No. _____

In the Supreme Court of the United States

NETCHOICE, LLC D/B/A NETCHOICE; AND
COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION D/B/A CCIA,
Applicants,

V.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,
Respondent.

TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT
ON APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION
ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EMERGENCY APPLICATION FOR IMMEDIATE ADMINISTRATIVE RELIEF AND TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IDENTITY OF PARTIES, CORPORATE DISCLOSURE STATEMENT, AND RELATED PROCEEDINGS

The parties to the proceeding below are:

Applicants are NetChoice, LLC d/b/a NetChoice; and Computer & Communications Industry Association d/b/a CCIA.

Pursuant to Rule 29.6, Applicants NetChoice and CCIA state that no individual Applicant has any parent corporation, and that no publicly held company owns any portion of any Applicant.

Respondent is Ken Paxton, in his official capacity as Attorney General of Texas.

The related proceedings are:

NetChoice, LLC v. Paxton, No. 1:21-cv-00840 (W.D. Tex. Dec. 1, 2021) (order granting preliminary injunction)

NetChoice v. Paxton, No. 21-51178 (5th Cir. May 11, 2022) (order staying preliminary injunction pending appeal)

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TO THE HONORABLE SAMUEL A. ALITO, JR.,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Texas House Bill 20 ("HB20") is an unprecedented assault on the editorial discretion of private websites (like Facebook.com, Instagram.com, Pinterest.com, Twitter.com, Vimeo.com, and YouTube.com) that would fundamentally transform their business models and services. HB20 prohibits covered social media platforms (many of which are members of Applicants NetChoice and CCIA) from engaging in any viewpoint-based editorial discretion. Thus, HB20 would compel platforms to disseminate all sorts of objectionable viewpoints—such as Russia's propaganda claiming that its invasion of Ukraine is justified, ISIS propaganda claiming that extremism is warranted, neo-Nazi or KKK screeds denying or supporting the Holocaust, and encouraging children to engage in risky or unhealthy behavior like eating disorders. HB20 also imposes related burdensome operational and disclosure requirements designed to chill the millions of expressive editorial choices that platforms make each day.

Applicants challenged HB20 immediately following its passage and, after the parties conducted discovery, the District Court issued a thirty-page opinion preliminarily enjoining the Texas Attorney General from enforcing it before HB20 took effect.

Yet, on Wednesday night, a divided Fifth Circuit panel issued a one-sentence order granting a stay motion filed by the Texas Attorney General five months earlier, allowing him to immediately enforce HB20. This unexplained order deprives Applicants of the "careful review and a meaningful decision" to which they are "entitle[d]." *Nken v. Holder*, 556 U.S. 418, 427 (2009). The Fifth Circuit has yet to offer any

explanation why the District Court's thorough opinion was wrong. This Court should allow the District Court's careful reasoning to remain in effect while an orderly appellate process plays out.

Vacating the stay in this case will maintain the status quo while the Eleventh Circuit also considers a parallel appeal concerning a preliminary injunction against Florida's similar law. *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1086 (N.D. Fla. 2021), *appeal docketed*, 11th Cir. No. 21-12355 (11th Cir. July 13, 2021). Until the Fifth Circuit issued this stay, the status quo had been maintained pending a decision from at least one federal court of appeals weighing in on the constitutionality of unprecedented state laws regulating the worldwide speech of only some government-disfavored social media platforms. And even then, that decision would not have gone into effect until the appellate court's mandate had issued or the parties sought further review in this Court. By issuing a stay and allowing the Texas Attorney General to enforce HB20 while appeals are still pending, the Fifth Circuit short-circuited the normal review process, authorizing Texas to inflict a massive change to leading global websites and undoubtedly also interfering with the Eleventh Circuit's consideration of Applicants' challenge to the similar Florida law.

