INTERNET AND TELECOMMUNICATIONS REGULATION

SECOND EDITION

2025–2026 SUPPLEMENT

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CHAPTER 1
Introduction to Internet and Telecommunications Regulation

Insert on pages 28–29, replacing the carryover paragraph:

Legal interpretations made by the agency are subject to a different form of review, one that changed in 2024. Beginning with Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Supreme Court and the D.C. Circuit had firmly adopted the view that, if an agency's statute was ambiguous and the agency had been delegated authority to administer the statute, courts were required to defer to any "permissible" (meaning "reasonable") agency interpretation of the statute—including in situations in which an agency changed its mind about the meaning of a statutory provisions (which, as you will see, has happened in relatively dramatic fashion in the FCC's development and withdrawal of so-called net neutrality rules, Chapter 6). Throughout this casebook, you will see courts deferring to the FCC's interpretation of the Communications Act under this so-called "*Chevron* doctrine."

In June 2024, the Supreme Court declared, "*Chevron* is overruled." Loper Bright Enterp. v. Raimondo, 603 U.S. 369, 412 (2024). Henceforth, the Court said, courts must exercise their "independent judgment" on matters of statutory interpretation, while taking into account the views of administrative agencies. The Court also said, however, that Congress could "confer discretionary authority on agencies … subject to constitutional limits." When Congress does so, judges "independently identify and respect such delegations of authority, police the outer boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA." *Id*. at 404.

It is too early to know exactly how much the elimination of the *Chevron* doctrine will constrain the FCC's administration of the Communications Act, for the Communications Act unambiguously delegates much authority to the FCC. Yet, *Loper Bright* identified as a particular problem of *Chevron* the ability of agencies to change their minds on statutory interpretation, criticizing the holding of National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) (excerpted in Chapter 6). And the Supreme Court has otherwise taken actions (best studied in an administrative law course) to reduce the historic deference courts have given agency lawmaking. The latest word on net neutrality, from the Sixth Circuit, provides an early indication of how *Loper Bright* may change the FCC's authority. The decision is excerpted later in this supplement. In re MCP No. 185—Federal Communications Commission, 124 F.4th 993 (6th Cir. 2025).

CHAPTER 3
First Amendment Coverage

Insert on page 64, after note 2:

TikTok Legislation and Litigation

On April 24, 2024, the President signed legislation that effectively required the transfer of TikTok to control by a non-Chinese company within 270 days (which was January 19, the day before the next presidential inauguration). TikTok brought a challenge in the D.C. Circuit arguing that the law violated the First Amendment, and in December 2024 the D.C. Circuit upheld the law. TikTok petitioned for certiorari, and a flurry of activity in the Supreme Court followed—briefing that was completed on January 3, oral argument on January 10, and the opinion below issued on January 17.

TIKTOK INC. V. GARLAND

145 S. Ct. 57 (2025)

Opinion for the Court per curiam. SOTOMAYOR, J., filed an opinion concurring in part and concurring in the judgment. GORSUCH, J., filed an opinion concurring in the judgment.

PER CURIAM.

As of January 19, the Protecting Americans from Foreign Adversary Controlled Applications Act will make it unlawful for companies in the United States to provide services to distribute, maintain, or update the social media platform TikTok, unless U.S. operation of the platform is severed from Chinese control. Petitioners are two TikTok operating entities and a group of U.S. TikTok users. We consider whether the Act, as applied to petitioners, violates the First Amendment.

In doing so, we are conscious that the cases before us involve new technologies with transformative capabilities. This challenging new context counsels caution on our part. As Justice Frankfurter advised 80 years ago in considering the application of established legal rules to the "totally new problems" raised by the airplane and radio, we should take care not to "embarrass the future." *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944).

I

A

TikTok is operated in the United States by TikTok Inc., an American company incorporated and headquartered in California. TikTok Inc.'s ultimate parent company is ByteDance Ltd., a privately held company that has operations in China. ByteDance Ltd. owns TikTok's proprietary algorithm, which is developed and maintained in China. The company is also responsible for developing portions of the source code that runs the TikTok platform. ByteDance Ltd. is subject to Chinese laws that require it to "assist or cooperate" with the Chinese Government's "intelligence work" and to ensure that the Chinese Government has "the power to access and control private data" the company holds. H. R. Rep. No. 118–417, p. 4 (2024) (H. R. Rep.).

B

2

[T]he Protecting Americans from Foreign Adversary Controlled Applications Act. Pub. L. 118–50, div. H, 138 Stat. 955, makes it unlawful for any entity to provide certain services to "distribute, maintain, or update" a "foreign adversary controlled application" in the United States. § 2(a)(1).

The Act provides two means by which an application may be designated a "foreign adversary controlled application." First, the Act expressly designates any application that is "operated, directly or indirectly," by "ByteDance Ltd." or "TikTok," or any subsidiary or successor thereof. § 2(g)(3)(A). Second, the Act establishes a general designation framework for any application that is both (1) operated by a "covered company" that is "controlled by a foreign adversary," and (2) "determined by the President to present a significant threat to the national security of the United States," following a public notice and reporting process. § 2(g)(3)(B).

The Act exempts a foreign adversary controlled application from the prohibitions if the application undergoes a "qualified divestiture." § 2(c)(1). A "qualified divestiture" is one that the President determines will result in the application "no longer being controlled by a foreign adversary." § 2(g)(6)(A).

II

A

At the threshold, we consider whether the challenged provisions are subject to First Amendment scrutiny.

It is not clear that the Act itself directly regulates protected expressive activity, or conduct with an expressive component. Indeed, the Act does not regulate the creator petitioners at all. And it directly regulates ByteDance Ltd. and TikTok Inc. only through the divestiture requirement. Petitioners, for their part, have not identified any case in which this Court has treated a regulation of corporate control as a *direct* regulation of expressive activity or semi-expressive conduct. We hesitate to break that new ground in this unique case.

Petitioners assert—and the Government does not contest—that, because it is commercially infeasible for TikTok to be divested within the Act's 270-day timeframe, the Act effectively bans TikTok in the United States. Petitioners argue that such a ban will burden various First Amendment activities, including content moderation, content generation, access to a distinct medium for expression, association with another speaker or preferred editor, and receipt of information and ideas.

We have recognized a number of these asserted First Amendment interests. *See* Moody v. NetChoice, LLC, 603 U.S. 707, 731 (2024) ("An entity 'exercising editorial discretion in the selection and presentation' of content is 'engaged in speech activity.'" [internal citation omitted]). And an effective ban on a social media platform with 170 million U.S. users certainly burdens those users' expressive activity in a non-trivial way.

At the same time, a law targeting a foreign adversary's control over a communications platform is in many ways different in kind from the regulations of non-expressive activity that we have subjected to First Amendment scrutiny. Those differences—the Act's focus on a foreign government, the congressionally determined adversary relationship between that foreign government and the United States, and the causal steps between the regulations and the alleged burden on protected speech—may impact whether First Amendment scrutiny applies.

This Court has not articulated a clear framework for determining whether a regulation of non-expressive activity that disproportionately burdens those engaged in expressive activity triggers heightened review. We need not do so here. We assume without deciding that the challenged provisions fall within this category and are subject to First Amendment scrutiny.

B

1

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." Turner Broadcasting

System, Inc. v. FCC, 512 U.S. 622, 641 (1994) (*Turner I*). Government action that suppresses speech because of its message "contravenes this essential right." *Id.* "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). Content-neutral laws, in contrast, "are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner I*, 512 U.S. at 642 (citation omitted). Under that standard, we will sustain a content-neutral law "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 189 (1997) (*Turner II*).

We have identified two forms of content-based speech regulation. First, a law is content based on its face if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. Second, a facially content-neutral law is nonetheless treated as a content-based regulation of speech if it "cannot be 'justified without reference to the content of the regulated speech'" or was "adopted by the government 'because of disagreement with the message the speech conveys.'" *Id*. at 164 [internal citation omitted].

As applied to petitioners, the challenged provisions are facially content neutral and are justified by a content-neutral rationale.

a

The challenged provisions are facially content neutral. They impose TikTok-specific prohibitions due to a foreign adversary's control over the platform and make divestiture a prerequisite for the platform's continued operation in the United States. They do not target particular speech based upon its content. Nor do they impose a "restriction, penalty, or burden" by reason of content on TikTok—a conclusion confirmed by the fact that petitioners "cannot avoid or mitigate" the effects of the Act by altering their speech. *Turner I*, 512 U.S. at 644. As to petitioners, the Act thus does not facially regulate "particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163.

b

The Government also supports the challenged provisions with a content-neutral justification: preventing China from collecting vast amounts of sensitive data from 170 million U.S. TikTok users. That rationale is decidedly content agnostic. It neither references the content of speech on TikTok nor reflects disagreement with the message such speech conveys.

Because the data collection justification reflects a "purpose[] unrelated to the content of expression," it is content neutral. *Ward*, 491 U.S. at 791.

2

The Act's TikTok-specific distinctions, moreover, do not trigger strict scrutiny. "Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner I*, 512 U.S. at 659. But while "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," *Id.* at 658, such scrutiny "is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular [speaker] being regulated," *Id.* at 660–661 [internal citation omitted].

For the reasons we have explained, requiring divestiture for the purpose of preventing a foreign adversary from accessing the sensitive data of 170 million U.S. TikTok users is not "a subtle means of exercising a content preference." *Turner I*, 512 U.S. at 645. The prohibitions, TikTok-specific designation, and divestiture requirement regulate TikTok based on a content-neutral data collection interest. And TikTok has special characteristics—a foreign adversary's ability to leverage its control over the platform to collect

vast amounts of personal data from 170 million U.S. users—that justify this differential treatment. "[S]peaker distinctions of this nature are not presumed invalid under the First Amendment." *Id.*

While we find that differential treatment was justified here, however, we emphasize the inherent narrowness of our holding. Data collection and analysis is a common practice in this digital age. But TikTok's scale and susceptibility to foreign adversary control, together with the vast swaths of sensitive data the platform collects, justify differential treatment to address the Government's national security concerns. A law targeting any other speaker would by necessity entail a distinct inquiry and separate considerations.

On this understanding, we cannot accept petitioners' call for strict scrutiny. No more than intermediate scrutiny is in order.

C

As applied to petitioners, the Act satisfies intermediate scrutiny. The challenged provisions further an important Government interest unrelated to the suppression of free expression and do not burden substantially more speech than necessary to further that interest.

1

The Act's prohibitions and divestiture requirement are designed to prevent China—a designated foreign adversary—from leveraging its control over ByteDance Ltd. to capture the personal data of U.S. TikTok users. This objective qualifies as an important Government interest under intermediate scrutiny.

Petitioners do not dispute that the Government has an important and well-grounded interest in preventing China from collecting the personal data of tens of millions of U.S. TikTok users. Nor could they. The platform collects extensive personal information from and about its users. If, for example, a user allows TikTok access to the user's phone contact list to connect with others on the platform, TikTok can access "any data stored in the user's contact list," including names, contact information, contact photos, job titles, and notes. Access to such detailed information about U.S. users, the Government worries, may enable "China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage." 3 C.F.R. 412. And Chinese law enables China to require companies to surrender data to the government, "making companies headquartered there an espionage tool" of China. H. R. Rep., at 4.

Even if China has not yet leveraged its relationship with ByteDance Ltd. to access U.S. TikTok users' data, petitioners offer no basis for concluding that the Government's determination that China might do so is not at least a "reasonable inference[] based on substantial evidence." *Turner II*, 520 U.S. at 195.

2

As applied to petitioners, the Act is sufficiently tailored to address the Government's interest in preventing a foreign adversary from collecting vast swaths of sensitive data about the 170 million U.S. persons who use TikTok. To survive intermediate scrutiny, "a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner I*, 512 U.S. at 662. Rather, the standard "is satisfied 'so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation'" and does not "burden substantially more speech than is necessary" to further that interest. *Ward*, 491 U.S. at 799 [internal citation omitted].

The challenged provisions meet this standard. The provisions clearly serve the Government's data collection interest "in a direct and effective way." *Ward*, 491 U.S. at 800. The prohibitions account for the fact that, absent a qualified divestiture, TikTok's very operation in the United States implicates the Government's data collection concerns, while the requirements that make a divestiture "qualified" ensure that those concerns are addressed before TikTok resumes U.S. operations. Neither the prohibitions nor the

divestiture requirement, moreover, is "substantially broader than necessary to achieve" this national security objective. *Id.* Rather than ban TikTok outright, the Act imposes a conditional ban. The prohibitions prevent China from gathering data from U.S. TikTok users unless and until a qualified divestiture severs China's control.

Petitioners parade a series of alternatives—disclosure requirements, data sharing restrictions, [a] proposed national security agreement, the general designation provision—that they assert would address the Government's data collection interest in equal measure to a conditional TikTok ban. Those alternatives do not alter our tailoring analysis.

Petitioners' proposed alternatives ignore the "latitude" we afford the Government to design regulatory solutions to address content-neutral interests. *Turner II*, 520 U.S. at 213. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U.S. at 800. For the reasons we have explained, the challenged provisions are "not substantially broader than necessary" to address the Government's data collection concerns. Nor did the Government ignore less restrictive approaches already proven effective. "We cannot displace [the Government's] judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." *Turner II*, 520 U.S. at 224. Those requirements are met here.

* * *

There is no doubt that, for more than 170 million Americans, TikTok offers a distinctive and expansive outlet for expression, means of engagement, and source of community. But Congress has determined that divestiture is necessary to address its well-supported national security concerns regarding TikTok's data collection practices and relationship with a foreign adversary. For the foregoing reasons, we conclude that the challenged provisions do not violate petitioners' First Amendment rights.

Concurring opinions of JUSTICE SOTOMAYOR and JUSTICE GORSUCH omitted.

Notes and Questions

1. Is this "Speech" for First Amendment Purposes? The Court assumed without deciding that the law triggers First Amendment scrutiny. In a concurrence, Justice Sotomayor stated flatly that "I see no reason to assume without deciding that the Act implicates the First Amendment because our precedent leaves no doubt that it does." She relied on the Court's statement in Moody v. NetChoice, 603 U.S. 707, 731 (2024), which is excerpted in the portion of this supplement covering Chapter 12 of the casebook, that "compiling and curating" material is expressive activity, and a case holding that laws imposing a disproportionate burden on expressive activity are subject to heightened First Amendment scrutiny. Is she right? What is the best argument against application of the First Amendment in this case?

2. Content Neutrality. *TikTok* relied heavily on *Turner I* in concluding that the challenged provisions are content neutral. What is the best argument against the Court's holding? Is it that the Court mischaracterizes *Turner I*? That the provisions are not facially content neutral? That the fear of China collecting Americans' sensitive data is not "content agnostic"? That TikTok does not have a "special characteristic" in the form of a foreign adversary's ability to collect sensitive data? How persuasive are such arguments?

3. Intermediate Scrutiny. *TikTok* relied on *Turner II* in according deference to Congress's determination that China might exploit its relationship with ByteDance and Congress's choice of divestiture as the means of preventing this potential harm. What is the best argument that *Turner II* is inapposite, or more generally that the Court should not give Congress such latitude? That judges should be wary of congressional characterizations of another country as a foreign adversary? That congressional concerns about data

collection are likely to be a smokescreen? If so, for what—jingoism, a desire to protect domestic companies, something else? And how should judges determine what the *real* motivation is?

4. "Embarrass[ing] the Future." Almost every law or judicial opinion (or casebook) involving internet and telecommunications regulation runs the risk of embarrassing the future. A key question that should be in the back of your mind as you read the materials in the casebook is how legislators, regulators, and judges should respond to this concern. Should legislators and regulators err on the side of nonregulation, on the theory that uncertainty counsels regulatory restraint? Or should they err on the side of regulation, because uncertainty counsels restraining companies that otherwise might run amok? And similar questions exist for judges—should concerns about making mistakes in rapidly developing fields lead them to be more willing to invalidate regulations, or to allow them? On what basis would you answer these questions? What metrics would you use?

CHAPTER 5
Natural Monopoly Regulation

Insert on page 227, after note 8:

9. Constitutional Challenge. In FCC v. Consumers' Research, the Supreme Court upheld the FCC's universal service program against constitutional challenges founded on the nondelegation doctrine. 606 U.S. ___, 2025 WL 1773630, https://www.supremecourt.gov/opinions/24pdf/24-354_0861.pdf (2025). The Fifth Circuit, en banc, had previously held that key elements of the FCC's universal service program under § 254 were unconstitutional. That court had expressed doubts that Congress had complied with the nondelegation doctrine because it found that § 254 did not give the FCC sufficient direction in setting the amount of universal service contributions (which the court found were "taxes," not "fees"). The court also doubted that the FCC could constitutionally delegate to the Universal Service Administrative Company (USAC) — a private, non-profit corporation—authority to set the particular contribution rate charged and to administer the program. The court held that the combination of these two aspects of universal service under § 254 rendered the regime unconstitutional. The Fifth Circuit's holding created a direct split with decisions from three circuits upholding the current scheme against identical constitutional challenges. *See* Consumers' Research v. FCC, 88 F.4th 917 (11th Cir. 2023); Consumers' Research v. FCC, 67 F.4th 773 (6th Cir. 2023); Rural Cellular Ass'n v. FCC, 685 F.3d 1083, 1089–90 (D.C. Cir. 2012). The Supreme Court held that § 254's delegation to the FCC was constitutional because under the Court's jurisprudence Congress is required only to articulate an intelligible principle to guide the agency. The Court held that Congress did not need to meet a higher burden of specificity than an intelligible principle simply because universal service fees might be described as "taxes," and that Congress, by directing the FCC to collect contributions "sufficient" to support specified universal-service programs, provided sufficiently determinate standards to satisfy the intelligible-principle test. The Court also rejected the argument that the FCC's lack of control over the USAC constituted an unconstitutional delegation of power to a private party (often called the private nondelegation doctrine). The Court noted that the FCC has the power to review and revise all contribution rates that the USAC calculated, and more generally that "[a]lthough the [USAC] plays an advisory role, the Commission alone has decision-making authority." Finally, the Court held that the combination of Congress's grant of authority to the FCC and the FCC's use of the USAC did not violate the Constitution.

CHAPTER 6
Regulating Internet Access

Insert on page 316, after note 4:

Reclassifying Broadband Internet Access Under Title II

In 2024, the FCC repealed the 2018 order and reclassified broadband internet access service (BIAS) as a telecommunications service under Title II (so, picking up on footnote 8 on page 280 of the casebook, the 2024 rules were a re-re-re-reclassification). Safeguarding and Securing the Open Internet, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, FCC 24-52, 2024 WL 2109860 (2024). As with the earlier votes on net neutrality rules, the vote was 3-2, with the President's party prevailing.

The 2024 rules hewed very closely to the 2015 rules excerpted on pages 252-59 of the casebook—indeed, the 2024 order stated that the new rules were "materially identical" to the 2015 rules. *Id.* ¶ 257; *see also* ¶ 7 ("our approach reinstates the rules that the Commission adopted in 2015"). So the 2024 rules articulated definitions (of BIAS etc.) and rules that were basically verbatim from the 2015 rules. And the 2024 rules reinstated the bright-line rules from the 2015 rules prohibiting blocking, throttling, and paid prioritization by BIAS providers, and they reinstated the general conduct rule prohibiting, on a case-by-case basis, practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers (and exempting "reasonable network management" from this rule). *Id.* ¶ 516. Similarly, the 2024 rules followed the 2015 rules in forbearing from imposing a range of Title II provisions, most notably (and most importantly for BIAS providers) rate regulation. *Id.* ¶ 386.

The similarity between the 2024 and 2015 rules reflects the 2024 majority's apparent agreement with the approach of the 2015 rules. It also reflects the fact that the 2015 rules were upheld in United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016) (excerpted on pages 260–72). By following the 2015 rules, the 2024 FCC majority placed itself in a position to argue that its rules were entitled to the same treatment as the 2015 rules.

Weren't there legal and factual developments between 2015 and 2024? Yes, but none that the FCC majority deemed sufficient to merit changing its 2015 approach. As for the former, in the intervening years the Supreme Court developed what has come to be called the major questions doctrine, under which "decisions of vast economic and political significance" relying on "an unheralded power" "in a long-extant statute" require clear congressional authorization. West Virginia v. EPA, 597 U.S. 697, 700, 724 (2022). The majority contended that the major questions doctrine was inapplicable, emphasizing the FCC's history of applying Title II (having classified DSL service under Title II in 2015 and BIAS under Title II in 2015), and arguing that net neutrality does not have vast economic significance. The dissenting commissioners instead emphasized that BIAS had been regulated under Title I for all but the period between 2015 and 2018 and contended that net neutrality regulations are indeed of vast economic and political significance.

Notable among the factual developments was network slicing, which allows 5G mobile networks to create subnetworks (or slices) that have different network management rules without any physical division of network resources. As the 2024 order noted, "network slicing proponents contend that it allows [mobile networks] to establish separate slices for mobile broadband and fixed wireless traffic, while simultaneously offering customized slices for enterprise private networks, video calls, and a variety of other uses." 2024 order ¶ 201. Opponents of network slicing "express[ed] concern that network slicing will be used to circumvent our prohibition on paid prioritization, throttling, or unreasonable discrimination." *Id.* ¶ 202. Proponents of network slicing argued that it is a non-BIAS service and thus outside Title II (as the order applied Title II only to BIAS) or, if treated as a BIAS service, such slicing was a reasonable network management practice and thus permissible. Opponents, unsurprisingly, argued the opposite.

The 2024 order concluded that "Given the nascent nature of network slicing, we conclude that it is not appropriate at this time to make a categorical determination regarding all network slicing and the services delivered through the use of network slicing." *Id.* ¶ 203. The order stated that it would monitor the development of network slicing, and its general conduct rule gave it considerable flexibility in determining at a later point that network slicing was inconsistent with its 2024 rules.

