petitioners' rights of speech than is guaranteed by the First Amendment,"); *Lockheed Aircraft Corp. v. Superior Ct. of Los Angeles Cnty.*, 171 P.2d 21, 24 (Cal. 1946) (upholding California statute prohibiting employer discrimination based on employee political

activity against First Amendment challenge); *Batchelder*, 445 N.E.2d at 593 (rejecting argument that a company has "a First Amendment right not to be forced by the State to use its property as a forum for the speech of others"); *J.M.B. Realty Corp.*, 650 A.2d at 760 (rejecting argument that granting plaintiff the constitutional right of free speech infringes on mall owners' right of free speech).

C. Neutral nondiscrimination laws are crucially different than right-to-reply or must-carry laws.

Notably, NetChoice does not characterize the laws at issue as nondiscrimination laws. Instead, it argues that they are laws impinging on "editorial discretion." Pet. Br. 14. As such, it attempts to group them in with, and urge the Court to treat them as right-to-reply laws, a much rarer category of compelled-speech mandates. *E.g.*, Pet. Br. 1-2, 29. But viewpoint nondiscrimination laws are distinct from right-to-reply laws in crucial ways.

In *Miami Herald*, a key case relied on by NetChoice, the challenged law provided that if a political candidate was "assailed regarding his personal character or official record by any newspaper, the candidate ha[d] a right to demand that the newspaper print, free of cost, any reply the candidate may make," and that the reply was to be "as conspicuous and in the same kind of type" as the initial charge. 418 U.S. at 244. The Court struck down the statute as infringing on the editorial rights of newspapers.

The mall owner in *PruneYard* attempted, unsuccessfully, to invoke *Miami Herald*. The *PruneYard* Court explained that while *Miami Herald* "rests on the principle that the State cannot tell a

newspaper what it must print" the California law did not because it simply told the mall what third-party expression it couldn't suppress. 447 U.S. at 88.

PruneYard then went on to explain why open-access laws do not present the same First Amendment concerns as right-to-reply laws. First, the right-of-reply law in *Miami Herald* penalized an offending newspaper on "the basis of the content of a newspaper." *Id.* at 88 (internal quotation marks omitted) (quoting *Miami Herald*, 418 U.S. at 256). This created an explicit danger that the statute would "dampe[n] the vigor and limi[t] the variety of public debate" by disincentivizing statements made in the newspapers, which could trigger the statute's applicability. *Id.* (cleaned up) (quoting *Miami Herald*, 418 U.S. at 257). "These concerns obviously are not present" with California's law, which instead sought to promote open access to a mall. *Id.*

Most importantly, the *Miami Herald* newspaper did not hold its pages open to all members of the public. Newspapers are exclusive publications; the public cannot, at any moment, publish their views in the *New York Times*. By contrast, "the shopping center by choice of its owner is not limited to the personal use of appellants" and is "instead a business establishment that is open to the public to come and go as they please." *Id.* at 87.

On these terms, the Texas law is similar to the California law, and dissimilar from the right of reply law. Social media platforms are free to voice, amplify, and serve their *own* opinions on content posted on their service, none of which are disincentivized; there is no penalty for particular forms of speech, merely a right of access.

HB20 is also not a "must-carry" law. A must-carry law dictates a category of content that must be produced. The statute at issue in *Turner Broad. Systems, Inc. v. F.C.C.*, 512 U.S. 622 (1994), was a must-carry law. It required cable operators to "carry the signals of a specified number of local broadcast television stations." *Id.* at 630. The governmental interest behind the statutes was to preserve the benefits of free local television, promote dissemination of information from multiple sources, and encourage fair competition in the market for television programming. *Id.* at 662. Thus, unlike nondiscrimination laws, which do not designate particular stations, or a range of stations, must-carry laws present a greater risk that the government will impose its viewpoint on private actors. That is because, with a must-carry law, the government necessarily selects a specific category of speakers (such as local cable stations) to receive special treatment in the form of compelled dissemination. The platform has few choices but to carry the chosen category.