Furthermore, the covered platforms face immediate irreparable injury many times over. Unrebutted record evidence demonstrates that it will be impossible for these websites to comply with HB20's key provisions without irreversibly transforming their worldwide online platforms to disseminate harmful, offensive, extremist, and disturbing content—all of which would tarnish their reputations for offering appropriate content and cause users and advertisers to leave. As one of Applicants'

declarants stated, HB20 "would force us to change all of our systems to try to come into compliance." App.350a. And because there is no "off-switch" to platforms' current operations, the cost of revamping the websites' operations would undo years of work and *billions* of dollars spent on developing some platforms' current systems. *Id.* Even if platforms could revamp their entire communities, they would lose substantial revenue from boycotts by advertisers who do not want their ads to appear next to vile, objectionable expression. In the past, YouTube and Facebook "lost millions of dollars in advertising revenue" from advertisers who did not want their advertisements next to "extremist content and hate speech." App.139a-40a; *see* App.168a, 325a-27a, 359a; *infra* p.40.

More fundamentally, the Fifth Circuit's order contradicts bedrock First Amendment principles established by this Court. When "a private entity provides a forum for speech," it may "exercise editorial discretion over the speech and speakers in the forum." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019). This Court thus has repeatedly recognized that private entities have the right under the First Amendment to determine whether and how to disseminate speech. *E.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 581 (1995); *PG&E v. PUC of Cal.*, 475 U.S. 1, 12 (1986) (plurality op.);[1] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *Arkansas Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 674 (1998); *Denver*

[1] All citations to *PG&E* are to the plurality opinion. *See Hurley*, 515 U.S. at 573, 575-76, 580 (recognizing *PG&E*'s plurality opinion is case's holding).

Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 737-38 (1996) (plurality op.); *id.* at 825 (Thomas, J., concurring in the judgment in part and dissenting in part) (protecting "cable operators' editorial discretion" notwithstanding legislature's "common carrier" label).

These principles apply with full force to websites. As this Court explained a generation ago in *Reno v. ACLU*, Internet websites "'publish' information," disseminating speech through websites is inherently "expressive," and there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." 521 U.S. 844, 853, 870 (1997). Accordingly, the government "may not . . . tell Twitter or YouTube what videos to post; or tell Facebook or Google what content to favor." *USTA v. FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc).

For all these reasons, Applicants request immediate relief to maintain the decades-old status quo of online speech free of government interference. *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978) (Rehnquist, J., in chambers) ("the maintenance of the status quo is an important consideration" in resolving emergency applications). Applicants request (1) a temporary administrative order, vacating the Fifth Circuit's stay while the Court considers this Application; and then (2) an order vacating the Fifth Circuit panel majority's order staying the District Court's preliminary injunction and leaving the District Court's injunction in force pending the Fifth Circuit's decision on the merits that will allow the parties the opportunity to seek timely review of that decision from this Court. *Frank v. Walker*, 574 U.S. 929 (2014).

OPINIONS BELOW

The district court's order is available at 2021 WL 5755120 and reproduced at App.6a-35a. The Fifth Circuit's stay order is unreported and reproduced at App.2a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §§ 1254(1), 1651, and 2101(f), and Supreme Court Rule 23.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at App.37a-55a.

STATEMENT

A. Social media platforms are Internet websites that exercise editorial discretion over what content they disseminate and how such content is displayed to users.

The vast Internet is a "dynamic, multifaceted category of communication" that "provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno*, 521 U.S. at 870. Without governmental intervention, "the content on the Internet" generated by countless people across the country and the globe remains "as diverse as human thought." *Id.* (citation omitted).

Among those who contribute to that communication, social media platforms[2] offer their own curated collections of speech to each individual user designed to "convey a message about the type of community the platform seeks to foster." App.21a. Through a set of comprehensive policies, covered platforms here (like other websites) determine (1) who can access their platforms; (2) what kinds of expression is acceptable on their platforms; (3) what format that expression will take; (4) how expression

[2] This brief refers to all entities covered by HB20 as "platforms."

is displayed to users; and (5) what expression should take priority over other expression, in addition to similar considerations.