We excerpt below the part of the 2024 order that responded to the 2018 order's argument (¶¶ 116 and 140–154 of the 2018 rules, excerpted on pages 284 and 290–93) that its transparency rule plus existing consumer protection and antitrust laws provided adequate protection:

SAFEGUARDING AND SECURING THE OPEN INTERNET

Declaratory Ruling, Order, Report and Order, and Order on Reconsideration,
FCC 24-52, 2024 WL 2109860 (2024)

4. The Restoring Internet Freedom Order's Framework Is Insufficient to Safeguard and Secure the Open Internet

482. We find that framework in the 2018 Restoring Internet Freedom Order (RIF Order), does not adequately protect consumers from the potential harms of BIAS provider misconduct. BIAS providers have the incentive and technical ability to engage in conduct that undermines the openness of the Internet. In 2018, when the Commission repealed the open Internet conduct rules, the Commission asserted that a modified transparency rule, combined with the effects of competition, would prevent BIAS provider conduct that might threaten the Internet's openness. Notwithstanding this conclusion, the Commission found that "[i]n the unlikely event that ISPs engage in conduct that harms Internet openness," preexisting antitrust and consumer protection laws will protect consumers. RIF Order, 33 FCC Rcd. at 393–94, para. 140. We believe that this framework is insufficient to safeguard and secure the open Internet.

483. Even while upholding the Commission's reliance on consumer protection and antitrust law to protect the open Internet in Mozilla Corp. v. FCC, 940 F.3d 1, 59 (D.C. Cir. 2019), the court observed that the RIF Order's "discussion of antitrust and consumer protection law is no model of agency decisionmaking." As the court explained, although "[t]he Commission theorized why antitrust and consumer protection law is preferred to *ex ante* regulations [it] failed to provide any meaningful analysis of whether these laws would, in practice, prevent blocking and throttling." *Id.* Consequently, although "the Commission opine[d] that '[m]ost of the examples of net neutrality violations discussed in the [2015 Open Internet Order] could have been investigated as antitrust violations,'" the RIF Order "fail[ed] to explain what, if any, concrete remedies might address these antitrust violations." *Id.* (citation omitted).

484. Consistent with the D.C. Circuit's skepticism of the RIF Order's approach, we find that the consumer protection and antitrust laws, even combined with transparency requirements, are insufficient to protect against blocking, throttling, and other conduct that harms the open Internet. We believe that the approach we adopt today, based on the 2015 Open Internet Order, is consistent with a light-touch regulatory framework to protect Internet openness. Even while upholding the RIF Order, the D.C. Circuit was "troubled by the Commission's failure to grapple with the fact that, for much of the past two decades, broadband providers were subject to some degree of open Internet restrictions," *id.* at 79, and we aim to return to the Commission understanding that existed from the 2005 Internet Policy Statement through the repeal of the 2015 Open Internet Order in 2018.

485. As an initial matter, we find the RIF Order's reliance on transparency as a deterrent for problematic practices to be insufficient to protect consumers and edge providers from BIAS provider misconduct. We affirm our tentative conclusion from the [NPRM we issued in 2023] that there are types of conduct, such as blocking, throttling, and traffic discrimination, that require *ex ante* intervention to prevent their occurrence in the first instance. We agree with those commenters that argue it is not enough for the Commission to require that BIAS providers disclose their policies on these network practices in the commercial terms of

their service offerings because it does not restrict BIAS providers from engaging in harmful behavior. We conclude that a comprehensive set of conduct rules, which includes a transparency element, is required to protect consumers from harmful BIAS provider conduct, and that the open Internet rules we adopt today, including bright-line rules, are necessary to safeguard and secure the open Internet.

486. Furthermore, based on the record in this proceeding, we find that the RIF Order's reliance on the DOJ and the FTC for enforcement of the consumer protection and antitrust laws is unlikely to provide sufficient deterrence to BIAS providers from engaging in conduct that may harm consumers, edge providers, and the open Internet. Both the DOJ and the FTC have authority to enforce the federal antitrust laws, and particularly sections 1 and 2 of the Sherman Act. In the 2010 and 2015 Open Internet Orders, the Commission found that it was necessary to adopt certain rules to protect the openness of the Internet and that sole reliance on enforcement of the antitrust laws by the DOJ and FTC was insufficient to protect edge providers, consumers, and the open Internet. In the RIF Order, the Commission reconsidered and concluded that conduct that harms the openness of the Internet was unlikely, and that other legal regimes—particularly antitrust law and section 5 of the Federal Trade Commission Act (FTC Act)—were sufficient to protect consumers.

487. We disagree with commenters who argue that existing consumer protection and antitrust laws provide adequate protection against the harms the open Internet rules we adopt today seek to prevent. To begin with, the FTC's section 5 authority does not apply to "common carriers subject to" the Communications Act, so if BIAS providers are properly classified as common carriers, section 5 does not apply at all. 15 U.S.C. § 45(a)(2). With respect to antitrust oversight, it is not clear that all conduct that could harm consumers and edge providers would constitute an "unfair method of competition" under section 5 of the FTC Act or a violation of section 1 or 2 of the Sherman Act. For example, if a vertically integrated BIAS provider blocked or throttled the content of a particular edge provider with which it competed in the content market, it is not clear whether such conduct would constitute a violation of section 2 of the Sherman Act. It is well settled that there are two elements to the offense of unlawful monopolization under section 2 of the Sherman Act: "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 284 U.S. 563, 570–71 (1966); *see also* Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004) (stating that "it is settled law that [an offense under section 2 of the Sherman Act] requires[] . . . the possession of monopoly power in the relevant market"). As the Commission has repeatedly explained, however, it is not necessary for a BIAS provider to have "market power with respect to end users" for it to be able to engage in conduct that harms edge providers, the open Internet, and consumers. 2015 Open Internet Order, 30 FCC Rcd. at 5633, para. 84 Thus, section 2 of the Sherman Act will not provide adequate protection, at least in cases where the BIAS provider lacks monopoly power over its end user customers. [W]hile the Sherman Act may complement the rules we adopt today, it would not be sufficient on its own to protect edge providers, consumers, and the open Internet.

488. Similarly, it is not clear that all conduct that harms edge providers, consumers, and the open Internet would necessarily violate section 5 of the FTC Act's prohibition on "unfair or deceptive acts or practices" even while BIAS providers are not classified as common carriers and thus are subject to the FTC Act. Commenters argue that the FTC is a more appropriate enforcer of open Internet principles, emphasize that the FTC has the authority to enforce BIAS provider pledges and commitments not to block, throttle, or otherwise harm consumers. But these commenters do not address whether the FTC would have any enforcement authority with respect to a BIAS provider that does not make affirmative pledges or commitments. Nor is it clear how the FTC would rule should a BIAS provider engage in other types of conduct that do not amount to blocking or throttling, but that nevertheless harm edge providers and the open Internet. As such, we disagree that consumer protection law is adequate to protect the open Internet.

489. We also find that there are significant advantages to adopting *ex ante* bright-line rules compared with relying on an *ex post* case-by-case approach, the latter of which is necessary for the DOJ and FTC. First, *ex ante* bright-line rules can reduce regulatory uncertainty and provide better guidance to BIAS providers, edge providers, and end users. In contrast, *ex post* case-by-case enforcement like that under the FTC and DOJ involves greater expense, longer delays in prosecuting enforcement actions, and greater uncertainty as to which types of conduct are allowed or proscribed.

491. Finally, we agree with Public Knowledge that "Congress correctly identified that telecommunications services require sector-specific rules from an expert regulator: the FCC." Public Knowledge Comments at 59. To the extent that the conduct complained of does not involve a violation of a bright-line rule, as with enforcement under the Sherman Act and to the extent that section 5 of the FTC Act might apply, it seems inefficient to place enforcement responsibility with generalist agencies rather than with the FCC, which possesses the technical and market knowledge and expertise concerning communications and broadband technologies. Indeed, the common carrier exception in section 5 of the FTC Act appears to presume that telecommunications carriers should instead be principally governed by sector-specific FCC rules. Moreover, because the FCC is constantly monitoring the telecommunications markets that it is charged with regulating, it is more likely to detect and deter conduct that harms the open Internet. Finally, the FCC is better placed to enforce open Internet rules and such violations where remedying harmful conduct is likely to require ongoing monitoring and supervision by the expert agency's enforcement oversight. Thus, we reaffirm our belief that the Commission, as the expert agency on communications, is best positioned to safeguard Internet openness.

Notes and Questions

1. Persuasion. Compare the 2024 and 2018 orders' discussion of these issues. Which arguments do you find persuasive, and why? What laws and/or facts would need to be different for you to reach a different conclusion?

2. Sector-Specific Regulation. Paragraph 491 contends that its sector-specific regulations are preferable to those of generalist agencies like the FTC. Which sort of regulator do you think is preferable with respect to BIAS? Picking up on the previous question: under what circumstances would you reach a different conclusion? How likely are those circumstances?

3. (Un)certainty. The bright-line rules prohibiting blocking, throttling, and paid prioritization by BIAS providers reflect a desire to create clear rules. The general conduct rule is quite different. It eschews certainty, choosing instead to determine unreasonableness on a case-by-case. This is another iteration of the choice between rules and standards. With respect to internet access, should there be a presumption in favor of one over the other?

Consider the FCC's decision to leave the status of network slicing unsettled, emphasizing that it is a developing technology. Who benefits from that uncertainty? Is the FCC's decision the right outcome? On what basis should an FCC Commissioner, or a judge, answer that question?

4. More Uncertainty. The FCC's various interpretations, alternatively holding that BIAS is a telecommunications (common carrier) service and that it is not, were upheld by the D.C. Circuit under the *Chevron* doctrine and specifically the Court's application of *Chevron* in *Brand X*, which allows administrative agencies very broad discretion to change their interpretation of ambiguous statutory provisions. As noted previously in this supplement, the Court overruled *Chevron*. Loper Bright Enterp. v. Raimondo, 603 U.S. 369, 412 (2024). The Court criticized *Brand X*, *see, e.g., id*. at 2272, and urged judges to "independently" interpret statutory provisions. *Loper Bright* may, therefore, be used against the latest agency change of mind, or, alternatively, it might indicate that the Court will decide the matter for itself.

5. Uncertainty Resolved(?). On appeal to the Sixth Circuit, the court of appeals first stayed the FCC's 2024 order, on the ground that "[t]he petitioners are likely to succeed on the merits because the final rule

implicates a major question, and the Commission has failed to satisfy the high bar for imposing such regulations." In re MCP No. 185—Federal Communications Commission, 2024 WL 3650468 (6th Cir. 2024). The court elaborated:

> An agency may issue regulations only to the extent that Congress permits it. *See* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994). When Congress delegates its legislative authority to an agency, it presumably resolves "major questions" of policy itself while authorizing the agency to decide only those "interstitial matters" that arise in day-to-day practice. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (quoting Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986)). When Congress upsets that presumption and delegates its power to "alter the fundamental details of a regulatory scheme" to an agency, it must speak clearly, without "hid[ing] elephants in mouseholes." Whitman v. Am. Trucking Assocs., 531 U.S. 457, 468 (2001); *see* Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302, 324 (2014). The more an agency asks of a statute, in short, the more it must show in the statute to support its rule.
>
> Net neutrality is likely a major question requiring clear congressional authorization. As the Commission's rule itself explains, broadband services "are absolutely essential to modern day life, facilitating employment, education, healthcare, commerce, community-building, communication, and free expression," to say nothing of broadband's importance to national security and public safety. *Safeguarding*, 89 Fed. Reg. at 45405–12; *see also id.* at 45496–97. Congress and state legislatures have engaged in decades of debates over whether and how to require net neutrality. Because the rule decides a question of "vast 'economic and political significance,'" it is a major question. *Util. Air Regul. Grp.*, 573 U.S. at 324 (citation omitted).
>
> The Communications Act likely does not plainly authorize the Commission to resolve this signal question. Nowhere does Congress clearly grant the Commission the discretion to classify broadband providers as common carriers. To the contrary, Congress specifically empowered the Commission to define certain categories of communications services—and never did so with respect to broadband providers specifically or the internet more generally. *See* 47 U.S.C. § 153(51) (requiring the Commission to "determine whether the provision of fixed and mobile satellite service shall be treated as common carriage" under the definition of a "telecommunications carrier"); *id.* § 332(d)(1), (3) (defining mobile services in part "as specified by regulation by the Commission"). Absent a clear mandate to treat broadband as a common carrier, we cannot assume that Congress granted the Commission this sweeping power, and Petitioners have accordingly shown that they are likely to succeed on the merits.

Id. at *3. In a concurring opinion, Chief Judge Sutton found that he did not need to rely on the major questions doctrine because "[t]he best reading of the statute, and the one in place for all but three of the last twenty-eight years, shows that Congress did not likely view broadband service provider as common carriers under Title II of the Telecommunications Act." *Id*. at *5.

When it reached the merits, just days before President Trump took office (under whom the FCC could have been expected to reverse position yet again), the Sixth Circuit adopted Judge Sutton's position and held that the Communications Act does not (and never did) authorize the FCC to impose common carrier regulation on internet service providers.

IN RE MCP NO. 185—FEDERAL COMMUNICATIONS COMMISSION

124 F.4th 993 (6th Cir. 2025)

Opinion for the court filed by Circuit Judge GRIFFIN, joined by Circuit Judges KETHLEDGE and BUSH.

GRIFFIN, Circuit Judge:

As Congress has said, the Internet has "flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4). The Federal Communications Commission largely followed this command from the Telecommunications Act of 1996 by regulating the Internet with a light touch for nearly 15 years after enactment. But since, the FCC's approach has been anything but consistent.

Today we consider the latest FCC order, issued in 2024, which resurrected the FCC's heavy-handed regulatory regime. Under the present Safeguarding and Securing the Open Internet Order, Broadband Internet Service Providers are again deemed to offer a "telecommunications service" under Title II and therefore must abide by net-neutrality principles. 89 Fed. Reg. 45404 (May 22, 2024) (to be codified at 47 C.F.R. pts. 8, 20) [hereinafter Safeguarding Order]. But unlike past challenges that the D.C. Circuit considered under *Chevron*, we no longer afford deference to the FCC's reading of the statute. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)). Instead, our task is to determine "the best reading of the statute" in the first instance.

Using "the traditional tools of statutory construction," we hold that Broadband Internet Service Providers offer only an "information service" under 47 U.S.C. § 153(24), and therefore, the FCC lacks the statutory authority to impose its desired net-neutrality policies through the "telecommunications service" provision of the Communications Act, *id.* § 153(51). Nor does the Act permit the FCC to classify mobile broadband—a subset of broadband Internet services—as a "commercial mobile service" under Title III of the Act (and then similarly impose net-neutrality restrictions on those services). *Id.* § 332(c)(1)(A). We therefore grant the petitions for review and set aside the FCC's Safeguarding Order.

II.

2.

Preliminarily, we must consider if National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005), binds our statutory-interpretation analysis, given that the Supreme Court overruled *Chevron* in *Loper Bright*. *Brand X* involved a challenge to an FCC ruling determining that cable companies that owned cable lines used to provide broadband Internet service offered only an information service, not a telecommunications service as well. Applying *Chevron*, the Court held that the Act's use of the term "offering of telecommunications" as used in § 153(53) was ambiguous and that the FCC's construction was therefore permissible. 545 U.S. at 986–1000. In the Court's view, the FCC reasonably chose to define "offering" to mean offering "consumers an information service in the form of Internet access ... via telecommunications" instead of more broadly construing it as offering "consumers the high-speed data transmission (telecommunications) that is an input used to provide this service." *Id.* at 989.

But *Loper Bright* ended *Chevron*'s mandated deference to an agency's statutory interpretation upon a finding of ambiguity. In overruling *Chevron*, the Court found such a view of implicit delegation inconsistent with the Administrative Procedure Act. Now, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority" by "us[ing] every tool at their disposal to determine the best reading of the statute and resolve the ambiguity." 144 S. Ct. at 2266, 2273.

Following *Loper Bright*, we cannot agree with petitioners that *Brand X* expressly bars the FCC's order at issue. The "specific agency action," 144 S. Ct. at 2273, that the Court approved in *Brand X* was the

FCC's 2002 Internet Over Cable Declaratory Ruling. The specific action before us here is the FCC's 2024 Safeguarding Order, which came 22 years later. The Safeguarding Order therefore is not the "specific agency action" that the Court approved in *Brand X*. And that means we are not bound by *Brand X*'s holding as a matter of statutory *stare decisis*.

3.

a.

We now turn to the merits, which the parties have argued here in exemplary fashion. But the key flaw in the FCC's arguments throughout is that the FCC elides the phrase "offering of a capability" as used in § 153(24). That phrase makes plain that a provider need not *itself* generate, process, retrieve, or otherwise manipulate information in order to provide an "information service" as defined in § 153(24). Instead, a provider need only offer the "*capability*" of manipulating information (in the ways recited in that subsection) to offer an "information service" under § 153(24). Even under the FCC's narrower interpretation of "capability," Broadband Internet Access Providers allow users, at minimum, to "retrieve" information stored elsewhere. And we think it equally plain, for the reasons recited below, that Broadband Internet Service Providers offer at least that capability.

Start with "offering" as used in § 153(24). "It is common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product." *Brand X*, 545 U.S. at 990. As for "capability," "contemporaneous dictionaries are the best place to start." Keen v. Helson, 930 F.3d 799, 802 (6th Cir. 2019). And they define "capability" as "having traits conducive to or features permitting," Merriam-Webster's Collegiate Dictionary 168 (10th ed. 1997), the "power or ability in general" and "the quality of being susceptible of," A Dictionary of Modern Legal Usage 129 (2d ed. 1995), or "having the ability or capacity for," Random House Unabridged Dictionary 308 (2d ed. 1993).

In the view of the current Commission, Broadband Internet Service Providers offer a telecommunications service that merely connects consumers to edge providers (like Netflix, Amazon, Facebook, and Google). Safeguarding Order, 89 Fed. Reg. at 45425, ¶ 99 ("[C]onsumers today perceive [Broadband Internet Service Providers to offer] ... a telecommunications service that is primarily a transmission conduit used as a means to send and receive information to and from third-party services."). In essence, the FCC contends that edge providers offer an "information service" but that Broadband Internet Service Providers do not.

Everyone agrees with the Commission's classification of edge providers as offering an information service. Those providers indisputably "'generate' and 'make available' information to others through email and blogs; 'acquire' and 'retrieve' information from sources such as websites, online streaming services, and file sharing tools; 'store' information in the cloud; 'transform' and 'process' information through image and document manipulation tools, online gaming, cloud computing, and machine learning capabilities; 'utilize' information by interacting with stored data; and publish information on social media sites." *Id.* at 45426, ¶ 105.

Yet, by connecting consumers to edge providers' information, Broadband Internet Service Providers plainly provide a user with the "capability" to, at minimum, "retrieve" third-party content. 47 U.S.C. § 153(24); *see also* United States Telecom Ass'n. v. FCC, 855 F.3d. 381, 395 (denying en banc petition) (*Telecom (en banc))* (Brown, J., dissenting from the denial of rehearing en banc) ("The 'offering of a capability' for engaging in all [Internet] activities is exactly what is provided by broadband Internet access."). That is, they offer a "feature[] permitting" consumers to stream videos stored on Netflix's servers, Merriam-Webster's Collegiate Dictionary 168 (10th ed. 1997), the "ability" to purchase gifts from information stored on Amazon's servers, Random House Unabridged Dictionary 308 (2d ed. 1993), the "capacity" to view posts stored on Facebook's servers, *id.*, and the "power" to conduct a search using Google's servers, A Dictionary of Modern Legal Usage 129 (2d ed. 1995). By utilizing high-speed Internet

offered by Broadband Internet Service Providers, consumers are *capable* of obtaining edge providers' information. In our view, then, the Safeguarding Order reads out the key phrase—"offering of a capability"—that precedes the gerunds ("generating," "acquiring," "storing," "transforming," "processing," "retrieving," "utilizing," and "making available information") set forth in § 153(24).

"While the statute's language spells trouble for the Government's position, a wider look at the statute's structure gives us even more reason for pause." Van Buren v. United States, 593 U.S. 374, 389 (2021). Specifically, Congress emphasized the importance of deregulating the "Internet and other interactive computer systems," finding in the Telecommunications Act of 1996 that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4). Thus, the policy of the United States is "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* § 230(b)(2). It would be strange for Congress to enact this policy while, in the same bill, shackling Internet access providers with onerous Title II regulation.

Further, Congress defined "interactive computer service" as an "information service ... that provides access to the Internet," *id.* § 230(f)(2), and specified that "[n]othing in th[at] section shall be construed to treat interactive computer services as common carriers or telecommunications carriers," *id.* § 223(e)(6). True, as the FCC points out, the definition of "interactive computer service" applies to that term as it is "used in" § 230 itself. *Id.* § 230(f). But that means the definition of "interactive computer service" *as a whole* is limited to § 230—not that the meaning of every word or phrase within that definition likewise has a meaning peculiar to that subsection. (In that case, § 230 itself would have to define every word used within it.) And the usage of the term "information service" in § 230(f)(2) takes for granted that "information service" includes Internet providers. We see no reason why that usage should be understood as peculiar to § 230—any more than its usage of, say, "transmit" or "receive" is. *Id*. § 230(f)(4)(C). The Act's structure thus favors petitioners' position, not the FCC's.