In contrast to right-to-reply and must-carry laws, measures promoting equal access regardless of speaker or viewpoint *promote* free speech by definition. For that reason, the Court's application of strict First Amendment scrutiny in *Miami Herald* or intermediate scrutiny in *Sullivan* are not appropriate guideposts here. To put a fine point on it: Facebook, Twitter Instagram, and TikTok are not newspapers. They are not space-limited publications dependent on editorial discretion in choosing what topics or issues to highlight. Rather, they are platforms for widespread public expression and discourse. They are their own beast, but they are far closer to a public shopping

center or a railroad than to the *Manchester Union Leader*.

D. The proposed NetChoice trigger of "editorial judgment" is misplaced.

NetChoice and its *amici* attempt to distinguish *PruneYard* and this case by suggesting that unlike the operator of a mall, social media platforms are actively engaged with editorializing content.[7] That cannot be the right point of differentiation. Mall owners sought such editorial power as well by choosing who could say what on their public-use properties, and were denied it in *PruneYard*. The distinction, rather, is right-to-reply laws requiring a publication to adopt a particular viewpoint by placing it within the non-public pages of its newspaper versus nondiscrimination laws requiring a commercial business to leave a space that it has opened to the public available equally for all members of the public regardless of viewpoint or speaker. Unlike newspapers, social media platforms hold themselves out as open-access spaces of public discourse for any user to access and express themselves.

Moreover, since *Miami Herald*, the Court has treated editorial discretion as a trigger for enhanced scrutiny *only* in contexts in which the regulated entities do not open themselves up to public use. *See, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 14-16 (1986) (plurality op.) (a newspaper published by a utility cannot be forced to include views

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[7] *E.g.*, Pet. Br. 29; Media Law Resource Center, Inc. Amicus Br. at 10-11; Reporters Committee for Freedom of the Press, American Civil Liberties Union, et al. Amicus Br. at 17; TechFreedom Amicus Br. at 5.

it disagrees with); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636, 643-44 (1994) (cable operators who do not generally open themselves up to the public have First Amendment interests as against must-carry provisions). In *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, relied on by NetChoice and various amici, the interest of the parade organizer concerns fundamental associational rights, and so is inapposite in other ways, but there, also, the parade had also never broadly opened itself up to public use. 515 U.S. 557, 572-75 (1995).

The rule proposed by NetChoice is too malleable. Google prioritizes search results—is that enough to make how Google organizes its search protocol constitutionally immune from all legislative regulation? If the "editorial discretion" trigger were to apply even to those instances in which an industry opens access up to the public, it would undermine the validity of many existing areas of law. It is not hard to imagine a currently regulated telephone company wanting to use new technology to make real-time censorship decisions about what can be talked about over the phone. It might choose, for example, to mute all conversations about abortion-access advocacy. In doing so, the company would be violating their nondiscrimination obligations. According to the logic of NetChoice, however, the phone company's First Amendment rights would protect their muting, because an entity engaged in editorial discretion (aka, viewpoint discrimination) cannot be regulated.

In fact, all the amici in support of NetChoice fail to proffer a limiting principle that still allows room for the existing nondiscrimination and utility laws to avoid strict scrutiny when applied to today's

technologies, which allow real-time surveillance and censorship. Public Knowledge argues that the Court must distinguish between those platforms that engage in neutral transmission, versus those that engage in expressive content. Public Knowledge Amicus Br. at 10. The Knight Institute argues that content moderation decisions are protected by the First Amendment because they reflect the exercise of editorial judgment. Knight First Amendment Institute Amicus Br. at 12. The Solicitor General argues that a compilation of third-party speech is protected and must withstand strict or intermediate scrutiny. U.S. Amicus Br. at 10. However, existing regulated utilities could easily argue that new technologies allow them to easily compile, mute, or amplify third-party speech, and therefore challenge existing utility regulation. Utility nondiscrimination rules are needed precisely because in their absence, phone companies, meatpackers, and public companies in their proxy access *would* engage in suppression of expressive conduct.

II. The "editorial judgment" standard would implicate teenage social media laws, nascent AI regulation, and proposed antimonopoly laws.