In short, platforms "publish," *Reno*, 521 U.S. at 853, and "disseminate" speech authored by others, *Sorrell*, 564 U.S. at 570. But just as a newspaper does not publish every opinion piece it receives, these platforms do not disseminate *all* speech users submit—or treat all user-submitted speech equally. Instead, each platform has its own rules about what speech is acceptable for its particular service and community. Platforms all have hate-speech policies, for example. App.21a, 389a-445a. Platforms also differ in important ways that accord with the websites' designs and different editorial policies and emphases. YouTube, for example, supports a "community that fosters self-expression on an array of topics as diverse as its user base," while prohibiting "harmful, offensive, and unlawful material" like "pornography, terrorist incitement, [and] false propaganda spread by hostile foreign governments." App.146a, 149a. Twitter allows a wider range of expression such as adult content.[3] Other social media platforms—including Texas-favored websites excluded from HB20's coverage that tout less-moderated communities—still have similar policies. App.115a, 134a.

For all platforms, the expressive act of policy enforcement is critical to the distinctive experiences that platforms provide their users—and to ensuring that the services remain hospitable and useful services. Without these policies, platforms would offer fundamentally worse (and perhaps even useless) experiences to their users,

[3] The Twitter Rules, Twitter, https://bit.ly/3ICc5ok (last visited May 12, 2022); App.397a-398a.

potentially overrun with spam, vitriol, and graphic content. App.20a-21a. The record confirms that when platforms have failed to remove harmful content, their users and advertisers have sought to hold platforms accountable—including through boycotts. App.126a, 135a-38a, 168a-69a, 187a. And when platforms have chosen to remove, or reduce the distribution of, objectionable content, they have faced criticism from users as well as elected officials. App.73a.

From the moment users access a social media platform, everything they see is subject to editorial discretion by the platform in accordance with the platforms' unique policies. Platforms dynamically create curated combinations of user-submitted expression, the platforms' own expression, and advertisements. This editorial process involves prioritizing, arranging, and recommending content according to what users would like to see, how users would like to see it, and what content reflects (what the platform believes to be) accurate or interesting information. App.21a; *see* App.312a (YouTube: "I believe in 2018 that data was about 70 percent of views are driven by recommendations.").

Those decisions begin with the very basic design and functions of the site. YouTube and Vimeo, for instance, disseminate both videos and users' comments on those videos. Facebook and LinkedIn have a broader range of videos and text. Instagram focuses on images and video, though it too has options for comments. Twitter is largely limited to 280-character text "tweets," with options to post videos and images. TikTok has short videos. And Pinterest has images on digital "pin boards." Across all these websites, platforms make decisions about the user interface and appearance of the platform. Some provide filters or parental controls to offer users even more

curated experiences. And all this content appears next to the platforms' distinctive branding.

Given their size and dynamic nature, platforms must constantly make editorial choices on what speech to disseminate and how to present it. At a minimum, this involves the platforms' determination of what should show up at the top of users' "feeds" and search results—which are functions the platforms engage in for each user and countless times a day. App.163a. Platforms also recommend or prioritize content they consider relevant or most useful. App.150a. Consequently, much like a newspaper must decide what stories deserve the front page, how long stories should be, what stories should be next to other stories, and what advertisements should be next to what stories, social media platforms engage in the same kinds of editorial and curatorial judgments both for individual users and the platforms as a whole.

Platforms also engage in speech they author themselves, through warning labels, disclaimers, links to related sources, and other commentary they deem important. App.20a-21a. For instance, YouTube provides "information panels" that inform users with (1) notice that videos are from "a news publisher that is funded by a government"; (2) "context on content relating to topics and news prone to misinformation"; and (3) suicide prevention information "in response to search queries for terms related to suicide." App.150a-51a.

Finally, platforms prevent dissemination of, or later remove, expression that violates the platforms' policies regarding acceptable expression. Platforms thus routinely remove spam, pornography, hate speech, and other content they consider objectionable. For instance, during 6 months in 2018, Facebook, Google, and Twitter

took action on *over 5 billion* accounts or submissions—"including 3 billion cases of spam, 57 million cases of pornography, 17 million cases of content regarding child safety, and 12 million cases of extremism, hate speech, and terrorist speech." App.27a.