So too does history. *Brand X* persuasively posits that we should view the definitions of "telecommunications service" and "information service" "against the background of" the FCC's pre-Telecommunications Act's regulatory efforts. 545 U.S. at 992–93. In its 1980 Computer II decision, the FCC "distinguished between 'basic' service (like telephone service) and 'enhanced' service (computer-processing service offered over telephone lines)." *Id.* at 976. It noted that "in an enhanced service the content of the information need not be changed and may simply involve subscriber interaction with stored information." *See* In re Amendment of Section 64.702 of the Comm'rs Rules and Regs. (Second Computer Inquiry), 77 F.C.C.2d 384, 421, ¶ 97 (1980) [hereinafter Computer II]. The Telecommunications Act of 1996 codified these distinctions: "telecommunications service" is "the analog to basic service," and "information service" is "the analog to enhanced service." *Brand X*, 545 U.S. at 977. When Congress borrows long-existing regulatory history, "it brings the old soil with it." George v. McDonough, 596 U.S. 740, 746 (2022). And when Congress approvingly adopted the FCC's prior regulatory approach, it "placed Internet access on the 'enhanced service' side, and thus prohibited the FCC from construing the 'offering' of 'telecommunications service' to be the 'information service' of Internet access." *Telecom (en banc)*, 855 F.3d at 405 (Brown, J., dissenting).

Following enactment, various historical datapoints indicate that treating broadband Internet as a telecommunications service under Title II contradicts the Act. The FCC has hewed to this view from enactment until recent administration changes, which is "especially useful in determining the statute's meaning." *Loper Bright*, 144 S. Ct. at 2262. [Discussion of FCC history, covered earlier in this chapter of the casebook, omitted here.]

b.

In the face of the statutory text, context, and history, the FCC largely resists our reading of what "offering of a capability" means because of how that reading would affect telephone services—the paradigmatic example of telecommunications service. If Broadband Internet Service Providers fall within "information services" given their facilitation of access to third-party content, the argument goes, so too would telephone services. *See also Mozilla*, 940 F.3d at 93 (Millett, J., concurring). It is true, in one sense, that a telephone user retrieves information from a third-party in a phone conversation with a friend or customer-service agent. But that is not the sense meant by the statute.

The existence of a fact or a thought in one's mind is not "information" like 0s and 1s used by computers. The former implies knowledge qua knowledge, while the latter is knowledge reduced to a tangible medium. Both sound and text can be stored: a cassette tape for audio information, a journal for written information, or a computer for both. But during a phone call, one creates audio information by speaking, which the telephone service transmits to an interlocutor, who responds in turn. Crucially, the telephone service merely transmits that which a speaker creates; it does not access information.

The FCC counters that telephone service enables users to interact with stored data, citing voicemail and call menus. The answer remains the same. These ancillary services may themselves be information services. But they do not transform the categorization of telephone service because its core standalone offering is the transparent transmission of telecommunications.

Nor do the FCC's other counterarguments hit the mark. The FCC points to the Act's "advanced telecommunications incentives" section. Known as Section 706(a), it "encourage[s]" the FCC and its state analogues to "deploy[] ... advanced telecommunications capability to all Americans ... by utilizing" certain regulatory measures, including "price cap regulation" and "regulatory forbearance." 47 U.S.C. § 1302(a). In the FCC's view, this section's mention of those terms—which are associated with common-carrier regulation under Title II—demonstrate that broadband can be a telecommunications service. That is too sweeping of a reading of the statute. *In re MCP No. 185*, 2024 WL 3650468, at *6 (Sutton, C.J., concurring) ("[T]his authorization under Title VII to impose some regulations on broadband providers does not provide the Commission with the power to regulate all broadband providers as common carriers under Title II.").

Moreover, in the late 1990s, when greater than 90% of households accessed the Internet through dial-up, there was a distinct possibility that advanced services would improve the last mile of transmission, which telecommunications carriers provided across notoriously slow copper phone lines, Advanced Services Order, 13 FCC Rcd. at 24016, ¶ 8. Indeed, the Advanced Services Order shows that this possibility came to fruition with the introduction of DSL. And in line with Section 706(a), the FCC categorized this improvement over dial-up as a telecommunications service when offered for a fee directly to the public. But that tells us nothing about how to treat Broadband Internet Service Providers, which offer a service integrating the last mile of transmission in addition to Internet access. And to be clear, the Advanced Services Order reiterated that Internet access is an information service.

One final response. We acknowledge that the workings of the Internet are complicated and dynamic, and that the FCC has significant expertise in overseeing "this technical and complex area." *Brand X*, 545 U.S. at 992. Yet, post-*Loper Bright*, that "capability," if you will, cannot be used to overwrite the plain meaning of the statute.

B.

Finally, we turn to the Safeguarding Order's related provisions concerning mobile broadband. Because users can access broadband Internet when using mobile devices connected to cellular networks like 5G, separate from wired (or Wi-Fi) connections, the Safeguarding Order similarly imposes net-neutrality policies on those so-called "mobile broadband services" through the Act's "commercial mobile service"

provision. 47 U.S.C. § 332(c)(1)(A). [T[he plain text of the statute forecloses the FCC's position on mobile broadband as well.

1.

In 1993, Congress added a "mobile services" provision to the radio-transmission part of the Communications Act (Title III). Pub. L. No. 103-66, § 60001, 107 Stat. 379. Three definitions are pertinent:

> (1) the term "commercial mobile service" means any mobile service ... that is provided for profit and *makes interconnected service available* (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;
>
> (2) the term "interconnected service" means service that is *interconnected with the public switched network* (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B); and
>
> (3) the term "private mobile service" means any mobile service ... that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

47 U.S.C. § 332(d) (emphases added). A commercial mobile service (think today's cellular telephone networks like AT&T, Verizon, or T-Mobile) is subject to Title II common-carrier regulation, *id.* § 332(c)(1)(A), while a private mobile service (such as a trucking company's private dispatch radio system) is not, *id.* § 332(c)(2). The dispute here lies in the language emphasized above—whether mobile broadband is "interconnected with the public switched network." *Id.* § 332(d)(2).

[T]oday's Safeguarding Order again attempts to regulate mobile broadband as a "commercial mobile service." 89 Fed. Reg. at 45447–52, ¶¶ 198–220.

2.

There is no disputing that mobile broadband is a "mobile service" "provided for profit" "to the public" (or a "substantial portion of the public."). 47 U.S.C. § 332(d)(1). Instead, whether mobile broadband is a "commercial mobile service" that is subject to Title II common-carrier regulation depends on if mobile broadband is an "interconnected service," which in turn means a "service that is interconnected with the public switched network." *Id.* § 332(d)(1), (2). Mobile broadband does not satisfy this definition.

We start with the text's use of a definite article. It would be one thing if the statute said, "interconnected with *a* public switched network, for that would connote *multiple* networks. But § 332(d)(2) does not do so; it uses "the," a fixed, singular reference. [W]hat is "*the* public switched network"? In basic terms, it is the patchwork of telecommunication services that consumers use to place and receive calls from their telephone. More technically, it is "[a]ny common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan [(NANP)] in connection with the provision of switched services." Implementation of Sections 3(n) & 332 of the Commc'ns Act, 9 FCC. Rcd. 1411, 1517 (1994).

History supports this reading. When Congress added "the public switched network" to Title III in 1993, it legislated against a backdrop that included "contemporaneous understandings of 'public switched network' by the Commission and the courts suggesting that it was commonly understood to refer to the 'public switched telephone network.'" *Id.* at 38; *see also Telecom (en banc)*, 855 F.3d at 396 (Brown, J., dissenting). As the RIF Order cogently summarizes, "[o]n multiple occasions before 332(d)(2) was enacted, the [FCC and the courts] used the term 'public switched network' to refer to the traditional public switched telephone network." 33 FCC Rcd. at 356, ¶ 75 (citing Ad Hoc Telecomms. Users Comm. v. FCC, 680 F.2d

790, 793 (D.C. Cir. 1982); Pub. Util. Comm'n v. FCC, 886 F.2d 1325, 1327, 1330 (D.C. Cir. 1989)). And the FCC's contemporaneous interpretations—which *Loper Bright* says "may be especially useful in determining the statute's meaning," 144 S. Ct. at 2262—track this original understanding.

To its credit, the FCC concedes that the public switched network means the 10-digit telephone system, but the FCC argues that the public switched network also encompasses Internet Protocol (IP) addresses. In support, it points to the statute's delegation provision to assert that Congress intentionally drafted a dynamic statute. In its view, § 332(d)(2) permits the FCC to say again what it said in the 2015 Open Internet Order: "the network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use[s] the North American Numbering Plan, *or public IP addresses*, in connection with the provision of switched services." Safeguarding Order, 89 Fed. Reg. at 45448, ¶ 203. By adding IP addresses, the FCC says, it permissibly updated the definition of public switched network to account for technological changes—e.g., Voice over Internet Protocol (VoIP) services like Skype, Google Voice, and Apple Facetime, which allow mobile broadband users to effectively connect with the 10-digit system by placing and receiving phone calls. The D.C. Circuit accepted this argument strain when, in *Telecom*, it found for the FCC's position in its 2015 Open Internet Order that "mobile broadband is a commercial mobile service." *Telecom (panel)*, 825 F.3d at 718.

But delegation is not unfettered, and it is still our task to "fix the boundaries of the delegated authority." *Loper Bright*, 144 S. Ct. at 2263. And we see nothing in the statute that permits the FCC to effectively change the statute's original meaning of "the public switched network" as set forth above by adding "public IP addresses" to adapt to new technology. Nor can we agree with our colleagues on the D.C. Circuit, who apparently did not consider the contemporaneous meaning or the definite-versus-indefinite-article analysis set forth above.

With this understanding of "the public switched network," we cannot agree with the FCC's assertion that the telephone network and the Internet are "interconnected" due to commingling of facilities and the use of VoIP technology. Mobile broadband Internet access simply does not constitute a service interconnected with '*the* public switched network.'" (internal citations omitted)). *But see Telecom (panel)*, 825 F.3d at 722–23 (coming to the opposite conclusion under *Chevron*).

In sum, mobile broadband does not qualify as "commercial mobile service" under § 332(d)(1) and therefore may not be regulated as a common carrier.

Notes and Questions

1. Statutory Construction. The majority says that "the statutory text, context, and history" make it plain that the FCC lacks the authority to treat broadband internet access providers as offering a telecommunications service. If so, what work is *Loper Bright* doing? That is, does the court's reasoning suggest that it would have found the statute clear under *Chevron*?

Are you persuaded by the court's statutory interpretation? What is the best argument against it?

2. The Scope of the FCC's Powers. Note the significant change in the way in which the FCC's role under the Communications Act has been conceived. As opposed to an expert agency in charge of an industry, as discussed in Chapter 1, or an agency whose expertise and democratic accountability warranted significant deference under *Chevron* as to the meaning of its organic statute, the courts under *Loper Bright* take an independent view of the statute. And, under the Sixth Circuit's interpretation, the agency will have very limited authority to "update" a statute through interpretation in light of changed circumstances. Do you agree with this view? On what basis would you agree or disagree?

3. Certainty? The FCC acquiesced in the Sixth Circuit's ruling (because it did not petition for review of the Sixth Circuit's decision), and its determination that the Communications Act does not permit the FCC

to impose common carrier rules on ISPs can be changed in only two ways. First, of course, Congress could amend the Act. Second, the FCC could push a fight to the Supreme Court, which would require it to adopt new rules and pursue litigation through the courts of appeals to the Supreme Court.

4. The States. The Sixth Circuit's decision does not touch state regulation, and recall that several states have adopted net neutrality rules and the courts have decided that the FCC may not preempt those rules. If states increasingly regulate internet service providers, do you think that is a good, bad, or indifferent result?

CHAPTER 8
Antitrust in Networked Industries

Insert on page 351 before note 1:

0.5 "Old" and "Odd" Parallel Case. In a parallel action, forty-six states (plus the District of Columbia and the Island of Guam) sued Facebook alleging that the Instagram and WhatsApp acquisitions were violations of the antitrust laws. In New York v. Meta Platforms, Inc., 66 F.4th 288 (D.C. Cir. 2023), the District of Columbia Court of Appeals, remarking that "the States' lawsuit is not only odd, but old," upheld a district court ruling—also by Judge Boasberg—that the states had waited too long to act. The Circuit Court ruled that "the judicially-devised doctrine of laches, developed in the 18th century English Chancery Court and imported into our laws, took care of long-delayed claims for relief" and approved the district court's four-year limitation "because the typical remedy of divestiture, if ordered well after the merger has closed, will usually prejudice the defendant."

How should time factor into a merger review? Between 1921 and 1924, the ICC (which then had jurisdiction over telecom) approved 223 AT&T acquisitions of the 234 independent local telephone companies that existed in the US at that time. The latches doctrine did not deter Judge Greene more than a half-century later in United States v. AT&T on page 99 of the casebook.

Insert at the top of page 353, replacing pages 353–358 (before Notes and Questions):

EPIC GAMES, INC. v. APPLE, INC.

67 F.4th 946 (9th Cir. 2023)

Opinion for the court filed by Circuit Judge M. SMITH, in which District Judge McSHANE concurs and Circuit Judge THOMAS concurs in part and dissents in part.

M. SMITH, Circuit Judge:

Epic Games, Inc. sued Apple, Inc. pursuant to the Sherman Act, 15 U.S.C. §§ 1–2, and California's Unfair Competition Law (UCL). Epic contends that Apple acted unlawfully by restricting app distribution on iOS devices to Apple's App Store, requiring in-app purchases on iOS devices to use Apple's in-app payment processor, and limiting the ability of app developers to communicate the availability of alternative payment options to iOS device users. Apple counter-sued for breach of contract and indemnification for its attorney fees arising from this litigation.

Factual and Procedural History

I. The Parties

Apple is a multi-trillion-dollar technology company that, of particular relevance here, sells desktop and laptop computers (Macs), smartphones (iPhones), and tablets (iPads). In 2007, Apple entered, and revolutionized, the smartphone market with the iPhone—offering consumers, through a then-novel multi-touch interface, access to email, the internet, and several preinstalled "native" apps that Apple had developed itself. Shortly after the iPhone's debut, Apple decided to move on from its native-apps-only approach and open the iPhone's (and later, the iPad's) operating system (iOS) to third-party apps.

This approach created a "symbiotic" relationship: Apple provides app developers with a substantial consumer base, and Apple benefits from increased consumer appeal given the ever-expanding pool of iOS apps. Apple now has about a 15% market share in the global smartphone market with over 1 billion iPhone users, and there are over 30 million iOS app developers. Considering only video game apps, the number of iOS games has grown from 131 in the early days of the iPhone to over 300,000 by the time this case was brought to trial. These gaming apps generate an estimated $100 billion in annual revenue.

Despite this general symbiosis, there is periodic friction between Apple and app developers. That is because Apple, when it opened the iPhone to third-party developers, did not create an entirely open ecosystem in which developers and users could transact freely without any mediation. Instead, Apple created a "walled garden" in which Apple plays a significant curating role. Developers can distribute their apps to iOS devices only through Apple's App Store and after Apple has reviewed an app to ensure that it meets certain security, privacy, content, and reliability requirements. Developers are also required to use Apple's in-app payment processor (IAP) for any purchases that occur within their apps. Subject to some exceptions, Apple collects a 30% commission on initial app purchases (downloading an app from the App Store) and subsequent in-app purchases (purchasing add-on content within an app).

Epic is a multi-billion-dollar video game company with three primary lines of business, each of which figures into various aspects of the parties' appeals. First, Epic is a video game developer—best known for the immensely popular *Fortnite*, which has over 400 million users worldwide across gaming consoles, computers, smartphones, and tablets. Second, Epic is a gaming-software developer that offers several apps on Apple's App Store. Third, Epic is a video game publisher and distributor. It offers the Epic Games Store as a game-transaction platform on PC computers and Macs and seeks to do the same for iOS devices. As a distributor, Epic makes a game available for download on the Epic Games Store and covers the direct costs of distribution; in exchange, Epic receives a 12% commission—a below-cost commission that sacrifices short-term profitability to build market share. The Epic Games Store has over 180 million registered accounts and over 50 million monthly active users. Through the Epic Games Store, Epic is a would-be competitor of Apple for iOS game distribution and a direct competitor when it comes to games that feature cross-platform functionality like *Fortnite*.

II. The Developer Program Licensing Agreement

Apple creates its walled-garden ecosystem through both technical and contractual means. To distribute apps to iOS users, a developer must pay a flat $99 fee and execute the Developer Program Licensing Agreement (DPLA). By agreeing to the DPLA, developers unlock access to Apple's vast consumer base—the over 1 billion users that make up about 15% of global smartphone users. They also receive tools that facilitate the development of iOS aps, including advanced application-programming interfaces, beta software, and an app-testing software. In essence, Apple uses the DPLA to license its IP to developers in exchange for a $99 fee and an ongoing 30% commission on developers' iOS revenue.

The DPLA contains the three provisions that give rise to this lawsuit and were mentioned in the introduction. First, developers can distribute iOS apps only through the App Store (the distribution restriction). Epic Games, for example, cannot make the Epic Games Store available as an iOS app and then offer *Fortnite* for download through that app. Second, developers must use Apple's IAP to process in-app payments (the IAP requirement). Both initial downloads (where an app is not free) and in-app payments are subject to a 30% commission. Third, developers cannot communicate out-of-app payment methods through certain mechanisms such as in-app links (the anti-steering provision).

In 2010, Epic agreed to the DPLA. Over the next few years, Epic released three games for iOS, each of which Apple promoted at major events. In 2015, however, Epic began objecting to Apple's walled-garden approach. Epic's CEO Tim Sweeney argued, in an email seeking a meeting with Apple senior leadership, that it "doesn't seem tenable for Apple to be the sole arbiter of expression and commerce" for iOS users, and explained that Epic runs a competing game-transaction platform that it "would love to eventually" offer on iOS. Nothing came of this email, and Epic continued to offer games on iOS while complying with the DPLA's terms. In 2018, Epic released *Fortnite* on iOS— amassing about 115 million iOS users.

In 2020, Epic renewed the DPLA with Apple but sought a "side letter" modifying its terms. In particular, Epic desired to offer iOS users alternatives for distribution (the Epic Games Store) and in-app payment processing (Epic Direct Pay). Apple flatly rejected this offer, stating: "We understand this might be in Epic's financial interests, but Apple strongly believes these rules are vital to the health of the Apple platform and carry enormous benefits for both consumers and developers. The guiding principle of the App Store is to prove a safe, secure, and reliable experience for users."

Once Apple rejected its offer, Epic kicked into full gear an initiative called "Project Liberty": a two-part plan it had been developing since 2019 to undermine Apple's control over software distribution and payment processing on iOS devices, as well as Google's influence over Android devices. Project Liberty coupled a media campaign against Apple and Google with a software update expressly designed to circumvent Apple's IAP restriction. On the media-campaign side, Epic lowered the price of *Fortnite*'s in-app purchases on all platforms but Apple's App Store and Google's Google Play Store; it formed an advocacy group (the Coalition for App Fairness), tasking it with "generating continuous media …pressure" on Apple and Google; and it ran advertisements portraying Apple and Google as the "bad guys" standing in the way of Epic's attempt to pass cost- savings onto consumers.

On the IAP-circumvention side, Epic submitted a *Fortnite* software update (which Epic calls a "hotfix") to Apple for review containing undisclosed code that, once activated, would enable *Fortnite* users to make in-game purchases without using Apple's IAP. Unaware of this undisclosed code, Apple approved the update and it was made available to iOS users. Shortly thereafter Epic activated the undisclosed code and opened its IAP alternative to users. That same day, Apple became aware of the hotfix and removed *Fortnite* from the App Store. Apple informed Epic that it had two weeks to cure its breaches of the DPLA, or otherwise Apple would terminate Epic Games' developer account.

Three days after Apple removed *Fortnite* from the App Store, Epic filed a 62-page complaint against Apple, asking for permanent injunctive relief pursuant to the Sherman Act and the UCL. Epic's requested relief would essentially convert iOS into an entirely open platform: Developers would be free to distribute apps through any means they wish and use any in-app payment processor they choose. Taken together, this relief would create a pathway for developers to bypass Apple's 30% commission altogether, though Epic made open-ended assurances at trial that its relief would allow Apple to collect a commission—just not in the manner that the DPLA establishes. Apple brought counter-claims for breach of contract.[1]

III. Market Definition

The district court began its analysis by defining the relevant market for Epic's Sherman Act claims. Epic proposed two *single-brand* markets: the *aftermarkets* for iOS app distribution and iOS in-app payment solutions, derived from a *foremarket* for smartphone operating systems. Apple, by contrast, proposed the market for *all* video game transactions, whether those transactions occur on a smartphone, a gaming console, or elsewhere. The district court ultimately found a market between those the parties proposed: mobile-game transactions—*i.e.*, game transactions on iOS and Android smartphones and tablets. Compared to Epic's proposed aftermarkets, the district court's relevant market was both broader and narrower—broader in that it declined to focus exclusively on iOS, but narrower in that it considered only video game transactions instead of all app transactions. Compared to Apple's proposed market, the district court's relevant market was narrower—excluding game-console and streaming-service transactions.

[1] The same day, Epic filed a 60-page complaint against Google, challenging its policies regarding the Google Play Store on Android devices—*i.e.*, smartphones and tablets that use the main operating-system alternative to iOS. *See* Complaint for Injunctive Relief, Epic Games, Inc. v. Google LLC, No. 3:20-cv-05671 (filed Aug. 13, 2020 N.D. Cal.).

The district court rejected Epic's proposed single-brand markets on several grounds. It held that there was no foremarket for smartphone and tablet operating systems because Apple does not license or sell iOS. More critically, it analyzed Epic's aftermarkets in the alternative and found a failure of proof. Epic presented no evidence regarding whether consumers unknowingly lock themselves into Apple's app-distribution and IAP restrictions when they buy iOS devices. A natural experiment facilitated by Apple's removal of *Fortnite* from the App Store showed that iOS *Fortnite* users switched about 87% of their pre-removal iOS spending to other platforms—suggesting substitutionality between the App Store and other game-transaction platforms. The district court also rejected Epic's relevant market-definition expert as "weakly probative" and "more interested in a result [that] would assist his client than in providing any objective ground to assist the court in its decision-making." Among other flaws, the expert's analysis contradicted his own academic articles on how to analyze two-sided markets; used consumer-survey wording that departed from well-established market-definition principles; failed to account for holiday-season idiosyncrasies; and excluded minors (who are an important segment of mobile-game purchasers). The district court then turned to Apple's proposed relevant market definition and refined it from *all* game transactions to *mobile* game transactions by relying extensively on the "practical indicia" of markets.