If NetChoice prevails, and the *PruneYard* limiting principle is replaced by the "exercise of editorial discretion" limiting principle, it will have significant impacts on the ability of states to address emerging threats to public health and economic concentration in the digital age. The consequences of such a rule would lead to invalidation (or preclude enactment) of a wide swath of nascent tech regulation.

The potential impact on laws aimed at protecting young people in the digital space is significant. Many

online businesses profit from prolonging user time on their platforms and therefore design interfaces to addict users with personalized feeds and other techniques that prey on human vulnerabilities.[8] In response, state and federal lawmakers have proposed or adopted laws to regulate how social media platforms present content to children in addiction-fostering ways. The Kids Online Safety Act (KOSA), S.1409, requires social media companies to act in the best interests of a user. If the law were passed, social media companies would be required, *inter alia*, to mitigate mental health disorders and patterns of use that indicate or encourage addiction-like behaviors. They would be required to provide an opt-out option for algorithmically served content. New York's proposed Stop Addictive Feeds Exploitation (SAFE) For Kids Act, NY S07694, would require social media platforms to provide users under 18 with a default chronological feed from users they already follow—the same way social media feeds functioned before the advent of addictive, algorithm-driven feeds. Other proposals would ban infinite scroll, or push

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[8] *See* Gaia Bernstein, *Unwired: Gaining Control over Addictive Technologies* 35-38 (2023) (canvassing addictive design features). Numerous studies document the harms posed to children by social media addiction. *See, e.g.*, U.S. Surgeon General's Advisory, *Social Media and Youth Mental Health* 6-12 (2023) (discussing research showing overuse of social media can lead to "changes in brain structure similar to changes seen in individuals with substance use or gambling addictions"); Jean M. Twenge, et al., *Increases in Depressive Symptoms, Suicide-Related Outcomes, and Suicide Rates Among U.S. Adolescents After 2010 and Links to Increased New Media Screen Time*, 6(1) Clinical Psychological Science 3-17 (2018) (discussing connection between increased screen time and higher anxiety, depression, and suicide rates).

notifications. According to the "editorial judgment" test, all these laws would be subject to strict scrutiny, because they constrain how social media platforms organize and deliver content.

AI regulation is a second example. While AI systems hold incredible potential for beneficial use, AI also allows for precise targeting in ways that can be incredibly effective—and incredibly harmful. As one example, online businesses like ChatGPT use generative AI systems to collect and process user data to generate personalized content. Generative AI is technology that "scrapes" the Internet for data on various topics and then, based on massive-scale aggregation of that data, "learns" about and generates individualized content for users on the topic of their choice. Such content can include text, imagery, audio, and many other outputs.

The customization of content and recommendations by AI systems can create highly personalized and thus irresistibly engaging experiences based on a user's individual habits and weaknesses, intentionally fostering addictive behavior that leads to excessive screen time and dependency.[9] The danger is acute for children, who are more vulnerable to such influences, but it is present for all users.[10] Moreover, AI systems can be intentionally or

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[9] *See, e.g.*, Jonathan Haidt & Eric Schmidt, *AI is About to Make Social Media (Much) More Toxic*, The Atlantic (May 5, 2023), https://www.theatlantic.com/technology/archive/2023/05/generative-ai-social-media-integration-dangers-disinformation-addiction/673940/.

[10] *See, e.g.*, Keya Ding & Hui Li, *Digital Addiction Intervention for Children and Adolescents: A Scoping Review*, 20(6) Int. J. Environ. Res. Pub. Health 1 (Mar. 2023) ("As young minds are premature and thus very vulnerable, young children tend to

negligently designed in a way that incorporates systemic biases and then reflects those biases in their generative output—for example, depicting stereotypes of minority appearance or culture.[11]

Regulators are actively seeking ways to address its vast potential harms. For example, Ireland's National Standards Authority of Ireland has released an AI Standards & Assurance Roadmap, a regulatory framework designed to "safeguard against these potential risks and to ensure that the functionality of AI is maximi[z]ed for good."[12] The Roadmap lays out a plan to develop harmonized industry standards for AI technologies, including design standards.[13] The proposed standards require platforms to avoid discriminating in favor of preferred content and consequently suppressing a far wider range of generally available content. If the Court adopts the framework advanced by NetChoice or its amici, regulations like this would trigger strict scrutiny and, thus, likely, would be held invalid if they in any way

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become addicted to playing mobile phones, video games, and social media, causing the phenomenon of digital addiction []."); Haidt & Schmidt, *supra* ("[W]e can expect many [social media platforms] to become far more addictive as AI becomes rapidly more capable.").