Analysis

On appeal, Epic challenges the district court's Sherman Act and breach of contract rulings. We affirm the district court's denial of antitrust liability and its corresponding rejection of Epic's illegality defense to Apple's breach of contract counterclaim. Though the district court erred as a matter of law on several issues, those errors were harmless. Independent of the district court's errors, Epic failed to establish—as a factual matter—its proposed market definition.

I. Market Definition

Epic argues that the district court incorrectly defined the relevant market for its antitrust claims to be mobile-game transactions instead of Epic's proposed aftermarkets of iOS app distribution and iOS in-app payment solutions. Epic contends both that the district court erred as a matter of law by requiring several threshold showings before finding a single-brand market and that, once those errors are corrected, the record compels the conclusion that Epic established its single-brand markets. We agree that the district court erred in certain aspects of its market-definition analysis but conclude that those errors were harmless.

A. General Market-Definition Principles

The Sherman Act contains two principal prohibitions. Section 1 targets *concerted* action, rendering unlawful "every contract, combination …, or conspiracy, in restraint of trade." Section 2 targets *independent* action, making it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

In most cases, a "threshold step" is defining the relevant market in which the alleged restraint occurs. The relevant market for antitrust purposes is "the area of effective competition"—*i.e.*, the arena within which significant substitution in consumption or production occurs. A market comprises "any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel" could profitably raise prices above a competitive level.). If the "sales of other producers could substantially constrain the price-increasing ability of the monopolist or hypothetical cartel, these other producers must be included in the market. To conduct this inquiry, courts must determine which products have a reasonable interchangeability of use or sufficient cross-elasticity of demand with each other.

Often, this inquiry involves empirical evidence in the form of a "SSNIP" analysis, whether a hypothetical monopolist could profitably impose a **S**mall, **S**ignificant, **N**on-transitory **I**ncrease in **P**rice above a competitive level. As we have previously summarized:

> [A]n economist proposes a narrow geographic and product market definition and then iteratively expands that definition until a hypothetical monopolist in the proposed market would be able to profitably make a small but significant non-transitory increase in price ("SSNIP"). At each step, if consumers would respond to a SSNIP by making purchases outside the proposed market definition, thereby rendering the SSNIP unprofitable, then the proposed market definition is too narrow. At the next step, the economist expands the proposed geographic or product market definition to include the substituted products or area. This process is repeated until a SSNIP in the proposed market is predicted to be profitable for the hypothetical monopolist.

B. Single-Brand Aftermarkets

In some instances one brand of a product can constitute a separate market. More specifically, the relevant market for antitrust purposes can be an *aftermarket*—where demand for a good is entirely dependent on the prior purchase of a durable good in a *foremarket*.

In Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451 (1992), the Supreme Court considered the question of whether a lack of market power in the foremarket (photocopier machines, generally) categorically precludes a finding of market power in the aftermarket (replacement parts for and servicing of Kodak-brand photocopiers), which Kodak had allegedly achieved by contractually limiting customers to Kodak-provided parts and services. The Supreme Court rejected Kodak's invitation to impose an across-the-board rule because it was not convinced that the rule—which "rest[ed] on a factual assumption about the cross-elasticity of demand" in aftermarkets—would always hold true. The Supreme Court thus folded aftermarkets into the framework for assessing markets generally, evaluating cross-elasticity of demand to determine whether a hypothetical monopolist could profitably charge a supracompetitive price. ("The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product to a price change in another.")

The *Kodak* Court reasoned that "significant" information costs and switching costs could create a less responsive connection between aftermarket prices and foremarket sales, particularly where the percentage of sophisticated purchasers able to accurately life-cycle price is low. That is, these conditions might "lock-in" unknowing customers such that competition in the foremarket cannot discipline competition in the aftermarkets, meaning a hypothetical monopolist could price its aftermarket products at a supracompetitive level without a substantial number of customers substituting to other products. Whether a plaintiff has proven such a lock-in must be resolved on a case-by-case basis, focusing on the particular facts disclosed by the record.

In sum, to establish a single-brand aftermarket, a plaintiff must show: (1) the challenged aftermarket restrictions are "not generally known" when consumers make their foremarket purchase; (2) "significant" information costs prevent accurate life-cycle pricing; (3) "significant" monetary or non-monetary switching costs exist; and (4) general market-definition principles regarding cross-elasticity of demand do not undermine the proposed single- brand market.

D. Epic's Legal Challenges

With these principles in mind, we now turn to Epic's arguments that the district court committed legal error when it held that a market can never be defined around a product that the defendant does not license or sell.

We agree with Epic that the district court erred by imposing a categorical rule that an antitrust market can *never* relate to a product that is not licensed or sold—here smartphone operating systems. To begin, this categorical rule flouts the Supreme Court's instruction that courts should conduct market-definition inquiries based not on formalistic distinctions but on actual market realities.

Moreover, the district court's rule is difficult to square with decisions defining a product market to include vertically integrated firms that self-provision the relevant product but make no outside sales. For example, the D.C. Circuit in *Microsoft* noted that "Apple had a not insignificant share of worldwide sales of operating systems," even though Apple did not sell or license macOS but instead only included it in its own Mac computers. While the *Microsoft* court ultimately excluded macOS from its market, it did so on fact-bound substitutability grounds, not the categorical grounds that the district court used here.

Finally, the district court's rule overlooks that there may be markets where companies offer a product to one side of the market for free but profit in other ways, such as by collecting consumer data or generating ad revenue. *See, e.g.*, FTC v. Facebook, Inc. (D.D.C. 2022) It puts form over substance to say that such products cannot form a market because they are not directly licensed or sold.

Epic also argues that it is entitled, as a factual matter, to a finding in favor of its proposed aftermarkets. Though Epic attempts to avoid the clear-error label, its argument requires it to carry the heavy of burden on appeal of showing that the district court clearly erred in finding that (1) Epic failed to show a lack of general consumer awareness regarding Apple's restrictions on iOS distribution and payment processing, (2) Epic failed to show significant switching costs, and (3) the empirical evidence in the record support a market of mobile- game transactions, not Epic's iOS-specific aftermarkets.[2]

Beginning with the first prong, Epic had the burden of showing a lack of consumer awareness—whether through a change in policy or otherwise. Epic identified a purported change in policy, contrasting the App Store's now-immense profitability with a pre-launch statement from Steve Jobs that Apple did not "intend to make money off the App Store['s]" 30% commission. The district court reasonably found this statement to simply reflect Jobs's "initial expectation" about the App Store's performance, not an announcement of Apple policy. Especially in light of the district court's finding that Apple has "maintained the same general rules" for distribution and payment processing since the App Store's early days, it did not clearly err in concluding that Epic failed to prove a lack of consumer awareness through a change of policy.

Nor did the district court clearly err in finding that Epic otherwise failed to establish a lack of awareness. Indeed, the district court squarely found: "[T]here is *no evidence* in the record demonstrating that consumers are unaware that the App Store is the sole means of digital distribution on the iOS platform" (emphasis added). And on appeal, Epic fails to cite any evidence that would undermine the district court's characterization of the record.

Because of this failure of proof on the first prong of Epic's *Kodak* showing, we need not reach—and do not express any view regarding—the other factual grounds on which the district court rejected Epic's single-brand markets.

Moreover, the district court's finding on *Kodak's* consumer-unawareness requirement renders harmless its rejection of Epic's proposed aftermarkets on the legally erroneous basis that Apple does not license or sell iOS as a standalone product. To establish its single-brand aftermarkets, Epic bore the burden of rebutting the economic presumption that consumers make a knowing choice to restrict their aftermarket options when they decide in the initial (competitive) market to enter a contract. Yet the district court found that there was "no evidence in the record" that could support such a showing. As a result, Epic cannot establish its proposed aftermarkets on the record before our court—even after the district court's erroneous reasoning is corrected.

[2] The district court did not rule against Epic on the remaining prong of the *Kodak* test: the presence of significant information costs that make accurate life-cycle pricing difficult.

Conclusion

There is a lively and important debate about the role played in our economy and democracy by online transaction platforms with market power. Our job as a federal Court of Appeals, however, is not to resolve that debate—nor could we even attempt to do so. Instead, in this decision, we faithfully applied existing precedent to the facts as the parties developed them below.

THOMAS, Circuit Judge, concurring in part and dissenting in part:

I agree with much of the majority opinion. I agree that the district court erred in defining the relevant market. However, unlike the majority, I would not conclude that these errors were harmless. An error is harmless if it "do[es] not affect the substantial rights of the parties." 28 U.S.C. § 2111. The district court's errors relate to threshold analytical steps, and the errors affected Epic's substantial rights. Thus, I would reverse the district court and remand to evaluate the claims under the correct legal standard.

A threshold step in any antitrust case is to accurately define the relevant market. The district court rejected the foremarket of mobile operating systems because Apple does not sell or license its operating system separately from its smartphones. But we have previously recognized that such a market can exist. The district court then rejected Epic's proposed aftermarket of iOS app payment processing ("IAP") because IAP is integrated into the operations system. This conclusion was not only legally erroneous, but in contradiction to the district court's factual finding of separate demand.

The majority holds that the errors were harmless given the district court's analysis of the remaining steps in the Rule of Reason analysis. However, there is no direct authority for that proposition, and it amounts to appellate court fact-finding. Indeed, the Supreme Court has instructed that courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market.

Correction of these errors would have changed the substance of the district court's Rule of Reason analysis. Unless the correct relevant market is identified, one cannot properly assess anticompetitive effects, procompetitive justifications, and the satisfaction of procompetitive justifications through less anticompetitive means. Relying on the district court's market does not solve this problem. The parties formulated arguments around their own markets—not the district court's market. Remand would have given the parties an opportunity to argue whether the DPLA worked unfair competition in the district court's market.

Therefore, I respectfully concur in part and dissent in part.

Insert on page 359 before note 2:

2. Epic as a New Platform. The court tellingly observed that Epic had three lines of business that were each implicated in Apple's restrictive "walled garden" platform policies: Epic creates games, sells software for other games developers, and is a game publisher and distributor. Through this first role—as a games creator—it has been frustrated by Apple's 30% commission. But through other two roles, and especially in its role as an independent publisher and distributor, Epic appears to aspire towards offering its own platform, one that rivals Apple's App Store, and is more stymied by the DLPA's requirement for payment and distribution exclusivity. Accordingly, the court noted that "Through the Epic Games Store, Epic is a would-be competitor of Apple for iOS game distribution and a direct competitor when it comes to games that feature cross-platform functionality like *Fortnite*." The 30% tax could be characterized as a monopoly price, whereas the exclusivity requirement could be characterized as an entrenchment of monopoly power.

Do these two competitive concerns have equal weight under the antitrust laws? Should we view Epic's effort to challenge Apple's market dominance—and the restraints that deter them from doing so—differently from Epic's complaints about Apple's exercise of its market dominance?

Insert on page 359, to replace notes 2 and 3:

3. A Partial Victory. In addition to making claims under the Sherman Act, Epic also sued Apple under California's Unfair Competition Law. The 9th Circuit (in sections not included above) upheld the district court's conclusion that certain anti-steering provisions in Apple's DPLA violated California's Unfair Competition Law (UCL). To remedy that violation, the court issued a nationwide, permanent injunction preventing Apple from enforcing the anti-steering provisions, which extends to all app categories (not just gaming apps). In effect, the injunction gives app developers the ability to avoid Apple's 30% IAP commission by directing users to external websites for in-app purchases. If state law can stop what the Sherman Act cannot, is that a failure of the Sherman Act?

4. Multiple Suits. Software developers separately sued Apple for the same restrictive conduct which, they claimed, subjected them to Apple's anticompetitive 30% commission and prevented them from marketing their products directly to consumers. These lawsuits were initiated well before the commencement of Epic's action against Apple. The first of the developers' lawsuits, Apple iPhone Antitrust Litigation, 4:11-cv-6714-YGR (Pepper), was filed in 2011 on behalf of a class of iOS device consumers alleging harm from the commission rate. The second, filed in 2019 after Pepper returned from the Supreme Court, was Donald Cameron v. Apple Inc., 4:19-cv-3074-YGR (Cameron), which was filed on behalf of a class of iOS app developers also alleging violations of antitrust and competition laws. In 2021, Apple reached a settlement with the Cameron plaintiffs that included $100 million for small developers and some modest modifications to its App Store rules that will now allow companies to notify users directly to encourage them to make purchases directly, rather than through the App Store.

5. Is it the Jury? As was noted in footnote 1, Epic also sued Google for similar restraints on its Google Play Store. In December 2023, a unanimous jury—after just three hours of deliberation following a four-week trial—issued a verdict for Epic. The jury concluded that Google has monopoly power in Android app distribution and in-app billing services markets, and that Google exploited that monopoly power by illegally tying its Google Play app store with its Google Play Billing payment services. A copy of the jury verdict is available at https://storage.courtlistener.com/recap/gov.uscourts.cand.364325/gov.uscourts.cand.364325.606.0.pdf

Epic's sweeping success against Google is in sharp contrast with its failure against Apple. One commentator remarked, "For [Epic CEO] Tim Sweeney, this is a surprising turn of events, since his real enemy has always been Apple, not Google … The Google case was seen almost as a sideshow compared to Epic's case against Apple, and it's turned out in the opposite direction." Bobby Allyn, "Epic Games beat Google but lost to Apple in monopoly lawsuits. What does it all mean?" NPR (Dec. 13, 2023). Note that Google's Play Store has been less restrictive than Apple's App Store, and its commissions were usually lower than Apple's 30% fees.

How will the inconsistent legal findings from Epic's two suits be reconciled? Will they need to be reconciled?

6. Or is it just Google? In December 2023, Google agreed to a $700 million settlement with Attorneys General of all 50 states, who brought an antitrust suit in 2021 alleging Google's Play Store used anticompetitive restraints to sustain a monopoly against software developers and Google Play users. The agreement also requires Google to change its Play Store rules to enable the installation of and billing for other apps to occur outside the Play Store.

A copy of the settlement agreement is available at https://storage.courtlistener.com/recap/gov.uscourts.cand.381462/gov.uscourts.cand.381462.522.2.pdf. Do these terms have any implications for how antitrust actions will proceed against Apple, Google, or other platforms?

7. A Bigger Challenge to Apple. In March 2024, the Department of Justice and 16 states brought a far-reaching antitrust suit against Apple, claiming that it illegally maintains a monopoly over smartphones. Note that unlike Epic's case against Apple, which claims that Apple monopolizes the App Store and its surrounding software market, the DOJ case accuses Apple of monopolizing the market for smartphone devices. Central to the DOJ case is the claim that Apple institutes restraints that prevent iPhone users from switching to competing phones and for preventing interoperability across Apple's and other platforms for software, content, and other service markets.

The DOJ's complaint alleges two different market definitions: "performance smartphones" in the United States, and the broader "smartphones" in the United States. (The complaint is available at https://www.justice.gov/d9/2024-06/423137.pdf.) How would litigating these market definitions differ from the market definition litigation that occurred in Epic v. Apple and Epic v. Google?

Insert on page 372, after note 3:

3.5. A "Middleware" Proposal. One market-based solution that has gained enthusiasm among policy experts is to allow users to append extensions, or "middleware," to dominant platforms such as Facebook, Amazon, and Google so as to tailor their algorithms to meet distinct user preferences. Such middleware extensions, advocates argue, would allow users to benefit from the scale economies the platforms offer while curtailing the force of their algorithmic power to gather private information, foreclose competition, promote anticompetitive bundles, and the like. The authors of a working group, led by Stanford's Francis Fukuyama, offered the following definition for a middleware solution:

> By "middleware," we refer to software products that can be appended to the major internet platforms. These products would interconnect with Facebook, Amazon, Apple, Twitter, and Google APIs and allow consumers to shape their feeds and influence the algorithms that those dominant platforms currently employ. Middleware would not necessarily disintermediate services between the consumer and the internet platform; rather, as a third-party service chosen by the consumer, it would make editorial judgments that are currently provided (usually without transparency) by the platform.
>
> A competitive middleware sector would [outsource] content curation to other organizations that enable consumers to tailor their feeds to their own explicit preferences. At the same time, middleware, in our view, could be a superior alternative to structural remedies imposed by either courts or regulators, in that it would directly respond to consumer preferences and market actors.

Francis Fukuyama, et al., Report of the Working Group on Platform Scale, at 30–31 (Nov. 17, 2020), https://cyber.fsi.stanford.edu/publication/report-working-group-platform-scale

Platform monopolies are increasingly invoking legal mechanisms—such as the Computer Fraud and Abuse Act, intellectual property laws, and Verizon v. Trinko's interpretation of the Sherman Act—to preclude users from adding middleware or other extensions to their platform. In 2024, Ethan Zukerman, a professor at the University of Massachusetts Amherst and director of a software lab "dedicated to creating user-empowering middleware" sued Meta to oppose its exclusion of Zuckerman's software products. *See* Ethan Zuckerman, "I Love Facebook. That's Why I'm Suing Meta," New York Times (May 5, 2024). Professor Zuckerman's complaint reads:

> Professor Zuckerman believes that third-party tools that operate at the explicit direction of social media users are a particularly promising avenue for improving online experiences. By employing such tools, users could exercise more control over their digital lives—controlling how information is presented to them on the platforms and what information about them is collected. For example, users could employ third-party tools to customize a platform's interface, to block content the platforms allow but that users would prefer not to see, and to automatically update their privacy settings. Tools in this model would function like pop-up ad blockers or instant messaging aggregators. In other words, they would carry out their users' wishes, operating as extensions or "agents" of the user.

Zuckerman v. Meta Platforms, Case No. 3:24-cv-02596 (N.D. Ca. 2024). Professor Zuckerman invoked Section 230, the Computer Fraud and Abuse Act, and some state doctrines in asking for a declaratory judgment that permits him (and others) to use his middleware extension with his Facebook account.

Why might policy advocates consider Middleware to be an attractive and viable public policy solution to the distinct harms caused by the dominant platforms? What legal pathway would you advise them to prevent the platforms from prohibiting these extensions? Does Verizon v. Trinko really prevent Middleware advocates from invoking the Sherman Act, to prevent unilateral refusals to deal?

Insert on page 387, after note 1:

1.5. A Preliminary Victory for the Government. In August 2024, District Judge Mehta ruled that Google's use of its general search engine amounted to a violation of Section 2 of the Sherman Act. The opinion succinctly covers each element of a Section 2 claim in the following summary:

> Specifically, the court holds that (1) there are relevant product markets for general search services and general search text ads; (2) Google has monopoly power in those markets; (3) Google's distribution agreements are exclusive and have anticompetitive effects; and (4) Google has not offered valid procompetitive justifications for those agreements. Importantly, the court also finds that Google has exercised its monopoly power by charging supracompetitive prices for general search text ads. That conduct has allowed Google to earn monopoly profits.

United States v. Google LLC, Case No. 20-cv-3010 (D.D.C. 2024), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2024/pr24-59-Google.pdf, at 8.

The court's ruling addresses only the question of liability, with later proceedings on devising an appropriate remedy. Thus, the question asked in note 1 is additionally relevant: what kind of remedy do you believe is appropriate? How does recent growth in AI-search engines affect what the court should do? ConsiderThe Department of Justice has requested an ambitious structural remedy, asking for Google's divestiture of both its Chrome browser and its Android software platform. *See* https://storage.courtlistener.com/recap/gov.uscourts.dcd.223205/gov.uscourts.dcd.223205.1062.0.pdf.

> Additionally, consider the excerpt below:
>
> I never thought we'd reach this point, but Googling things can honestly feel like a chore. Not only do we have to hop through numerous links to pinpoint what we're searching for, but we also navigate a maze of ads, spam, and pop-ups. Even then, we often don't find the answers we need. So why not let AI try its hand at search?
>
> A new breed of AI search engines leverages the tech behind AI chatbots like ChatGPT to fetch answers to your queries—without sending you down rabbit holes. They automatically pick the links most relevant to your questions and summarize them for you. You don't have

> to scroll through a list of URLs or peruse entire websites to find a little piece of information. It's as if you have a personal search engine assistant.
>
> [The piece then proceeds to recommend three AI search engines, one for featuring "the best AI search experience," one for featuring "up-to-date information," and one for offering "AI search and browser in one."]

The Best AI Search Engines, https://zapier.com/blog/best-ai-search-engine/.

Insert on page 387, to replace note 5:

4. Another Google Loss. In April 2025, District Judge Brinkema gave the Department of Justice a second antitrust victory against Google, ruling that "Google has violated Section 2 of the Sherman Act by willfully acquiring and maintaining monopoly power in the open-web display publisher ad server market and the open-web display ad exchange market, and has unlawfully tied its publisher ad server (DFP) and ad exchange (AdX) in violation of Sections 1 and 2 of the Sherman Act." United States v. Google LLC, Case No. 1:23-cv-108 (D. Va. 2025), at 1. Remedy proceedings for this case, along with the Google Search case, could lead to significant changes for the company.

5. Antitrust Enforcement, Big Tech, and Vertical Agreements. At around the time the Department of Justice brought this suit, other antitrust enforcers brought similarly conceived actions against other dominant internet platforms. In 2021, the District of Columbia sued Amazon, claiming the internet retail giant was illegally securing its monopoly through a "Fair Pricing Policy" that prohibited its vendors from selling goods on other platforms at prices lower than those on Amazon (the suit was dismissed in an oral ruling in 2022). Also in 2021, a group of state attorneys general accused Google of forcing restrictive terms on software developers that sell apps on the Google Play Store, the same theory used by Epic in its suit against Apple. And multiple state and national authorities continued to scrutinize Apple's App Store restrictions even after its victory over Epic (see § 8.A.1). And in 2023, the FTC (with seventeen state attorneys general) sued Amazon for, among other charges, preventing vendors from selling at lower prices through other online retailers, biasing Amazon search results to preference Amazon products, and conditioning sellers' ability to obtain "Prime" eligibility for their products on their using Amazon's fulfillment service.

Note that all of these cases claimed that the monopolist-defendant violated the Sherman Act by implementing vertical restraints that secured its market power. Why do you think this is the prevailing theory behind these antitrust actions? Reciprocally, if this is the prevailing approach of enforcers, why do you think internet giants continue to rely so heavily on vertical restraints? Do these cases offer any additional insight to the materials discussed in Chapter 5, especially part 5.C, that detailed the many statutory and regulatory prohibitions preventing telecommunications networks from engaging in vertical agreements?

Add the following notes on pages 394–95:

0. Upheld on Appeal. In September 2024, the European Court of Justice rejected Google's appeal and upheld the Commission's finding that Google illegally steered search consumers to its shopping service. The Court additionally upheld a fine of €4.2 billion.

5. Meta Too. In November 2024, the European Commission assessed Meta Platforms Inc. with a nearly €800 million fine for automatically showing Facebook Marketplace classified advertisements to Facebook users. The Commission concluded that it gave an unfair competitive advantage to Facebook Marketplace over other online retailers.

6. The EU's Digital Markets Act (DMA). In 2022, the European Parliament passed the Digital Markets Act. Central to the DMA is the identification of "gatekeepers," which are defined as "large digital platforms providing so-called core platform services, such as online search engines, app stores, messenger services." *See* https://digital-markets-act.ec.europa.eu/about-dma_en. The DMA imposes on gatekeepers both unique prohibitions (such as self-preferencing, tracking data for targeted advertising, and impeding users' access to outside sites) and unique obligations (such as enabling interoperability with third-parties, allowing users to access data they generate on the platform, and allowing businesses on the platform to contract directly with their customers).

Enforcement of the DMA began in 2023, and in September 2023 the European Commission ("EC") designated Apple as a gatekeeper in relation to its iOS, App Store and Safari. In June 2024, the EC concluded that Apple's App Store rules violated the DMA's "steering requirements," which require gatekeepers to allow developers to steer consumers to offers outside their app stores free of charge. Since then, Alphabet, Amazon, ByteDance, Meta, and Microsoft have all been deemed to be gatekeepers under the DMA, and noncompliance investigations have been initiated against Alphabet and Meta.

In April 2025, the European Commission fined Apple €500 million and Meta €200 million for failing to give consumers choices on offers and how their personal data is used. These were the first fines assessed under the Digital Markets Act, but they surely will not be the last.

How does this regulatory approach towards internet platforms compare with the US approach? Is it possible for US antitrust enforcers to use the Sherman Act to mimic the substance of the DMA rules?

Insert on page 397, after first full paragraph:

In 2023, the FTC and DOJ's Antitrust Division issued new Merger Guidelines, which superseded both the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf

Insert on page 401–402, as new introductory text to Sect. 8.B.2:

§ 8.B.2. Horizontal Mergers

As was discussed above, the FTC and the DOJ's Antitrust Division review mergers to determine whether they comply with the Clayton Act, which prohibits acquisitions and transactions where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. And, also discussed above, the agencies offer guidance to would-be merging parties and make transparent their internal review process through the issuance of Merger Guidelines. The guidelines describe the agencies' analytical process in determining whether to challenge a horizontal merger and when parties should expect their proposed merger will receive scrutiny.

The agencies' Merger Guidelines have been revised every decade or so and, historically, separate guidelines were offered for "horizontal" and "vertical" mergers. Horizontal mergers are defined as combinations of firms that compete with each other, and vertical mergers are combinations of firms that transact with each other (such as between a supplier and a retailer). The current Merger Guidelines, issued in December 2023, superseded both the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines and were intended to reflect the Agencies' approach to all mergers. Moreover, the 2023 Guidelines disposed of the strictly separate treatment of horizontal and vertical transactions and instead offers a series of analytical frameworks in which mergers may substantially lessen competition. Despite avoiding the horizontal/vertical dichotomy, several of these analytical frameworks adopt the central motivation underlying the prior Horizontal Merger Guidelines, which pay close attention to whether firms compete with each other and, critically, the concentration of the particular market in which the merging parties compete.

Calculating market concentration requires defining the relevant market. As we observed in *FTC v. Facebook* and *Epic v. Apple*, see § 8.A.1, market definition is both complicated and critical in properly assessing the economic consequences of a merger. It can also be deceptively difficult, as the proposed merger between Sirius Satellite Radio and XM Satellite Radio—discussed below—illustrated. We first offer a popular description of the merger analysis and then share the Antitrust Division's conclusion after its review.

Insert on page 428, before note 3:

2.5. Worst Merger Ever? In 2021, less than four years after its acquisition of Time Warner, AT&T spun off its Warner Media assets and ceded management control to Discovery. *The New York Times* described the transaction as "a stunning retreat" by AT&T and an "about face" from the Time Warner purchase. The move also revealed how costly the merger turned out to be. The *Times* calculated that at the time of the spin off, AT&T shareholders' stake in the Time Warner assets were worth less than $20 billion, which amounts to a loss of about $47 billion from an original valuation of $109 billion valuation. *See* James Stewart, "Was This $100 Billion Deal the Worst Merger Ever?" New York Times (Nov. 19, 2022). Does the failure of the deal, and AT&T's inability to foreclose (let alone profit from) downstream markets suggest that the Justice Department's lawsuit was wrongheaded?

Stewart, in his post-mortem of the acquisition's failure, faults a clash of corporate cultures for the merger's failure ("In the eyes of former Time Warner executives, a vibrant culture of creative energy and success nurtured over decades was destroyed in months.") But a close reading of Stewart's account, especially in light of Judge Leon's opinion, reveals that much of the organizational clash came from AT&T effort "to promote Warner's streaming content exclusively through AT&T's streaming service" and to prevent HBO subscriptions from being sold on other platforms. In short, Stewart's reporting appears to confirm the Justice Department's fear, and to contradict testimony offered by AT&T executives, that AT&T would withhold Time Warner content to target rival distributors.

Insert on page 428, after note 4:

5. More Failed Challenges to Vertical Mergers. Despite failing to stop the AT&T-Time Warner merger, the antitrust enforcement agencies have continued to bring challenges to vertical mergers. The record has not been good. In September 2022, a federal court denied the Justice Department's effort to prevent UnitedHealth Group, one of the nation's largest health insurers, from acquiring Change Healthcare, a provider of revenue and payment services. The DOJ argued that the $13 billion purchase would allow United to obtain from Change data belonging to competing insurers, thereby anticompetitively harming United's competitors. In February 2023, a federal court rejected the FTC's challenge to Meta's $400 million acquisition of Within Unlimited, a virtual reality (VR) software developer. The FTC had argued that because of the breadth of Meta's platform, its acquisition of Within would substantially lessen competition in the market for VR fitness apps. And in July 2023, Microsoft, which owns (among other things) the Xbox console and a game streaming service, defeated the FTC's challenge to its $69 billion acquisition of Activision, maker of Call of Duty, Candy Crush, and other popular games. The FTC maintained that the vertical merger would give Microsoft outsized power to make Activision content exclusive to Xbox and foreclose Activision's popular offerings to competing consoles.

This string of losses might reflect a deeply-held skepticism in the judiciary that vertical mergers cause competitive harm. Put more forcefully, they might signal that there are few legal impediments to vertical acquisitions, even by monopolist platforms. Alternatively, they might suggest that the economics of vertical integration is either poorly understood or extremely difficult to explain in a legal setting. Or, more mundanely, a product of poor case selection or legal strategy among antitrust enforcers eager to halt vertical integration.

CHAPTER 9
Regulating the Spectrum

Insert on page 508, after note 7:

8. FCC Auction Authority. Congress allowed the FCC's auction authority to lapse in 2023. As is usually the case, budgetary pressures led to its renewal. Section 40002 of the 2025 legislation called the One Big Beautiful Bill Act, Pub. L. No. 119-21, restored the FCC's spectrum auction authority through 2034. It required the FCC to auction 800 megahertz of spectrum—a large amount of spectrum—from the 1.3–10.5 GHz bands, excluding the 3.1–3.45 GHz and 7.4–8.4 GHz bands, for commercial licenses. To state the obvious, the auctioned frequencies will not be devoted to unlicensed uses, commons, etc. Spectrum auction authority generally appears in budget-related legislation because auctions provide revenues that help to offset other expenditures and tax cuts in the legislation. In this case, the projected revenues from these auctions were $85 billion.

CHAPTER 11
Content-Based Regulations

Insert on page 621, after note 6:

7. New Legislation on Internet Porn and a Different Result. In 2023, Texas enacted legislation requiring internet pornography websites to verify that users are adults. Texas was not alone—21 other states enacted similar laws. The law was challenged on First Amendment grounds. The district court held that the statute was a content-based speech regulation and thus was subject to strict scrutiny, and it preliminarily enjoined the statute. The Fifth Circuit reversed, holding that because, under the Supreme Court's jurisprudence, pornography is generally not obscene for adults but is obscene for minors, the age-verification law was subject to rational-basis review, which it satisfied. The Supreme Court granted certiorari and agreed with neither of these approaches but upheld the Texas statute.

FREE SPEECH COALITION, INC. V. PAXTON

606 U.S. ___, 2025 WL 1773625 (2025)

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. KAGAN, J., filed a dissenting opinion, in which SOTOMAYOR and JACKSON, JJ., joined.

JUSTICE THOMAS delivered the opinion of the Court.

Texas, like many States, prohibits the distribution of sexually explicit content to children. Tex. Penal Code Ann. §43.24(b) (West 2016). But, although that prohibition may be effective against brick-and-mortar stores, it has proved challenging to enforce against online content. In an effort to address this problem, Texas enacted H. B. 1181, Tex. Civ. Prac. & Rem. Code Ann. §129B.001 *et seq.*, which requires certain commercial websites that publish sexually explicit content to verify the ages of their visitors. This requirement furthers the lawful end of preventing children from accessing sexually explicit content. But, it also burdens adult visitors of these websites, who all agree have a First Amendment right to access at least some of the content that the websites publish. We granted certiorari to decide whether these burdens likely render H. B. 1181 unconstitutional under the Free Speech Clause of the First Amendment. We hold that they do not. The power to require age verification is within a State's authority to prevent children from accessing sexually explicit content. H. B. 1181 is a constitutionally permissible exercise of that authority.

I

A

[H. B. 1181] applies to any "commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, . . . more than one-third of which is sexual material harmful to minors." Tex. Civ. Prac. & Rem. Code Ann. §129B.002(a). The statute defines "'[s]exual material harmful to minors'" as material that: (1) "is designed to appeal to or pander to the prurient interest" when taken "as a whole and with respect to minors"; (2) describes, displays, or depicts "in a manner patently offensive with respect to minors" various sex acts and portions of the human anatomy, including depictions of "sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, [and] excretory functions"; and (3) "lacks serious literary, artistic, political, or scientific value for minors." §129B.001(6).

H. B. 1181 requires a covered entity to "use reasonable age verification methods . . . to verify that an individual attempting to access the material is 18 years of age or older." §129B.002(a). To verify age, a covered entity must require visitors to "comply with a commercial age verification system" that uses "government-issued identification" or "a commercially reasonable method that relies on public or private transactional data." §129B.003(b)(2). The entity may perform verification itself or through a third-party service. §129B.003(b).

II

B

Our precedents hold that speech is obscene to the public at large—and thus proscribable—if (a) "the average person, applying contemporary community standards[,] would find that the work, taken as a whole, appeals to the prurient interest"; (b) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (c) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U. S. 15, 24 (1973) (internal quotation marks omitted).

Miller does not define the totality of States' power to regulate sexually explicit speech, however. In addition to their general interest in protecting the public at large, States have a specific interest in protecting *children* from sexually explicit speech.

[O]ur precedents recognize that States can impose greater limits on children's access to sexually explicit speech than they can on adults' access. When regulating adult access, a State may not prohibit adults from accessing speech that is inappropriate only for children. Minors, however, have long been thought to be more susceptible to the harmful effects of sexually explicit content, and less able to appreciate the role it might play within a larger expressive work.

When regulating minors' access to sexual content, the State may broaden *Miller*'s "definition of obscenity" to cover that which is obscene from a child's perspective. Ginsberg v. New York, 390 U. S. 629, 638 (1968). To be more precise, a State may prevent minors from accessing works that (a) taken as a whole, and under contemporary community standards, appeal to the prurient interest *of minors*; (b) depict or describe specifically defined sexual conduct in a way that is patently offensive *for minors*; and (c) taken as a whole, lack serious literary, artistic, political, or scientific value *for minors*.

C

This Court has applied these principles to regulations of internet-based speech on two prior occasions, both at the dawn of the internet age, [Reno v. American Civil Liberties Union, 521 U.S. 844 (1997), and Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004) (*Ashcroft II*)].

For the past two decades, *Ashcroft II* has been our last word on the government's power to protect children from sexually explicit content online. During this period, the "technology of the Internet" has continued to "evolv[e] at a rapid pace." *Id*. at 671. With the rise of the smartphone and instant streaming, many adolescents can now access vast libraries of video content—both benign and obscene—at almost any time and place, with an ease that would have been unimaginable at the time of *Reno* and *Ashcroft II*.

III

With that background in mind, we turn now to the level of scrutiny that applies to H. B. 1181. Petitioners contend that the law must survive strict scrutiny because it imposes a content-based regulation on protected speech. The State, on the other hand, argues that the statute is subject only to rational-basis review because it does not burden any protected speech. We think neither party has it right. Applying our precedents, we hold that intermediate scrutiny applies.

A

H. B. 1181 is an exercise of Texas's traditional power to prevent minors from accessing speech that is obscene from their perspective. To the extent that it burdens adults' rights to access such speech, it has "only an incidental effect on protected speech," making it subject to intermediate scrutiny. Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000).

1

Age-verification laws like H. B. 1181 fall within States' authority to shield children from sexually explicit content. The First Amendment leaves undisturbed States' traditional power to prevent minors from accessing speech that is obscene from their perspective. That power necessarily includes the power to require proof of age before an individual can access such speech. It follows that no person—adult or child—has a First Amendment right to access speech that is obscene to minors without first submitting proof of age.

The power to verify age is a necessary component of the power to prevent children's access to content that is obscene from their perspective. [B]ecause the First Amendment permits States to prohibit minors from accessing speech that is obscene to them, it likewise permits States to employ the ordinary and appropriate means of enforcing such a prohibition. Requiring proof of age to access that speech is one such means.

Requiring age verification is common when a law draws lines based on age. For example, Texas, like many States, requires proof of age to obtain alcohol; a lottery ticket; a tattoo; a body piercing; fireworks; and a driver's license. Federal law similarly mandates age verification to obtain certain medications from a pharmacist, or to obtain employment as a minor. Fundamental rights that turn on age are no different. Texas, again like many States, requires proof of age to obtain a handgun license; to register to vote; and to marry. In none of these contexts is the constitutionality of a reasonable, bona fide age-verification requirement disputed.

Obscenity is no exception to the widespread practice of requiring proof of age to exercise age-restricted rights. The New York statute upheld in *Ginsberg* required age verification: It permitted a seller who sold sexual material to a minor to raise "'honest mistake'" as to age as an affirmative defense, but only if the seller had made "'a reasonable bona fide attempt to ascertain the true age of [the] minor.'" 390 U.S. at 644. Most States to this day also require age verification for in-person purchases of sexual material. And, petitioners concede that an in-person age verification requirement is a "traditional sort of law" that is "almost surely" constitutional. Tr. of Oral Arg. 17.

H. B. 1181 imposes an age-verification requirement for online speech that is obscene to minors. And, the statute does not ban adults from accessing this material; it simply requires them to verify their age before accessing it on a covered website. §129B.002(a). H. B. 1181 thus falls within Texas's traditional power to protect minors from speech that is obscene from their perspective.

2

Because H. B. 1181 simply requires proof of age to access content that is obscene to minors, it does not directly regulate the protected speech of adults. A law can regulate the content of protected speech, and thereby trigger strict scrutiny, either "on its face" or in its justification. *Reed*, 576 U.S. at 163–164 (internal quotation marks omitted). H. B. 1181 does not regulate the content of protected speech in either sense. On its face, the statute regulates only speech that is obscene to minors. That speech is unprotected to the extent the State seeks only to verify age. And, the statute can easily "be justified without reference to the [protected] content of the regulated speech," because its apparent purpose is simply to prevent *minors*, who have no First Amendment right to access speech that is obscene to them, from doing so. *Id.* at 164 (internal quotation marks omitted).

That is not to say, however, that H. B. 1181 escapes all First Amendment scrutiny. Adults have the right to access speech that is obscene only to minors. And, submitting to age verification is a burden on the exercise of that right. But, adults have no First Amendment right to avoid age verification, and the statute can readily be understood as an effort to restrict minors' access. Any burden experienced by adults is therefore only incidental to the statute's regulation of activity that is not protected by the First Amendment. That fact makes intermediate scrutiny the appropriate standard under our precedents.

B

Applying the more demanding strict-scrutiny standard would call into question the validity of *all* age-verification requirements, even longstanding requirements for brick-and-mortar stores. But, as petitioners acknowledge, after *Ginsberg*, no serious question about the constitutionality of in-person age-verification requirements for obscenity to minors has arisen. *See* Tr. of Oral Arg. 43 (acknowledging that they "don't know of any . . . challenge being brought" to an age-verification requirement for "brick-and-mortar stores"). Petitioners insist that their proposed rule would not call into question these "traditional" requirements, because such requirements would "almost surely satisfy" strict scrutiny. *Id*., at 17. They also contend that a sufficiently tailored online age-verification requirement (although not Texas's) could satisfy strict scrutiny too. *Id.* at 6–8. But, if we are not to compromise "'[t]he "starch" in our constitutional standards,'" we cannot share petitioners' confidence. *Ashcroft II*, 542 U.S. at 670 (quoting United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 830 (2000) (THOMAS, J., concurring)).

Strict scrutiny—which requires a restriction to be the least restrictive means of achieving a compelling governmental interest—is "the most demanding test known to constitutional law." City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

Petitioners would like to invalidate H. B. 1181 without upsetting traditional in-person age-verification requirements and perhaps narrower online requirements. But, strict scrutiny is ill suited for such nuanced work. The only principled way to give due consideration to both the First Amendment and States' legitimate interests in protecting minors is to employ a less exacting standard.

C

We also reject petitioners' contention that, regardless of first principles, our precedents require us to apply strict scrutiny to H. B. 1181. Every case that petitioners cite involved a law that *banned* both adults and minors from accessing speech. But, this Court has never held that every content-based burden on adults' access to speech that is obscene to minors always triggers strict scrutiny.

1

Petitioners invoke two pre-internet cases in which this Court applied strict scrutiny. In the first, the Court did so to invalidate "a blanket prohibition" on "dial-a-porn" phone messages that were "indecent but not obscene." Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 118, 126 (1989). In the second, we did so to invalidate "a blanket ban" on broadcasting "indecent" but "not . . . obscene" cable television channels between the hours of 6 a.m. and 10 p.m. *Playboy*, 529 U.S. at 808, 811, 814. In contrast, H. B. 1181 is not a blanket prohibition. Adults remain free to access pornography on covered websites, so long as they verify their ages first. Neither *Sable* nor *Playboy* addresses the First Amendment consequences of that more modest burden.

Reno and *Ashcroft II*—our two decisions addressing attempts to restrict children's access to pornography online—likewise provide no support for petitioners' position that strict scrutiny applies. *Reno* applied strict scrutiny to the Communications Decency Act of 1996 (CDA), 110 Stat. 133, because it operated as a ban on speech to adults. The CDA made it a crime for any person to post content that is "'indecent'" or "'patently offensive'" anywhere in "the entire universe of cyberspace" where the person knew a child would be among the recipients. 521 U.S. at 868, 876. And, although the CDA had an age-verification affirmative defense, that defense was illusory. In many cases, "existing technology did not include any effective method . . . to prevent minors from obtaining access . . . without also denying access to adults." *Id.* at 876. The CDA thus triggered—and failed—strict scrutiny because it "effectively *suppresse[d]* a large amount of speech that adults have a constitutional right to receive" and to share. *Id.* at 874 (emphasis added). This kind of ban is categorically different from H. B. 1181's age-verification requirement.

Ashcroft II likewise characterized the [Child Online Protection Act of 1998] (COPA), 112 Stat. 2681-736, as a ban. COPA criminally prohibited posting "content that is 'harmful to minors'" online for "'commercial purposes,'" subject to an age-verification affirmative defense. 542 U.S. at 661–662. We thus applied strict scrutiny, because, as in *Reno*, the statute "'effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and to address to one another.'" 542 U.S. at 665 (quoting *Reno*, 521 U.S. at 874).

2

Petitioners read *Reno* and *Ashcroft II* to establish a comprehensive framework to govern all future attempts to restrict children's access to online pornography. As we have just explained, that view cannot be squared with those cases, which addressed only outright bans on material that was obscene to minors but not to adults. Petitioners also fail to appreciate the context in which those cases were decided. This Court decided both cases when the internet was "still more of a prototype than a finished product"—*Reno* in 1997 and *Ashcroft II* in 2004, with factual findings made in 1999. A. Kennedy, The Rough Guide to the Internet 493 (8th ed. 2002) (Kennedy). We were mindful that "judicial answers" to "the totally new problems" presented by new technology are necessarily "truncated," and that in such circumstances "we ought not to anticipate" questions beyond those immediately presented. Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 300 (1944). We did not purport to decide more than the specific circumstances of the cases that were before us.