[11] *See, e.g.*, Zachary Small, *Black Artists Say A.I. Shows Bias, With Algorithms Erasing Their History*, N.Y. Times (July 4, 2023), https://www.nytimes.com/2023/07/04/arts/design/black-artists-bias-ai.html (discussing racial biases shown in popular generative AI technologies and admission by executives of their developers that such biases persist in their software).

[12] Top Team on Standards and AI, Gov't of Ireland, *AI Standards & Assurance Roadmap* 10 (2023), available at https://perma.cc/N7UN-DEG3.

[13] *See id.* at 14, 24-26 (discussing, for example, standards in development to address "algorithmic bias").

require online platforms to limit the use of AI in ways that prioritize biased or addiction-fostering generative content at the expense of other content.

A third example can be found in the potential impact on antitrust measures. In recent years, there has been growing attention and concern about the rise of concentrated market power in several industries. In 2019, the House Committee on the Judiciary engaged in a major investigation into digital marketplace competition, and in 2020 released a 450-page report detailing the ways in which competition was choking both competition and democracy.[14]

Several federal bills were introduced in the wake of the report, including bills that limited the capacity of big tech platforms to discriminate between users. For instance, the American Innovation and Choice Online Act, a bill with bipartisan support, would prohibit operators of covered platforms from engaging in ten categories of conduct, including preferencing their own products or services over those of other business users of their platforms in a manner that would "materially harm competition" and discriminating in the application of their terms of service among similarly situated business users in a manner that would materially harm competition.[15] The Journalism Competition and Preservation Act, designed to protect local media organizations in the

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[14] *See* House Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, *Investigation of Competition on Digital Markets* (2020), *available at* https://perma.cc/D55A-JFXA.

[15] *See* Jay B. Sykes, Congressional Res. Serv., *The American Innovation and Choice Online* (2022) (summarizing American Innovation and Choice Online Act).

face of platform power, also prohibits discrimination against smaller news organizations based on its size or the view expressed in its content.[16]

These laws fall squarely in the long tradition of using nondiscrimination as a key antimonopoly tool: viewpoint discrimination can be a tool of the powerful intermediaries to increase their power over dependent users. But all of these laws would be threatened by the "editorial discretion" trigger, because they all constrain platforms from discriminating on the basis of viewpoint in the exercise of editorial judgment. They have, like all neutral nondiscrimination laws, been put forth because of a real or threatened exercise of viewpoint discrimination. They are needed because of the capacity of the regulated industry to engage in treating different counterparties differently, and because of the incentives for the regulated industry to engage in such discrimination. TikTok treats each user differently, based on highly intimate details about each user, and amplifies the most addictive content.[17] Uber treats each driver differently based on their personalized details, presenting different prompts matched to each driver' profile to induce

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[16] *See* Sen. Amy Klobuchar, Press Release, Klobuchar, Kennedy Introduce Bipartisan Legislation To Save Local Journalism (Mar. 31, 2023), https://perma.cc/AM9T-EYBC (summarizing Journalism Competition and Preservation Act).

[17] *See* Ben Smith, *How TikTok Reads Your Mind*, N.Y. Times (Dec. 5, 2021), https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html (discussing TikTok's user data-driven system for presenting personalized content to users and remarking that "TikTok's glimpses of people's inner lives are unusual").

certain behaviors.[18] And Amazon tracks the intimate details of customers' browsing and shopping patterns to develop targeted ads that encourage impulse buying.[19] In other words, innumerable industries and online businesses are engaging in precisely the activity for which NetChoice and its amici want heightened protections. Their proposed approaches would leave regulators on the outside looking in—even when it comes to the most harmful practices. When the business model of many big tech companies is built around discrimination, amplification, and obscurity, viewpoint neutral nondiscrimination solutions are essential.