The Court in *Reno* was quite concerned about the unique threat that the CDA posed to the development of the then-nascent internet. *Reno* was this Court's first decision about the internet. In resolving the case, the Court was keenly aware that the "wholly unprecedented" "breadth of the CDA's coverage" "threaten[ed] to torch a large segment" of this emerging medium of communication. *Id.* at 877, 882. In these uncharted waters, the Court was cautious not to definitively establish when regulations on internet pornography triggered strict scrutiny.

Similarly, *Ashcroft II* was a self-consciously narrow and factbound decision. There, the Court reviewed a preliminary injunction based on a record that was "over five years" old, all while the "technology of the Internet" continued to "evolv[e] at a rapid pace." 542 U.S. at 671. As a result, we emphasized the abuse-of-discretion standard and made clear that we did not mean to rule definitively on COPA's constitutionality. *Id.* at 673. Moreover, we could not have meant to offer a comprehensive discussion on the appropriate standard of scrutiny for laws protecting children from sexual content online, given that the appropriate standard was not even a contested issue in the case.

In the quarter century since the factual record closed in *Ashcroft II*, the internet has expanded exponentially. In 1999, only two out of five American households had home internet access. Nearly all those households used a desktop computer or laptop to connect to the internet, and most used a dial-up connection.

In contrast, in 2024, 95 percent of American teens had access to a smartphone, allowing many to access the internet at almost any time and place. Ninety-three percent of teens reported using the internet several times per day, and watching videos is among their most common activities online. The content easily accessible to adolescents online includes massive libraries of pornographic videos. For instance, in 2019, Pornhub, one of the websites involved in this case, published 1.36 million hours—or over 150 *years*—of new content. App. 177. Many of these readily accessible videos portray men raping and physically assaulting women—a far cry from the still images that made up the bulk of online pornography in the 1990s. The Court in *Reno* and *Ashcroft II* could not have conceived of these developments, much less conclusively resolve how States could address them.

Of course, *Reno* and *Ashcroft II* do not cease to be precedential simply because technology has changed so dramatically. "But respect for past judgments also means respecting their limits." Brown v. Davenport, 596 U.S. 118, 141 (2022). It is misleading in the extreme to assume that *Reno* and *Ashcroft II*

spoke to the circumstances of this case simply because they both dealt with "the internet" as it existed in the 1990s. The appropriate standard of scrutiny to apply in this case is a difficult question that no prior decision of this Court has squarely addressed. For the reasons we have explained, we hold today that H. B. 1181 triggers only intermediate scrutiny.

D

The dissent's real point of disagreement is whether an age-verification requirement regulates the *protected* speech of adults. On this point, the dissent has nothing to offer aside from the bald assertion that our precedents have held as much. But, our precedents have held no such thing. Because our previous decisions concerned only outright bans, this Court has never before considered whether lesser burdens aimed at distinguishing children from adults directly regulate any free speech right of adults.

Instead, as we have explained, the First Amendment leaves undisturbed States' power to impose age limits on speech that is obscene to minors.

[T]he dissent claims that we engage in "backwards," results-oriented reasoning because we are unwilling to adopt a position that would call into question the constitutionality of longstanding in-person age-verification requirements. Not so. We appeal to these requirements because they embody a constitutional judgment—made by generations of legislators and by the American people as a whole—that commands our respect. It would be perverse if we showed less regard for in-person age-verification requirements simply because their legitimacy is so uncontroversial that the need for a judicial decision upholding them has never arisen.

E

Texas, like the Fifth Circuit, contends that intermediate scrutiny is too demanding and that only rational-basis review applies. This position fails to account for the incidental burden that age verification necessarily has on an adult's First Amendment right to access speech that is obscene only to minors. Rational basis is the appropriate standard for laws that do not implicate "fundamental constitutional rights" at all. *Beach Communications*, 508 U.S. at 313. Intermediate scrutiny, which is deferential but not toothless, plays an important role in ensuring that legislatures do not use ostensibly legitimate purposes to disguise efforts to suppress fundamental rights.

IV

A statute survives intermediate scrutiny if it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189. H. B. 1181 readily satisfies these requirements.

A

H. B. 1181 undoubtedly advances an important governmental interest. Texas's interest in shielding children from sexual content is important, even "compelling." *Reno*, 521 U.S. at 869; *Sable*, 492 U.S. at 126. H. B. 1181 furthers that interest by preventing minors from easily circumventing a prohibition on their accessing sexual content.

H. B. 1181 is also sufficiently tailored to Texas's interest. Under intermediate scrutiny, a regulation is adequately tailored so long as the government's interest "would be achieved less effectively absent the regulation" and the regulation "does not burden substantially more speech than is necessary to further that interest." *TikTok*, 604 U.S. at ___ (internal quotation marks omitted). The regulation "need not be the least restrictive . . . means of" serving the State's interest. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

Under this standard, requiring age verification online is plainly a legitimate legislative choice. Since at least the days of *Ginsberg*, States have commonly used age-verification requirements, in the case of in-

person access to sexual materials, to reconcile their interest in protecting children with adults' right to avail themselves of such materials. This approach ensures that an age-based ban is not ineffectual, while at the same time allowing adults full access to the content in question after the modest burden of providing proof of age. H. B. 1181 simply adapts this traditional approach to the digital age.

The specific verification methods that H. B. 1181 permits are also plainly legitimate. At present, H. B. 1181 allows for verification using government-issued identification or transactional data. Verification can take place on the covered website itself or through a third-party service. Other age-restricted services, such as online gambling, alcohol and tobacco sales, and car rentals, rely on the same methods. And, much of the online pornography industry has used analogous methods for decades. H. B. 1181 simply requires established verification methods already in use by pornographic sites and other industries. That choice is well within the State's discretion under intermediate scrutiny.

B

Petitioners' counterarguments are unpersuasive. Petitioners contend that Texas could adopt less restrictive means of protecting children, such as encouraging parents to install content-filtering software on their children's devices or requiring internet service providers to block adult content unless a household opts in to receiving it. But, even assuming these approaches are equally or more effective, under intermediate scrutiny a "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U.S. at 800. Texas's interest in shielding children from sexual content "'would be achieved less effectively absent'" H. B. 1181, and it cannot be said that "a substantial portion of the burden" that H. B. 1181 imposes fails "to advance [Texas's] goals." *Id.* at 799. That is enough to show that the Texas Legislature adequately tailored H. B. 1181, regardless of whether some other approach might be superior.

Petitioners further argue that H. B. 1181 is not appropriately tailored, because it does not require age verification on other sites, such as search engines and social-media websites, where children are likely to find sexually explicit content. Texas has a reasonable basis for excluding these sites from H. B. 1181's coverage. The statute does not contain any special exception for social-media sites. Rather, such sites fall outside the statute to the extent that less than a third of their content is obscene to minors. And, it is reasonable for Texas to conclude that websites with a higher proportion of sexual content are more inappropriate for children to visit than those with a lower proportion. The statute, on the other hand, does explicitly exempt search engines. But, search engines do not exercise the same degree of control over the websites to which they link, so the State could reasonably conclude that it makes less sense to regulate them.

Petitioners next assert that privacy concerns and the unique stigma surrounding pornography will make age verification too chilling for adults. But, users only have to submit verification to the covered website itself or the third-party service with which the website contracts. Both those entities have every incentive to assure users of their privacy. In any event, the use of pornography has always been the subject of social stigma. This social reality has never been a reason to exempt the pornography industry from otherwise valid regulation. And, the decades-long history of some pornographic websites requiring age verification refutes any argument that the chill of verification is an insurmountable obstacle for users.

***

H. B. 1181 simply requires adults to verify their age before they can access speech that is obscene to children. It is therefore subject only to intermediate scrutiny, which it readily survives. The statute advances the State's important interest in shielding children from sexually explicit content. And, it is appropriately tailored because it permits users to verify their ages through the established methods of providing government-issued identification and sharing transactional data. The judgment of the Court of Appeals for the Fifth Circuit is affirmed.

JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR and JUSTICE JACKSON join, dissenting.

No one doubts that the distribution of sexually explicit speech to children, of the sort involved here, can cause great harm. Or to say the same thing in legal terms, no one doubts that States have a compelling interest in shielding children from speech of that kind. What is more, children have no constitutional right to view it. The Texas statute before us (H. B. 1181) addresses speech understood in First Amendment law as "obscene for minors." That label means the First Amendment does not protect the speech *for minors*. The State can restrict *their* access without fear of colliding with the Constitution.

The trouble comes in the last two sentences' italics. Speech that is obscene for minors is often not so for adults. For them, the category of obscene—and therefore unprotected speech—is narrower. So adults have a constitutional right to view the very same speech that a State may prohibit for children. And it is a fact of life—and also of law—that adults and children do not live in hermetically sealed boxes. In preventing children from gaining access to "obscene for children" speech, States sometimes take measures impeding adults from viewing it too—even though, for adults, it is constitutionally protected expression.

H. B. 1181's requirements interfere with—or, in First Amendment jargon, burden—the access adults have to protected speech: Some individuals will forgo that speech because of the need to identify themselves to a website (and maybe, from there, to the world) as a consumer of sexually explicit expression. But still, the majority proposes, that burden demands only intermediate scrutiny because it arises from an "incidental" restriction, given that Texas's statute uses age verification to prevent minors from viewing the speech. Except that is wrong—nothing like what we have ever understood as an incidental restraint for First Amendment purposes. Texas's law defines speech by content and tells people entitled to view that speech that they must incur a cost to do so. That is, under our First Amendment law, a direct (not incidental) regulation of speech based on its content—which demands strict scrutiny.

I

A

If a law burdens protected speech based on what that speech says or depicts—as H. B. 1181 does—the law has to clear the strict-scrutiny bar.

B

[O]ur precedents have applied that rule in four cases similar to this one—when a statute has limited adults' access to sexually explicit materials in order to prevent those materials from getting to minors. The laws at issue pertained to diverse media—the telephone, cable, and (twice, as here) the internet. But the analysis about the level of scrutiny was in each case the same. To show the Court's (previous) consistency—and its relevance today—it is worth reviewing them one by one by one by one.

In Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) the Court considered a statute directed at dial-a-porn services that prohibited sexually "indecent" telephone messages, extending beyond those obscene for adults under *Miller*. *Id.* at 122–123. The Government defended the law as an effort to protect children from exposure to the speech. We recognized that interest as compelling. But we also understood that adults had a "protected" First Amendment right to listen to the non-obscene indecent speech that the law covered. *Id.* And so the Court applied strict scrutiny—thus requiring the Government to show that the statute did not "unnecessarily interfer[e] with [adults'] First Amendment freedoms." *Id.*

Then, in Reno v. American Civil Liberties Union, 521 U.S. 844, 859–861 (1997), the Court addressed a statute barring internet transmissions of obscene, indecent, or "patently offensive" messages to those under 18, with an affirmative defense available to anyone making use of age verification measures. Although the statute encompassed only communications to minors and excused from penalties those using a "reasonable" method to verify age, the Court recognized the "burden" that the statute would impose "on adult speech." *Id.* at 860, 874. Because of that "interfere[nce] with adult-to-adult communication"—and

despite the significance of the Government interest "in protecting children"—the Court again insisted on applying strict scrutiny. *Id.* at 875–876. So once more the key issue was whether "less restrictive alternatives would be at least as effective in achieving" the Government's goals. *Id.* at 874.

Next, in United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 806 (2000), the Court evaluated a law requiring that "sexually-oriented" cable channels "limit their transmission to hours when children are unlikely to be viewing." "[W]hat standard [must] the Government" meet, the Court asked, for the law to survive? *Id.* at 814. We did not think the question close. "As we consider a content-based regulation" of "protected speech," we said, "the answer should be clear: The standard is strict scrutiny." *Id.*; *see id.* at 812–813. So "if a less restrictive means" would serve the Government's goals, "the Government must use it." *Id.* at 815. Otherwise, the Court explained, the Government could, contrary to the First Amendment, "restrict speech without an adequate justification." *Id.* at 813.

And the denouement: The statute the Court addressed in Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004), was a near-twin of Texas's. The Child Online Protection Act (COPA) prohibited commercial entities from posting on the internet content "harmful to minors." *Id.* at 661 (quoting 47 U.S. C. §231(a)(1)). And just like H. B. 1181, that statute defined the covered material by adapting the *Miller* obscenity test for children—thus creating a category of obscene-for-children speech. So too, COPA made the adoption of an age verification system crucial. It did so by providing an affirmative defense to any entity that verified age through an "adult personal identification number" or similar mechanism before granting access to the posted materials. *Ashcroft*, 542 U.S. at 662. So, as in H. B. 1181, if the poster verified age, no liability could attach. How, then, to analyze such a statute? The Court viewed the problem as it had in prior cases: COPA, though directed at keeping sexually explicit materials from children, "was likely to burden some speech that is protected for adults." *Id.* at 665. And because of that "content-based restriction[]," the Court needed to apply strict scrutiny. *Id.* at 660, 665, 670. The Government thus had to show that "the proposed alternatives will not be as effective as the challenged statute." *Id.* at 665. In short, *Ashcroft* adhered to the view that "'the governmental interest in protecting children from harmful materials' does not 'justify an unnecessarily broad suppression of speech addressed to adults.'" Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 581 (2001) (Thomas, J., concurring in part and concurring in judgment) (quoting *Reno*, 521 U.S. at 875).

Four times, one result. Which is not surprising, because it is the result that basic First Amendment principles command. A statute tries to cut off children's access to sexually explicit speech, in line with the most worthy objectives. But the statute as well impedes adults' access to that speech, which the First Amendment protects. And the statute does so by drawing content-based lines: Sexually explicit speech is burdened, other speech is not. It follows, as the night the day, that strict scrutiny applies—that the statute, in addition to serving a compelling purpose, can restrict only as much adult speech as is needed to achieve the State's goal. That is true in the four cases above, and it is true in this case too.

II

The analytic path of today's opinion is winding, but I take the majority to begin with a conviction about where it must not end—with strict scrutiny. The majority is not so coy about this backwards reasoning. To the contrary, it defends it. The "legitimacy" of age verification schemes for sexually explicit speech, the majority tells us, is "uncontroversial" (despite *Reno* and *Ashcroft*). *Ante*. And "[a]pplying the more demanding strict-scrutiny standard would call" those schemes "into question." *Ante*. Ergo, its conclusion. I have just explained why the majority's fear is overblown—why in fact carefully drawn age verification laws stand a real chance of surviving strict scrutiny. But suppose I am wrong. Suppose there are both less speech-restrictive and equally effective ways to accomplish the State's goal of protecting children from sexually explicit materials. In that event, strict scrutiny tells us, the State should use those constitutionally superior alternatives. And why argue with that? The usual way constitutional review works is to figure out the right standard (here, strict scrutiny because H. B. 1181 is content-based), and let that standard work to a

conclusion. It is not to assume the conclusion (approve H. B. 1181 and similar age verification laws) and pick the standard sure to arrive there. But that is what the majority does. To answer what standard of scrutiny applies, the majority first spends four pages lauding age verification schemes as "common," "traditional," "appropriate," and "necessary." *Ante*. In other words, all over the place, and a good thing too. No wonder the majority doesn't land on strict scrutiny.

For page upon page, the majority explains that the First Amendment has nothing to say about age verification schemes attached to obscene-for-children speech. Again, that speech may as well be liquor, lottery tickets, or fireworks, for all it matters to the "States' authority." *Ante*. And then, in the space of one brief paragraph, the idea falls apart. Yes, the majority at last concedes, "[a]dults have the right to access speech that is obscene only to minors." *Ante*. And yes, the majority admits, "submitting to age verification is a burden on the exercise of that right." *Id.* So sure, the majority acknowledges, a really onerous age verification scheme—like its parental affidavit requirement—would flunk constitutional review. There is no getting around the fact: Obscene-for-children speech is constitutionally protected speech for adults. And age verification schemes "burden[ing]" adults' "right[s] to access [that] speech" are in fact not the kind of everyday, "appropriate," and "necessary" regulation courts can wave on by. *Ante*. The Constitution, contrary to what the majority at first assured us, is now very much in the picture.

At that point, one might think, the right approach—as the Court once said— "should be clear: The standard is strict scrutiny." *Playboy*, 529 U.S. at 814. Forgive a brief recap. H. B. 1181 regulates the communicative content of websites, imposing an age verification mandate on those exhibiting a specified amount of sexually explicit speech that, while obscene for children, is protected for adults. So the law directly burdens adults' right to view speech based on its sexual content. As the Court four times before found, that means strict scrutiny applies—even though the State is attempting to prevent the speech from reaching minors.

> In [*Sable, Reno, Playboy,* and *Ashcroft II*], States burdened protected speech for adults as a way of cutting off children's access to the expression. Two of those efforts involved internet speech. The same two made liability for infractions turn on whether the publisher of the speech used an age verification measure. One of them—*Ashcroft*—defined the regulated speech identically to H. B. 1181 (using the *Miller* test adapted for minors). Yet in none of the four cases did even a single Justice float the idea that, because the restriction was geared toward protecting minors or involved age verification, the statute somehow effected only an incidental restriction. In every one, it was common ground (even among the dissenting Justices) that the statute's restriction on adults' access to speech was direct. So our precedents stand as an embarrassment to the majority's reasoning.

The majority's primary—and deficient—response is that those cases involved "outright bans" on speech, whereas this one involves only a burden. *Ante*. To begin with, that assertion is factually inaccurate as to three of the four. In *Playboy*, the law did not ban adult cable channels, but instead limited their transmission to hours when children were unlikely to be in the audience. So as the Court took care to explain, the statute did "not impose a complete prohibition." 529 U.S. at 812. Rather, it effected only a "content-based burden[]"—as H. B. 1181 does. *Id*. The same is true of the statutes in *Reno* and *Ashcroft*, and in a way even more similar to Texas's law. Recall that under those statutes, publishers using age verification measures had an affirmative defense to all liability. So as long as those measures were in place, publishers could confidently press send on whatever sexual content they wanted to transmit. The majority argues that H. B. 1181 is yet more protective of publishers, because it turns the affirmative defense into an element—putting the burden on the State to show the absence of age verification measures. But in this context, the difference between an affirmative defense and an element is but a smidge: It will matter only when a jury thinks the presence (or absence) of age verification is a literal toss-up (which in the real world will be rare). And even if the difference is more than I think, it is one between two points on a continuum—not (as the majority insists) the dividing line between a "ban" and a "burden" on speech.

Much more important, the distinction between bans and burdens makes no difference to the level of scrutiny. When a statute draws lines based on the content of speech, strict scrutiny is required regardless of the amount of speech affected. *Playboy* made that point, in this context, at some length. "*It is of no moment*" to the level of scrutiny, the Court stated, that a law restricting speech "does not impose a complete prohibition." 529 U.S. at 812 (emphasis added). And if that weren't clear enough: "The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Id.* And if that weren't clear enough: When a statute regulates expressive content, no "special consideration" is given to the government "merely because the law can somehow be described as a burden rather than outright suppression." *Id.* at 826. What's more, *Playboy* is not alone in repudiating the majority's reasoning. The refusal to countenance the ban/burden line the majority today peddles is fundamental to our free speech doctrine. Take any subject—say, because it is close to home, the Supreme Court. Ban speech about the Court; tax speech about the Court ($20 a pop); limit speech about the Court to certain times (Tuesdays and Thursdays); or (as here) demand identification to gain access to websites addressing the Court. Ban or burden, the level of scrutiny is the same: strict. *See*, *e.g.*, *Turner I*, 512 U.S. at 642 (stating the rule); Sorrell v. IMS Health Inc., 564 U.S. 552, 565–566 (2011) (same). So the principal distinction the majority draws between this case and the four that should control it is a non-distinction, by command of how we have always understood the First Amendment.

That leaves only the majority's claim—again mistaken—that the internet has changed too much to follow our precedents' lead. Of course technology has developed, both swiftly and surely. And that fact might matter (as indeed the burden/ban distinction might) to how strict scrutiny applies—and particularly to whether the State can show it has adopted the least speech-restrictive means to achieve its goal. *Ashcroft* explicitly recognized that point: It thought that, given the pace of technological change, the District Court might make a different decision than it had five years earlier about whether there were "less restrictive alternative[s]" to COPA. 542 U.S. at 671–672. To that extent—but to that extent only—the majority is right that *Ashcroft* was "self-consciously narrow and factbound." *Ante*. Not, though, as to the level of scrutiny. On that question, the Court was unequivocal that because COPA was "a content-based speech restriction," it must satisfy the strict-scrutiny test. 542 U.S. at 665. For that was a matter of basic First Amendment principle. And as this Court has understood: "Whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of the First Amendment do not vary." Moody v. NetChoice, LLC, 603 U.S. 707, 733 (2024) (quoting Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 790 (2011)).

Except that those basic principles do vary today.

III

The last part of the majority's opinion shows why all this matters. In concluding that H. B. 1181 passes constitutional muster, the majority states (correctly) that under intermediate scrutiny Texas need not show it has selected the least speech-restrictive way of accomplishing its goal. Even if there were a mechanism that (1) as well or better prevented minors' access to the covered materials and (2) imposed a lesser burden on adults' ability to view that expression, Texas could spurn that "superior" method.

I would demand Texas show more, to ensure it is not undervaluing the interest in free expression. Texas can of course take measures to prevent minors from viewing obscene-for-children speech. But if a scheme other than H. B. 1181 can just as well accomplish that objective and better protect adults' First Amendment freedoms, then Texas should have to adopt it (or at least demonstrate some good reason not to). A State may not care much about safeguarding adults' access to sexually explicit speech; a State may even prefer to curtail those materials for everyone. Many reasonable people, after all, view the speech at issue here as ugly and harmful for any audience. But the First Amendment protects those sexually explicit materials, for every adult. So a State cannot target that expression, as Texas has here, any more than is necessary to prevent it from reaching children. That is what we have held in cases indistinguishable from

this one. And that is what foundational First Amendment principles demand. Because the majority departs from that right and settled law, I respectfully dissent.