The problems posed by social media cannot be adequately addressed if every regulation must run a heightened scrutiny, First Amendment gauntlet. This was the same insight that led courts to overturn the heightened scrutiny of *Lochner:* Such rules inevitably displace elected representatives with unelected judges. The Court should thus reaffirm the States' authority to counter such emerging threats to the public interest and give due deference to their expertise in wielding the police power to that end. *See Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963) ("[T]his Court does not sit to subject the state to an

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[18] *See* Noam Sheiber, *How Uber Uses Psychological Tricks to Push Its Drivers' Buttons*, N.Y. Times (Apr. 2, 2017), https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html (reporting on how Uber uses personalized data on drivers to manipulate how they interface with the Uber app in ways that place psychological pressure on them to achieve certain goals that are beneficial to Uber).

[19] *See* Sunny Kim, *The psychology behind why you spend so much money on Amazon Prime*, CNBC (Oct. 29, 2021), https://perma.cc/S4BY-ELZC.

intolerable supervision hostile to the basic principles of our government . . . ."); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) ("According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

III. The risks of amplification and increased hate speech do not justify the special, Internet-only First Amendment rule Nethoice and its amici seek.

Some amici have expressed sincere concern that the Texas law will, as drafted, enable further amplification of hateful and undesirable speech across essential social platforms on the Internet.[20] In other words, social media is fundamentally different than malls, because in malls a holocaust denier will sit quietly in the corner and be ignored, whereas on social media, amplification and anonymity will put the content front and center and essentially force users to read it.

To be sure, a consequence of HB20 is that significant amounts of users who violate basic norms of decency will be permitted to remain on social media platforms and further expound their hateful rhetoric, including harmful content like holocaust denialism. Access, by implication, means access to society's most loathed voices. But the problem with adopting a sweeping deregulatory rule based on these concerns is twofold.

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[20] *See* The Anti-Defamation League Amicus Br. at 6-7; Brief American Jewish Committee Amicus Br. at 12; Electronic Frontier Foundation Amicus Br. at 4-5.

First, one need only look at the consequences of recent changes in Twitter's moderation policy to see that profit-seeking social media platforms cannot be trusted to moderate in the public interest.[21] Time after time, social media platforms have failed to rein in online harassment and harmful content that impacts our elections.[22] Facebook's algorithms have amplified "superusers" who regularly call for the shooting of politicians.[23] Twitter is plagued by bots that spam conspiracy theories.[24] YouTube is a hub of health misinformation while seemingly profiting off advertisements sold on videos espousing hateful rhetoric.[25] Our political rhetoric is significantly worse

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[21] *See* Sheera Frenkel & Kate Conger, *Hate Speech's Rise on Twitter Is Unprecedented, Researchers Find*, N.Y. Times (Dec. 2, 2022) (cataloguing an "alarming," "sharp increase in hate speech, problematic content and formerly banned accounts" since Elon Musk purchased Twitter and began to change its content-moderation policies).

[22] *See, e.g.*, Tim Wu, *Is the First Amendment Obsolete*, 117 Mich. L. Rev. 547, 560-65 (2018) (discussing various campaigns to influence American elections through conspiracy theories and other propaganda on social media).

[23] *See* Matthew Hindman, Nathaniel Lubin, & Trevor Davis, *Facebook Has a Superuser-Supremacy Problem*, The Atlantic (Feb. 10, 2022), https://www.theatlantic.com/technology/archive/2022/02/facebook-hate-speech-misinformation-superusers/621617/ (summarizing research showing "[t]he most abusive people on Facebook, it turns out, are given the most power to shape what Facebook is").

[24] *See* Emilio Ferrara, et al., *Characterizing social media manipulation in the 2020 U.S. presidential election*, First Monday (2020), https://perma.cc/L97F-NGT3.

[25] Heidi Oi-Yee Li, *et al.*, *Misleading information in 1 in 4 most viewed YouTube COVID-19 videos in English*, BMJ Global

off today through the so-called "editorial discretion" used by social media platforms. All these issues require new, innovative policy solutions, not more trust in (and de facto constitutional immunity for) social media platforms.

These results are not incidental—they are deeply structural. Social media platforms hold no legal responsibility for the content of third parties posted on their websites. *See* 47 U.S.C. § 230(c)(1) (platforms cannot "be treated as the publisher or speaker of any information provided by another information content provider"); *see Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (following circuit majority reading Section 230 "to establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service'"). The platforms are economically conditioned towards utilizing content algorithms to promote highly targeted content that will maximize a user's time spent on a platform. Former employees at these platforms understood that content expressing negative emotions, including hate speech, misinformation, and conspiracy theories, tend to create "a craving" for the platform.[26]

Health (2020), https://perma.cc/3V7L-HCN5; CT Jones, *New Report Claims YouTube Is Cashing in on Misogyny, Racism, and Targeted Harassment*, Rolling Stone (Sept. 13, 2022), https://perma.cc/P58Q-26T5 (discussing study finding that "at least two dozen YouTube channels with 'flagrant' policy violations were allowed to continue posting without censure from YouTube moderators" and are "still getting paid").

[26] *See* Paul Lewis, *'Our minds can be hijacked': the tech insiders who fear a smartphone dystopia*, The Guardian (Oct. 6, 2017), https://perma.cc/8AGN-N5JW.

Second, some platforms might now provide content moderation that amici approve of, but a constitutional rule that hands them a First Amendment shield will have the long-term effect of making it harder to address the structural incentives. For instance, states might want to, for children or others, limit the use of amplification tools, or infinite scroll, or addictive features, all of which would make hateful content less viral. NetChoice's rule would create an impossible barrier to such solutions. Whether or not amici are right in the short term, the deregulatory argument in the long term will lead to more hateful content.

Negative structural incentives require structural solutions. Nondiscrimination laws have been a vital tool to addressing the systemic harms that arise from societies that harbor prejudices and desires to demonize racial, ethnic, sexual, religious minorities. State legislatures must have the ability to impose nondiscrimination rules on platforms in order to ensure they do not abuse the ability to target content to minors, prejudice racial minorities through digital redlining, or to exclude women and non-binary persons from learning about job opportunities in stereotypically "male dominated" industries.[27]

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[27] *See* Linda Morris & Olga Akselrod, *Holding Facebook Accountable for Digital Redlining*, Am. Civil Liberties Union (Jan. 27, 2022), https://perma.cc/6RQP-U997 (discussing digital redlining, "the use of technology to perpetuate discrimination" through "use personal data to target ads based on race, gender, and other protected traits"); Galen Sherwin, *How Facebook Is Giving Sex Discrimination in Employment Ads a New Life*, Am. Civil Liberties Union (Sept. 18, 2018), https://perma.cc/UCN4-XJ2J (discussing practice of social media advertisers exploiting users' personal data "to direct their ads — including for jobs — to

Today's social media platforms are large conglomerates that serve billions of monthly users—they bear no resemblance to their smaller and humbler origins. As the founder and chairman of Facebook has openly proclaimed, "In a lot of ways Facebook is more like a government than a traditional company. . . . We have this large community of people, and more than other technology companies we're really setting policies."[28] A rule in NetChoice's favor would effectively shift governing power from the states to these private entities, over which the public has no authority.

At all events, the Court should tread extremely cautiously in an area that has vast unintended consequences, and be wary of inventing new tests because of the structure of social media in a facial challenge before the law has even gone into effect and the actual impacts have been seen.

CONCLUSION

When assessing the constitutionality of HB20, the Court should reject NetChoice's invitation to Lochnerize the Internet with an overbroad First Amendment test that places social media beyond the reach of the States' police power. The Court should instead reaffirm that neutral nondiscrimination laws designed to ensure equal access to commercial spaces open to the public are a valid exercise of the police

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individual users based on characteristics such as sex, race, and age, thus excluding users outside of the selected groups from learning about these opportunities").

[28] Franklin Foer, *Facebook's war on free will*, The Guardian (Sept. 19, 2017), https://perma.cc/7ELR-DB7E (quoting Mark Zuckerberg).

power and do not infringe their operators' First Amendment rights. That is true whether the space is a public shopping center or a social media platform.

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