Notes and Questions

1. Earlier Cases. The majority and the dissent disagreed over the significance of *Sable, Playboy, Reno,* and *Ashcroft II*. Was the majority or the dissent more faithful to their holdings, and the implications of their holdings? Which is more persuasive about the significance of the internet's development in the years since those cases were decided?

2. Inconsistency? Insofar as *Free Speech Coalition* is inconsistent with *Reno* and *Ashcroft II*, what do you think explains the inconsistency? In this regard, note that Justice Thomas is the only member of the Court that decided *Free Speech Coalition* who heard *Reno* or *Ashcroft II*, and he joined the majority opinion in both cases. Is that surprising? Or is the answer that there is no inconsistency?

2. Implications. Under *Free Speech Coalition*, what other regulations might be subject to intermediate scrutiny? The majority said that "respect for past judgments also means respecting their limits." How might that principle apply to the implications of *Free Speech Coalition*? Legislatures might seek to treat other kinds of speech as harmful to minors, and if intermediate scrutiny were applied to such laws many might be upheld. But the Court has applied the "harmful to minors" standard only to material that is obscene to minors (and obscenity is defined as sexual content). And in Brown v. Entertainment Merchants Ass'n, 564 U.S. 786 (2011), which is excerpted on page 622 of the casebook, the Court rejected an analogy between obscenity and violence:

> Because speech about violence is not obscene, it is of no consequence that California's statute mimics the New York statute regulating obscenity for minors that we upheld in *Ginsberg*…. The California Act … does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children…. No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.

Id. at 794.

CHAPTER 12
Regulating Algorithms

Insert on page 675, after note 2:

MOODY V. NETCHOICE, LLC

603 U.S. 707 (2024)

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SOTOMAYOR, KAVANAUGH, and BARRETT, JJ., joined in full, and in which JACKSON, J., joined as to Parts I, II and III–A. BARRETT, J., filed a concurring opinion. JACKSON, J., filed an opinion concurring in part and concurring in the judgment. THOMAS, J., filed an opinion concurring in the judgment. ALITO, J., filed an opinion concurring in the judgment, in which THOMAS and GORSUCH, JJ., joined.

Justice KAGAN delivered the opinion of the Court.

[Two] laws, from Florida and Texas, restrict the ability of social-media platforms to control whether and how third-party posts are presented to other users. Or otherwise put, the laws limit the platforms' capacity to engage in content moderation—to filter, prioritize, and label the varied messages, videos, and other content their users wish to post. NetChoice, an internet trade association, challenged both laws on their face—as a whole, rather than as to particular applications. The Court of Appeals for the Eleventh Circuit [held] that the Florida law was not likely to survive First Amendment review. The Court of Appeals for the Fifth Circuit [concluded] that the Texas law does not regulate any speech and so does not implicate the First Amendment.

Today, we vacate both decisions for reasons separate from the First Amendment merits, because neither Court of Appeals properly considered the facial nature of NetChoice's challenge. The courts mainly addressed what the parties had focused on. And the parties mainly argued these cases as if the laws applied only to the curated feeds offered by the largest and most paradigmatic social-media platforms—as if, say, each case presented an as-applied challenge brought by Facebook protesting its loss of control over the content of its News Feed. But argument in this Court revealed that the laws might apply to, and differently affect, other kinds of websites and apps. In a facial challenge, that could well matter, even when the challenge is brought under the First Amendment.

To do that right, of course, a court must understand what kind of government actions the First Amendment prohibits. We therefore set out the relevant constitutional principles, and explain how one of the Courts of Appeals failed to follow them. Contrary to what the Fifth Circuit thought, the current record indicates that the Texas law does regulate speech when applied in the way the parties focused on below—when applied, that is, to prevent Facebook (or YouTube) from using its content-moderation standards to remove, alter, organize, prioritize, or disclaim posts in its News Feed (or homepage). The law then prevents exactly the kind of editorial judgments this Court has previously held to receive First Amendment protection. It prevents a platform from compiling the third-party speech it wants in the way it wants, and thus from offering the expressive product that most reflects its own views and priorities. Still more, the law—again, in that specific application—is unlikely to withstand First Amendment scrutiny. Texas has thus far justified the law as necessary to balance the mix of speech on Facebook's News Feed and similar platforms; and the record reflects that Texas officials passed it because they thought those feeds skewed against politically conservative voices. But this Court has many times held, in many contexts, that it is no job for government to decide what counts as the right balance of private expression—to "un-bias" what it thinks biased, rather than to leave such judgments to speakers and their audiences. That principle works for social-media platforms as it does for others.

In sum, there is much work to do below on both these cases, given the facial nature of NetChoice's challenges. But that work must be done consistent with the First Amendment, which does not go on leave when social media are involved.

I

As commonly understood, the term "social media platforms" typically refers to websites and mobile apps that allow users to upload content—messages, pictures, videos, and so on—to share with others. Those viewing the content can then react to it, comment on it, or share it themselves. The biggest social-media companies—entities like Facebook and YouTube—host a staggering amount of content. Facebook users, for example, share more than 100 billion messages every day. And YouTube sees more than 500 hours of video uploaded every minute.

In the face of that deluge, the major platforms cull and organize uploaded posts in a variety of ways. A user does not see everything—even everything from the people she follows—in reverse-chronological order. The platforms will have removed some content entirely; ranked or otherwise prioritized what remains; and sometimes added warnings or labels. Of particular relevance here, Facebook and YouTube make some of those decisions in conformity with content-moderation policies they call Community Standards and Community Guidelines. Those rules list the subjects or messages the platform prohibits or discourages—say, pornography, hate speech, or misinformation on select topics. The rules thus lead Facebook and YouTube to remove, disfavor, or label various posts based on their content.

In 2021, Florida and Texas enacted statutes regulating internet platforms, including the large social-media companies just mentioned.

Florida's law regulates "social media platforms," as defined expansively, that have annual gross revenue of over $100 million or more than 100 million monthly active users. Fla. Stat. § 501.2041(1)(g) (2023). The statute restricts varied ways of "censor[ing]" or otherwise disfavoring posts—including deleting, altering, labeling, or deprioritizing them—based on their content or source. § 501.2041(1)(b).

The Texas law regulates any social-media platform, having over 50 million monthly active users, that allows its users "to communicate with other users for the primary purpose of posting information, comments, messages, or images." Tex. Bus. & Com. Code Ann. §§ 120.001(1), 120.002(b) (West Cum. Supp. 2023). With several exceptions, the statute prevents platforms from "censor[ing]" a user or a user's expression based on viewpoint. Tex. Civ. Prac. & Rem. Code Ann. §§ 143A.002(a), 143A.006 (West Cum. Supp. 2023).

II

The first step in the proper facial analysis is to assess the state laws' scope. What activities, by what actors, do the laws prohibit or otherwise regulate? The laws of course differ one from the other. But both, at least on their face, appear to apply beyond Facebook's News Feed and its ilk. Members of this Court asked some of the relevant questions at oral argument. Starting with Facebook and the other giants: To what extent, if at all, do the laws affect their other services, like direct messaging or events management? And beyond those social-media entities, what do the laws have to say, if anything, about how an email provider like Gmail filters incoming messages, how an online marketplace like Etsy displays customer reviews, how a payment service like Venmo manages friends' financial exchanges, or how a ride-sharing service like Uber runs?

The next order of business is to decide which of the laws' applications violate the First Amendment, and to measure them against the rest. For the content-moderation provisions, that means asking, as to every covered platform or function, whether there is an intrusion on protected editorial discretion. Even on a preliminary record, it is not hard to see how the answers might differ as between regulation of Facebook's News Feed (considered in the courts below) and, say, its direct messaging service (not so considered).

Curating a feed and transmitting direct messages, one might think, involve different levels of editorial choice, so that the one creates an expressive product and the other does not. If so, regulation of those diverse activities could well fall on different sides of the constitutional line. To decide the facial challenges here, the courts below must explore the laws' full range of applications—the constitutionally impermissible and permissible both—and compare the two sets. Maybe the parties treated the content-moderation choices reflected in Facebook's News Feed and YouTube's homepage as the laws' heartland applications because they *are* the principal things regulated, and should have just that weight in the facial analysis. Or maybe not: Maybe the parties' focus had all to do with litigation strategy, and there is a sphere of other applications—and constitutional ones—that would prevent the laws' facial invalidation.

So we vacate the decisions below and remand these cases. That will enable the lower courts to consider the scope of the laws' applications, and weigh the unconstitutional as against the constitutional ones.

III

But it is necessary to say more about how the First Amendment relates to the laws' content-moderation provisions, to ensure that the facial analysis proceeds on the right path in the courts below. That need is especially stark for the Fifth Circuit. The Fifth Circuit was wrong in concluding that Texas's restrictions on the platforms' selection, ordering, and labeling of third-party posts do not interfere with expression. And the court was wrong to treat as valid Texas's interest in changing the content of the platforms' feeds. Explaining why that is so will prevent the Fifth Circuit from repeating its errors as to Facebook's and YouTube's main feeds.

A

Despite the relative novelty of the technology before us, the main problem in this case—and the inquiry it calls for—is not new. At bottom, Texas's law requires the platforms to carry and promote user speech that they would rather discard or downplay. The platforms object that the law thus forces them to alter the content of their expression—a particular edited compilation of third-party speech. That controversy sounds a familiar note. We have repeatedly faced the question whether ordering a party to provide a forum for someone else's views implicates the First Amendment. And we have repeatedly held that it does so if, though only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt. So too we have held, when applying that principle, that expressive activity includes presenting a curated compilation of speech originally created by others.

The seminal case is Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). There, a Florida law required a newspaper to give a political candidate a right to reply when it published "criticism and attacks on his record." *Id.* at 243. The Court held the law to violate the First Amendment because it interfered with the newspaper's "exercise of editorial control and judgment." *Id.* at 258. Forcing the paper to print what "it would not otherwise print," the Court explained, "intru[ded] into the function of editors." *Id*. at 256, 258. For that function was, first and foremost, to make decisions about the "content of the paper" and "[t]he choice of material to go into" it. *Id.* at 258. In protecting that right of editorial control, the Court recognized a possible downside. It noted the access advocates' view (similar to the States' view here) that "modern media empires" had gained ever greater capacity to "shape" and even "manipulate popular opinion." *Id.* at 249–250. And the Court expressed some sympathy with that diagnosis. *See id.* at 254. But the cure proposed, it concluded, collided with the First Amendment's antipathy to *state* manipulation of the speech market. Florida, the Court explained, could not substitute "governmental regulation" for the "crucial process" of editorial choice. *Id.* at 258.

In Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) (*Turner I*), the Court further underscored the constitutional protection given to editorial choice. At issue were federal "must-carry" rules, requiring cable operators to allocate some of their channels to local broadcast stations. The Court had no

doubt that the First Amendment was implicated, because the operators were engaging in expressive activity. They were, the Court explained, "exercising editorial discretion over which stations or programs to include in [their] repertoire." *Id.* at 636. And the rules "interfere[d]" with that discretion by forcing the operators to carry stations they would not otherwise have chosen. *Id.* at 643–644.

In a later decision, the Court ruled that the regulation survived First Amendment review because it was necessary to prevent the demise of local broadcasting. *See* Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) (*Turner II*). But for purposes of today's cases, the takeaway of *Turner* is this holding: A private party's collection of third-party content into a single speech product (the operators' "repertoire" of programming) is itself expressive, and intrusion into that activity must be specially justified under the First Amendment.

The capstone of those precedents came in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), when the Court considered (of all things) a parade. The question was whether Massachusetts could require the organizers of a St. Patrick's Day parade to admit as a participant a gay and lesbian group seeking to convey a message of "pride." *Id.* at 561. The Court held unanimously that the First Amendment precluded that compulsion. The "selection of contingents to make a parade," it explained, is entitled to First Amendment protection, no less than a newspaper's "presentation of an edited compilation of [other persons'] speech." *Id.* at 570 (citing *Tornillo*, 418 U.S. at 258). And that meant the State could not tell the parade organizers whom to include. Because "every participating unit affects the message," said the Court, ordering the group's admittance would "alter the expressive content of the[] parade." *Hurley*, 515 U.S. at 572–573. The parade's organizers had "decided to exclude a message [they] did not like from the communication [they] chose to make," and that was their decision alone. *Id.* at 574.

[C]onsider three general points to wrap up.

First, the First Amendment offers protection when an entity engaging in expressive activity, including compiling and curating others' speech, is directed to accommodate messages it would prefer to exclude. "[T]he editorial function itself is an aspect of speech." Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 737 (1996) (plurality opinion). Or said just a bit differently: An entity "exercis[ing] editorial discretion in the selection and presentation" of content is "engage[d] in speech activity." Arkansas Ed. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998). And that is as true when the content comes from third parties as when it does not. (Again, think of a newspaper opinion page or, if you prefer, a parade.) Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own. And that activity results in a distinctive expressive product. When the government interferes with such editorial choices—say, by ordering the excluded to be included—it alters the content of the compilation. (It creates a different opinion page or parade, bearing a different message.) And in so doing—in overriding a private party's expressive choices—the government confronts the First Amendment.

Second, none of that changes just because a compiler includes most items and excludes just a few. That was the situation in *Hurley*. The St. Patrick's Day parade at issue there was "eclectic": It included a "wide variety of patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes, as well as conflicting messages." 515 U.S. at 562. Or otherwise said, the organizers were "rather lenient in admitting participants." *Id.* at 569. No matter. A "narrow, succinctly articulable message is not a condition of constitutional protection." *Id.* It "is enough" for a compiler to exclude the handful of messages it most "disfavor[s]." *Id.* at 574. Suppose, for example, that the newspaper in *Tornillo* had granted a right of reply to all but one candidate. It would have made no difference; the Florida statute still could not have altered the paper's policy. Indeed, that kind of focused editorial choice packs a peculiarly powerful expressive punch.

Third, the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas. Of course, it is critically important to have a well-functioning sphere of expression, in which citizens have access to information from many sources. That is the whole project of the First Amendment. And the government can take varied measures, like enforcing competition laws, to protect that access. But in case after case, the Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm. The regulations in *Tornillo* and *Hurley* were thought to promote greater diversity of expression. They also were thought to counteract advantages some private parties possessed in controlling "enviable vehicle[s]" for speech. *Hurley*, 515 U.S. at 577. Indeed, the *Tornillo* Court devoted six pages of its opinion to recounting a critique of the then-current media environment—in particular, the disproportionate "influen[ce]" of a few speakers—similar to one heard today (except about different entities). It made no difference. However imperfect the private marketplace of ideas, here was a worse proposal—the government itself deciding when speech was imbalanced, and then coercing speakers to provide more of some views or less of others.

B

"[W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles" of the First Amendment "do not vary." Brown v. Entertainment Merchants Assn., 564 U.S. 786, 790 (2011). [A]nalogies to old media, even if imperfect, can be useful. And better still as guides to decision are settled principles about freedom of expression, including the ones just described. Those principles have served the Nation well over many years, even as one communications method has given way to another. And they have much to say about the laws at issue here.

Facebook's News Feed [and] YouTube's homepage present[] a user with a continually updating stream of other users' posts.

The key to the scheme is prioritization of content, achieved through the use of algorithms. Of the billions of posts or videos (plus advertisements) that could wind up on a user's customized feed or recommendations list, only the tiniest fraction do. The selection and ranking is most often based on a user's expressed interests and past activities. But it may also be based on more general features of the communication or its creator. Facebook's Community Standards and YouTube's Community Guidelines detail the messages and videos that the platforms disfavor. The platforms write algorithms to implement those standards—for example, to prefer content deemed particularly trustworthy or to suppress content viewed as deceptive.

Beyond rankings lie labels. The platforms may attach "warning[s], disclaimers, or general commentary"—for example, informing users that certain content has "not been verified by official sources."

But sometimes, the platforms decide, providing more information is not enough; instead, removing a post is the right course. The platforms' content-moderation policies also say when that is so. YouTube's Guidelines target videos falling within categories like: hate speech, violent or graphic content, child safety, and misinformation (including about elections and vaccines). The platforms thus unabashedly control the content that will appear to users, exercising authority to remove, label or demote messages they disfavor.[1]

Except that Texas's law limits their power to do so. As noted earlier, the law's central provision prohibits the large social-media platforms (and maybe other entities) from "censor[ing]" a "user's expression" based on its "viewpoint." § 143A.002(a)(2). The law defines "expression" broadly, thus including pretty much anything that might be posted. *See* § 143A.001(2). And it defines "censor" to mean "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." § 143A.001(1). That is a long list of verbs, but it comes down

[1] We therefore do not deal here with feeds whose algorithms respond solely to how users act online—giving them the content they appear to want, without any regard to independent content standards. *See* BARRETT, J., concurring.

to this: The platforms cannot do any of the things they typically do (on their main feeds) to posts they disapprove—cannot demote, label, or remove them—whenever the action is based on the post's viewpoint. [I]f Texas's law is enforced, the platforms could not—as they in fact do now—disfavor posts because they:

- support Nazi ideology;
- advocate for terrorism;
- espouse racism, Islamophobia, or anti-Semitism;
- glorify rape or other gender-based violence;
- encourage teenage suicide and self-injury;
- discourage the use of vaccines;
- advise phony treatments for diseases;
- advance false claims of election fraud.

The list could continue for a while. The point of it is not that the speech environment created by Texas's law is worse than the ones to which the major platforms aspire on their main feeds. The point is just that Texas's law profoundly alters the platforms' choices about the views they will, and will not, convey.

And we have time and again held that type of regulation to interfere with protected speech. Like the editors, cable operators, and parade organizers this Court has previously considered, the major social-media platforms are in the business, when curating their feeds, of combining "multifarious voices" to create a distinctive expressive offering. *Hurley*, 515 U.S. at 569. The individual messages may originate with third parties, but the larger offering is the platform's. It is the product of a wealth of choices about whether—and, if so, how—to convey posts having a certain content or viewpoint. Those choices rest on a set of beliefs about which messages are appropriate and which are not (or which are more appropriate and which less so). And in the aggregate they give the feed a particular expressive quality. Consider again an opinion page editor, as in *Tornillo*, who wants to publish a variety of views, but thinks some things off-limits (or, to change the facts, worth only a couple of column inches). "The choice of material," the "decisions made [as to] content," the "treatment of public issues"—"whether fair or unfair"—all these "constitute the exercise of editorial control and judgment." *Tornillo*, 418 U.S. at 258. For a paper, and for a platform too. And the Texas law (like Florida's earlier right-of-reply statute) targets those expressive choices—in particular, by forcing the major platforms to present and promote content on their feeds that they regard as objectionable.

That those platforms happily convey the lion's share of posts submitted to them makes no significant First Amendment difference. That Facebook and YouTube convey a mass of messages does not license Texas to prohibit them from deleting posts with, say, "hate speech" based on "sexual orientation." App. at 126a, 155a. It is as much an editorial choice to convey all speech except in select categories as to convey only speech within them.

Similarly, the major social-media platforms do not lose their First Amendment protection just because no one will wrongly attribute to them the views in an individual post. For starters, users may well attribute to the platforms the messages that the posts convey in toto. Those messages—communicated by the feeds as a whole—derive largely from the platforms' editorial decisions about which posts to remove, label, or demote. And because that is so, the platforms may indeed "own" the overall speech environment. In any event, this Court has never hinged a compiler's First Amendment protection on the risk of misattribution. When the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices. And because that is true, they receive First Amendment protection.

C

And once that much is decided, the interest Texas relies on cannot sustain its law. In the usual First Amendment case, we must decide whether to apply strict or intermediate scrutiny. But here we need not. Even assuming that the less stringent form of First Amendment review applies, Texas's law does not pass. Under that standard, a law must further a "substantial governmental interest" that is "unrelated to the suppression of free expression." United States v. O'Brien, 391 U.S. 367, 377 (1968). Many possible interests relating to social media can meet that test; nothing said here puts regulation of NetChoice's members off-limits as to a whole array of subjects. But the interest Texas has asserted cannot carry the day: It is very much related to the suppression of free expression, and it is not valid, let alone substantial.

Texas has never been shy, and always been consistent, about its interest: The objective is to correct the mix of speech that the major social-media platforms present. The large social-media platforms throw out (or encumber) certain messages; Texas wants them kept in (and free from encumbrances), because it thinks that would create a better speech balance.

But a State may not interfere with private actors' speech to advance its own vision of ideological balance. States (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views. That is, indeed, a fundamental aim of the First Amendment. But the way the First Amendment achieves that goal is by preventing *the government* from "tilt[ing] public debate in a preferred direction." Sorrell v. IMS Health Inc., 564 U.S. 552, 578–579 (2011). It is not by licensing the government to stop *private actors* from speaking as they wish and preferring some views over others. And that is so even when those actors possess "enviable vehicle[s]" for expression. *Hurley*, 515 U.S. at 577. In a better world, there would be fewer inequities in speech opportunities; and the government can take many steps to bring that world closer. But it cannot prohibit speech to improve or better balance the speech market. On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana. That is why we have said in so many contexts that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam). That unadorned interest is not "unrelated to the suppression of free expression," and the government may not pursue it consistent with the First Amendment.

The Court's decisions about editorial control make that point repeatedly. Again, the question those cases had in common was whether the government could force a private speaker, including a compiler and curator of third-party speech, to convey views it disapproved. And in most of those cases, the government defended its regulation as yielding greater balance in the marketplace of ideas. But the Court held that such an interest could not support the government's effort to alter the speaker's own expression.[2]

The case here is no different. The interest Texas asserts is in changing the balance of speech on the major platforms' feeds, so that messages now excluded will be included. To describe that interest, the State borrows language from this Court's First Amendment cases, maintaining that it is preventing "viewpoint discrimination." Brief for Texas 19. But the Court uses that language to say what governments cannot do: They cannot prohibit private actors from expressing certain views. When Texas uses that language, it is to say what private actors cannot do: They cannot decide for themselves what views to convey. The innocent-sounding phrase does not redeem the prohibited goal. The reason Texas is regulating the content-moderation policies that the major platforms use for their feeds is to change the speech that will be displayed there. Texas does not like the way those platforms are selecting and moderating content, and wants them to create

[2] Texas claims *Turner* as a counter-example, but that decision offers no help to speak of. *Turner* did indeed hold that the FCC's must-carry provisions, requiring cable operators to give some of their channel space to local broadcast stations, passed First Amendment muster. But the interest there advanced was not to balance expressive content; rather, the interest was to save the local-broadcast industry, so that it could continue to serve households without cable. That interest, the Court explained, was "unrelated to the content of expression" disseminated by either cable or broadcast speakers. *Turner I*, 512 U.S. at 647.

a different expressive product, communicating different values and priorities. But under the First Amendment, that is a preference Texas may not impose.

Justice BARRETT, concurring.

Assume that human beings decide to remove posts promoting a particular political candidate or advocating some position on a public-health issue. If they create an algorithm to help them identify and delete that content, the First Amendment protects their exercise of editorial judgment—even if the algorithm does most of the deleting without a person in the loop. In that event, the algorithm would simply implement human beings' inherently expressive choice "to exclude a message [they] did not like from" their speech compilation. *Hurley*, 515 U.S. at 574.

But what if a platform's algorithm just presents automatically to each user whatever the algorithm thinks the user will like—e.g., content similar to posts with which the user previously engaged? The First Amendment implications of the Florida and Texas laws might be different for that kind of algorithm. And what about AI, which is rapidly evolving? What if a platform's owners hand the reins to an AI tool and ask it simply to remove "hateful" content? If the AI relies on large language models to determine what is "hateful" and should be removed, has a human being with First Amendment rights made an inherently expressive "choice ... not to propound a particular point of view"? *Hurley*, 515 U.S. at 575. In other words, technology may attenuate the connection between content-moderation *actions* (e.g., removing posts) and human beings' constitutionally protected right to "*decide for [themselves]* the ideas and beliefs deserving of expression, consideration, and adherence." *Turner*, 512 U.S. at 641 (emphasis added). So the way platforms use this sort of technology might have constitutional significance.

[Opinions of Justice JACKSON, concurring in part and concurring in the judgment, and of Justice THOMAS, concurring in the judgment, are omitted.]

Justice ALITO, with whom Justice THOMAS and Justice GORSUCH join, concurring in the judgment.

III

D

Although the only question the Court must decide today is whether NetChoice showed that the Florida and Texas laws are facially unconstitutional, much of the majority opinion addresses a different question: whether the Texas law's content-moderation provisions are constitutional as applied to two features of two platforms—Facebook's News Feed and YouTube's homepage.

[T]he majority paints an attractive, though simplistic, picture of what Facebook's News Feed and YouTube's homepage do behind the scenes. Taking NetChoice at its word, the majority says that the platforms' use of algorithms to enforce their community standards is per se expressive. But the platforms have refused to disclose how these algorithms were created and how they actually work. And the majority fails to give any serious consideration to key arguments pressed by the States. Most notable is the majority's conspicuous failure to address the States' contention that platforms like YouTube and Facebook—which constitute the 21st century equivalent of the old "public square"—should be viewed as common carriers.

[T]he majority rests on NetChoice's dubious assertion that there is no constitutionally significant difference between what newspaper editors did more than a half-century ago at the time of *Tornillo* and what Facebook and YouTube do today.

Maybe that is right—but maybe it is not. Before mechanically accepting this analogy, perhaps we should take a closer look.

Let's start with size. Currently, Facebook and YouTube each produced—on a daily basis—more than four petabytes (4,000,000,000,000,000 bytes) of data. By my calculation, that is roughly 1.3 billion times as many bytes as there are in an issue of the New York Times.

No human being could possibly review even a tiny fraction of this gigantic outpouring of speech, and it is therefore hard to see how any shared message could be discerned. And even if someone could view all this data and find such a message, how likely is it that the addition of a small amount of discordant speech would change the overall message?

Now consider how newspapers and social-media platforms edit content. Newspaper editors are real human beings, and when the Court decided *Tornillo* (the case that the majority finds most instructive), editors assigned articles to particular reporters, and copyeditors went over typescript with a blue pencil. The platforms, by contrast, play no role in selecting the billions of texts and videos that users try to convey to each other. And the vast bulk of the "curation" and "content moderation" carried out by platforms is not done by human beings. Instead, algorithms remove a small fraction of nonconforming posts post hoc and prioritize content based on factors that the platforms have not revealed and may not even know. After all, many of the biggest platforms are beginning to use AI algorithms to help them moderate content. Are such decisions equally expressive as the decisions made by humans? Should we at least think about this?

Other questions abound. Maybe we should think about the enormous power exercised by platforms like Facebook and YouTube as a result of "network effects." And maybe we should think about the unique ways in which social-media platforms influence public thought. To be sure, I do not suggest that we should decide at this time whether the Florida and Texas laws are constitutional as applied to Facebook's News Feed or YouTube's homepage. My argument is just the opposite. Such questions should be resolved in the context of an as-applied challenge. But no as-applied question is before us, and we do not have all the facts that we need to tackle the extraneous matters reached by the majority.

Instead, when confronted with the application of a constitutional requirement to new technology, we should proceed with caution. While the meaning of the Constitution remains constant, the application of enduring principles to new technology requires an understanding of that technology and its effects. Premature resolution of such questions creates the risk of decisions that will quickly turn into embarrassments.

Notes and Questions

1. Going Beyond. The Court's holding was to vacate and remand the cases back to the 5th and 11th Circuits to reconsider the facial challenge. The majority could have stopped there but instead went on to discuss at some length the application of the First Amendment to social media platforms. This discussion was not necessary to its holding (and thus was dicta), but by including it the Court sent a clear message about what it considers to be the appropriate First Amendment analysis. So what could have been a minimalist opinion about the standards for facial invalidation became a broader opinion about how the First Amendment applies to content moderation.

2. Nothing New? The majority stated that the analysis is straightforward in light of cases like *Tornillo, Turner*, and *Hurley*—the major feeds of platforms like Facebook and YouTube are speech under the First Amendment. According to the Court, prioritization of content, including by algorithms, triggers First Amendment scrutiny. And the Court's discussion makes it reasonably clear that, whether or not the Texas and Florida statutes are facially invalid, they are unconstitutional as applied to the main feeds of Facebook and YouTube.

3. Counter-Arguments. What are the strongest arguments against the Court's analysis? Consider in this regard some of the arguments that the Court explicitly or implicitly rejected:

> **Platforms as Conduits**: The 5th Circuit opinion stated that "[t]he Platforms are nothing like the newspaper in Miami Herald v. Tornillo. Unlike newspapers, the Platforms exercise virtually no editorial control or judgment. The Platforms use algorithms to screen out certain obscene and spam-related content. And then virtually everything else is just posted to the Platform with *zero* editorial control or judgment. Thus the Platforms, unlike newspapers, are primarily 'conduit[s] for news,

comment, and advertising.'" NetChoice LLC v. Paxton, 49 F.4th 439, 459–60 (2022) (quoting *Tornillo*). The Court rejected this reasoning. Relatedly, the Court stated that users may attribute the views of posts to the platforms and that, in any event, application of the First Amendment does not depend on a risk of misattribution.

Common Carriage: Closely related to treating platforms as conduits was the common-carrier argument. A centerpiece of the Texas and Florida statutes' findings, the 5th Circuit's opinion, and both states' arguments in the Supreme Court was that the social media platforms function as common carriers and should be treated as such, and thus that the relevant precedents were not cases like *Tornillo*. The majority did not squarely address this argument, but its analysis forecloses it—the application of *Tornillo*, *Turner,* and *Hurley* is not consistent with treating these platforms as common carriers.

Enormous Power: Another related argument revolves around what Justice Alito referred to as social media platforms' "enormous power," which Texas and Florida also emphasized. The Court noted that the same arguments had been made and rejected in *Tornillo* (see page 588 of the casebook).

Governmental Interests in Balancing Voices: Should the government have the ability to regulate platforms' editing to ensure that the public receives an appropriate mix of perspectives (especially in light of those platforms' power)? The Court, invoking a line of cases, stated that the government has no valid (much less substantial) interest in creating an ideological balance of views by regulating private speakers.

Editing via Algorithm: To return to the subject of the excerpts in this chapter of the casebook, the Court treated editing decisions via algorithm the same as decisions made entirely by a human for First Amendment purposes. The majority did not address "feeds whose algorithms respond solely to how users act online," but it made clear that algorithmic curation is speech for First Amendment purposes, and it drew no other distinctions among algorithms. If the majority thought there were other distinctions to be made among the algorithms that Facebook's and YouTube's main feeds use, presumably it would have written a different opinion suggesting such distinctions. Justice Barrett proposed (as did Professor Benjamin in a portion of his article not included in the excerpt in the casebook) that decisions made by AI might sufficiently cut humans out of the process to call into question the application of the First Amendment to the AI's editing decisions, but the majority did not so indicate. All this led Justice Alito to note with apparent frustration that "the majority says that the platforms' use of algorithms to enforce their community standards is per se expressive."

With respect to each of these conclusions in *Moody*, did the Court err? On what basis would you so argue?

CHAPTER 13
Privacy Regulation

Insert on page 706 before note 1:

0.5 Subsequent History. In 2023 the Seventh Circuit affirmed the district court's judgment, but wholly on standing grounds. Dinerstein v. Google, LLC, 73 F.4th 502 (7th Cir. 2023). The court wrote that the plaintiff had not suffered "injury in fact," under federal standing doctrine, for two main reasons. First, the court found that plaintiff had not suffered any privacy injury sufficiently similar to a common-law privacy injury to sustain the cause of action. The court relied on Google's promising not to de-identify the health data it has received and on the plaintiff's failure to establish that "medical records privacy" was similar to common law privacy harms. As to breach of contract, the court held that the common law availability of a cause of action for breach of contract in the absence of monetary damages was insufficient for article III standing purposes, even if a common law court would award nominal damages in such a case. The court's view, in all likelihood, would also prevent Congress from creating an enforceable cause of action in such circumstances. If this is correct, then private rights of action for many modern privacy intrusions might be compensable only in state courts under state law, which of course impacts the question of whether regulation should be federal or state.

Insert on page 705 after the second full paragraph:

Momentum for state privacy regulation has increased, with a total of five states having comprehensive consumer privacy laws in effect as of the end of 2023: California, Colorado, Connecticut, Virginia, and Utah. Several other states passed legislation taking effect in 2024, including Oregon, Montana, and Texas. Categorizing these laws is difficult, but most bear significant resemblance to the California and European schemes. The International Association of Privacy Professionals is one organization that seeks to track developments across the states: https://iapp.org/resources/article/us-state-privacy-legislation-tracker/. Another is the National Conference of State Legislatures: https://www.ncsl.org/technology-and-communication/2023-consumer-data-privacy-legislation.

Insert on page 715 at the end of note 4:

In 2023 the European Commission entered into force a new "adequacy decision" finding that a revised "data privacy framework" would allow transfer between EU and U.S. companies. This framework is subject to annual reviews and other modifications. For more information generally, *see* https://www.dataprivacyframework.gov/Program-Overview.

Insert on page 716 at the end of footnote 2:

See also Rebecca Janßen. Reinhold Kesler, Michael E. Kummer, Joel Waldfogel, GDPR and the Lost Generation of Innovative Apps, NBER Working Paper 30028 (May 2022) (https://www.nber.org/system/files/working_papers/w30028/w30028.pdf) (estimating that "GDPR induced the exit of about a third of available apps" on the Google Play Store and "in the quarters following implementation, entry of new apps fell by half").

CHAPTER 15
General Protection for Intermediaries of User-Generated Content: Section 230

Insert on page 785 after note 4:

5. "Material Contribution." As the *Jones* court noted (and as is reflected by *Roommates.com*), many courts of appeals have converged on the "material contribution" test for platform authorship—that is, the platform loses its section 230 immunity if it "materially contributes" to the unlawfulness of the content. Materiality, however, is a very general term, perhaps not as capacious as "reasonable" in the law but nearly so. A contribution is material when it is important enough (to the illegality of content) that a reasonable person would consider it material. In *Roommates.com*, the court said that the site's contribution was "direct and palpable" in contributing to the meaning of the ultimate posting, while the court in *Jones* said that the quips did not add to the defamatory content of the user posts.

The material contribution test obviously creates the possibility of argument as well as differing interpretations. For example, in Henderson v. Source for Public Data, 53 F.4th 110 (4th Cir. 2022), the court wrote that a material contribution is any activity that goes "beyond the exercise of traditional editorial functions," *id.* at 128, and held that a site that edited public records and provided summaries had made a material contribution. Because summaries, in the court's view, were beyond usual editorial functions, section 230 did not provide protection. On the facts of the case, the court's decision not to apply section 230 makes sense, because the plaintiffs' essential claim was that the site's summaries were inaccurate. But traditional editorial functions often include materially contributing to content, say by clarifying it or streamlining it or, really, any significant editing. Indeed, the court says that any "change [to] the substance of the content" eliminates section 230, *id.* at 129, which sweeps more broadly than either *Zeran* or *Roommates.com*.

Insert on page 798 after note 6:

7. *Gonzalez v. Google* and *Twitter v. Taamneh*. In 2022, the Supreme Court granted certiorari in two cases implicating section 230, which reflected in part the discontent over the breadth of its interpretation in the lower courts. Both cases involved claims seeking to impose secondary liability on the internet platforms under the Anti-Terrorism Act, *see* 18 U.S.C. § 2333. Plaintiffs alleged that the platforms distributed user-generated content that furthered certain terrorist acts. In the *Google* case, the Ninth Circuit held that section 230 insulated the platform (in that case, YouTube).

In its amicus brief, the United States (through the Solicitor General) took the position that a platform's content moderation practices—specifically its promotion of certain content—was activity outside section 230's immunity and could be the basis for a claim. It distinguished this from claims based on liability for the content actually promoted.

> 1. Plaintiffs' broadest theory of direct and secondary ATA liability is that YouTube is liable for allowing ISIS-affiliated users to create accounts and post videos on the site. The court of appeals correctly held that Section 230(c)(1) precludes liability on that basis. YouTube is undoubtedly a provider of an interactive computer service, and plaintiffs do not allege that YouTube edited or otherwise contributed to the creation of the videos at issue. To the extent plaintiffs allege that YouTube violated the ATA by allowing its platform to be used for the dissemination of videos, Section 230(c)(1) bars their claims.

> 2. Plaintiffs' allegations regarding YouTube's use of algorithms and related features to recommend ISIS content require a different analysis. That theory of ATA liability trains on YouTube's own conduct and its own communications, over and above its failure to block or remove ISIS content from its site. Because that theory does not ask the court to treat YouTube as a publisher or speaker of content created and posted by others, Section 230(c)(1) protection is not available. That does not mean that YouTube should be deemed an information content provider with respect to the videos themselves. Although Section 230(c)(1) does not preclude liability premised on YouTube's recommendations if the elements of a private ATA suit are otherwise met, liability must be determined without regard to the fact that the recommended videos appeared on YouTube's own platform. Because the court of appeals did not consider whether plaintiffs have adequately pleaded the elements of ATA liability on that theory, the case should be remanded so that the court may do so in the first instance.

Brief for the United States as Amicus Curiae in Support of Vacatur, Gonzalez v. Google LLC, No. 21-1333 (U.S. Sup. Ct., Dec. 7, 2022) (https://www.supremecourt.gov/DocketPDF/21/21-1333/249441/20221207203557042_21-1333tsacUnitedStates.pdf).

Google and many other amici argued that removing content moderation (and promotion) practices from the scope of section 230 would essentially forbid internet platforms as we know them, and at argument the Justices appeared to struggle to grasp the technical operations. Indeed, Justice Kagan remarked: "[Y]ou know, every other industry has to internalize the costs of its conduct. Why is it that the tech industry gets a pass? A little bit unclear. On the other hand, I mean, we're a court. We really don't know about these things. You know, these are not like the nine greatest experts on the Internet." Tr. at 45–46 (https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1333_q4lp.pdf).

Eventually, the Supreme Court did not decide the section 230 issues, holding in each case that the plaintiffs had failed to state claims under the ATA. *See* Twitter, Inc. v. Taamneh, 598 U.S. 471 (2023); Gonzalez v. Google LLC, 598 U.S. 617 (2023).

8. Continuing Discontent on the Supreme Court. Notwithstanding the Court's avoiding section 230 in *Taamneh* and *Gonzalez*, some Justices continued to express the need for a new case to decide these issues. See for example Justice Thomas's intervention (joined by Justice Gorsuch) is Doe v. Snapchat, 144 S. Ct. 2493 (2024) (dissenting from denial of certiorari), which cited many other of Justice Thomas's separate statements. Justice Thomas particularly argued that the Court's recent holding in *Moody* (excerpted above) is inconsistent with the prevailing broad scope of section 230:

> Although the Court denies certiorari today, there will be other opportunities in the future. But, make no mistake about it—there is danger in delay. Social-media platforms have increasingly used § 230 as a get-out-of-jail free card. Many platforms claim that users' content is their own First Amendment speech. Because platforms organize users' content into newsfeeds or other compilations, the argument goes, platforms engage in constitutionally protected speech. *See Moody*. When it comes time for platforms to be held accountable for their websites, however, they argue the opposite. Platforms claim that since they are not speakers under § 230, they cannot be subject to any suit implicating users' content, even if the suit revolves around the platform's alleged misconduct. In the platforms' world, they are fully responsible for their websites when it results in constitutional protections, but the moment that responsibility could lead to liability, they can disclaim any obligations and enjoy greater protections from suit than nearly any other industry. The Court should consider if this state of affairs is what § 230 demands.

Id. at 2494. Do you agree with this characterization?

Justice Thomas's view of the interaction between *Moody* and section 230 found traction in the Third Circuit in Anderson v. TikTok, Inc., 116 F.4th 180 (3d Cir. 2024). The court held that section 230 did not protect TikTok from a liability claim because the plaintiff alleged that its algorithm affirmatively promoted to the plaintiff's daughter videos about the "Blackout Challenge," which "encourages viewers to record themselves in acts of self-asphyxiation." *Id*. at 181. Plaintiff's daughter died when she attempted the challenge. Citing Justice Thomas, the court said: "Given the Supreme Court's observations that platforms engage in protected speech under the First Amendment when they curate compilations of others' content via their expressive algorithms, it follows that doing so amounts to first-party speech under § 230 too." *Id*. at 184 (citing and then quoting Doe ex rel. Roe v. Shap, Inc. 144 S. Ct. 2493, 2494 (2024) (Thomas, J., dissenting from denial of certiorari)). Judge Mathey concurred in the judgment and dissented in part in a lengthy opinion arguing that the prevailing interpretation of section 230 did not follow from its text. Rather, "the ordinary meaning of § 230 provides TikTok immunity from suite for hosting videos created and uploaded by third parties. But it does not shield more …." *Id*. at 185 (Mathey, J., concurring in the judgment and dissenting in part). In other words, *Zeran*'s core holding, that section 230 extends to editorial functions" was wrong, as were the legion of cases following it. *Id*. at 190. The Fourth Circuit has disagreed with the Third, in a case holding that Facebook's algorithmic promotion of speech did not fall outside section 230. M.P. by and through Pinckney v. Meta Platforms Inc., 127 F.4th 516 (4th Cir. 2025), cert. petition pending, No. 24-1133 (filed May 2, 2025).

9. The Digital Services Act. The European Union in 2022 adopted a regulation titled the "Digital Services Act," which governs many practices that, in the U.S., would be protected by section 230. The DSA took effect in 2024, and many of the provisions will undergo further definition. But the official EU summary includes the following:

> Some of the obligations for intermediaries include:
>
> - **Measures to counter illegal content online, including illegal goods and services**. The DSA imposes new mechanisms allowing users to flag illegal content online, and for platforms to cooperate with specialised 'trusted flaggers' to identify and remove illegal content;
> - **New rules to trace sellers** on online market places, to help build trust and go after scammers more easily; a new obligation **by online market places to randomly check** against existing databases whether products or services on their sites are compliant; sustained efforts to enhance the traceability of products through advanced technological solutions;
> - **Effective safeguards for users**, including the possibility to challenge platforms' content moderation decisions based on a new obligatory information to users when their content gets removed or restricted;
> - Wide ranging **transparency measures for online platforms**, including better information on terms and conditions, as well as transparency on the algorithms used for recommending content or products to users;
> - New obligations for **the protection of minors on any platform in the EU**;
> - **Obligations for very large online platforms and search engines** to prevent abuse of their systems by taking risk-based action, including oversight through independent audits of their risk management measures. Platforms must mitigate against risks such as **disinformation or election manipulation**, **cyber violence against women, or harms to minors online**. These measures must be carefully balanced against restrictions of freedom of expression, and are subject to independent audits;
> - A new **crisis response mechanism** in cases of serious threat for public health and security crises, such as a pandemic or a war;

- **Bans on targeted advertising on online platforms** by profiling children or based on special categories of personal data such as ethnicity, political views or sexual orientation. Enhanced transparency for all advertising on online platforms and influencers' commercial communications;
- A ban on using so-called **'dark patterns'** on the interface of online platforms, referring to misleading tricks that manipulate users into choices they do not intend to make…

Questions and Answers: Digital Services Act (April 23, 2023) (https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348).

As particularly applicable to very large platforms, the DSA imposes affirmative obligations to monitor and to correct for several categories of harmful content, obligations not present under section 230 (and obligations that may also violated the First Amendment).