Without these policies, these websites would become barnacled with slurs, pornography, spam, and material harmful to children (for example content urging eating Tide Pods, eating disorders, or suicide)—which HB20 would require to be presented no differently than other lawful speech. Users would not have the benefit of the platforms' expressive judgments that certain content may be false, misleading, graphic, or upsetting. App.20a-21a. And users would be presented with content that is less informative, entertaining, and relevant to their particular interests.

B. HB20 is a content-, viewpoint-, and speaker-based law that would eviscerate editorial discretion and impermissibly compel and chill speech by targeted, disfavored "social media platforms."

Although HB20's text acknowledges that platforms provide unique experiences realized through the enforcement of their policies and the exercise of editorial discretion, *see* Tex. Bus. & Com. Code § 120.051(a), the entire impetus for HB20 was that Texas did not like how platforms were exercising such editorial discretion to remove or refrain from disseminating certain speech.

HB20 prohibits and chills covered platforms from exercising the editorial discretion that has defined their services and communities. As many statements in the record reflect, the State enacted HB20 for the viewpoint-based purpose of targeting certain disfavored "social media platforms" for exercising their editorial judgment in a manner the State dislikes. App.6a-7a, 21a-22a, 33a, 73a-75a. For example, the

Governor's official signing statement explained HB20 targets platforms to protect "conservative speech": "It is now law that conservative viewpoints in Texas cannot be banned on social media." Office of the Governor Greg Abbott, Facebook (Sept. 9, 2021), https://bit.ly/3z0Ysub.[4] In another tweet, the Governor said, "Too many social media sites silence conservative speech and ideas and trample free speech. It's un-American, Un-Texan, & soon to be illegal." App.73a.

1. HB20's key coverage definition of "social media platform" is content- and speaker-based, and intentionally targets only disfavored platforms.

HB20 defines a covered "social media platform" to include any "Internet website or application" that (1) "functionally has more than 50 million [monthly] active users in the United States"; is (2) "open to the public"; (3) "allows a user to create an account"; and (4) "enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images." Tex. Bus. & Com. Code §§ 120.001(1), .002(b); Tex. Civ. Prac. & Rem. Code § 143A.004(c).

But this definition expressly excludes certain businesses based on content: services that "consist[] primarily of news, sports, entertainment, or other information or content that is not user generated" where user chats and comments are "incidental to" the content posted by the website or application. Tex. Bus. & Com. Code § 120.001(1)(C).

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[4] As the District Court found, "The record in this case confirms that the Legislature intended to target large social media platforms perceived as being biased against conservative views and the State's disagreement with the social media platforms' editorial discretion over their platforms." App.29a.

HB20 thus covers platforms operated by Applicants' members—Facebook, Instagram, Pinterest, TikTok, Twitter, Vimeo, and YouTube. App.7a.[5] The 50-million-monthly-U.S.-user threshold is a constantly fluctuating and difficult-to-calculate number. App.208a. Nevertheless, it is plain that HB20's threshold singles out a select few websites for disfavored treatment. App.28a. Meanwhile, it excludes smaller social media platforms—like Truth Social, Parler, Gettr, Gab, and Rumble, which purport to appeal to more conservative users, even though they similarly exercise editorial discretion via their own policies. App.115a.

2. HB20's Sections 2 and 7 impose two sets of requirements. Both sets are enforceable by the Texas Attorney General, who may sue for "potential violation[s]" of Section 7, and is entitled to fee-shifting and "reasonable investigative costs." Tex. Bus. & Com. Code § 120.151; Tex. Civ. Prac. & Rem. Code § 143A.008(b). Courts may impose "daily penalties sufficient to secure immediate compliance." Tex. Civ. Prac. & Rem. Code § 143A.007(c).

a. HB20's Section 7 directly restricts platforms' editorial discretion over their platforms and compels speech. Specifically, platforms:

> may not censor ["block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression"] a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic

[5] Covered platforms also include non-member social media platforms like Reddit, which is "a vast network of communities that are created, run, and populated by . . . Reddit users." Reddit, Content Policy, https://bit.ly/39bleIo (last visited May 13, 2022).

location in this state or any part of this state.

Tex. Civ. Prac. & Rem. Code §§ 143A.001(1), .002(a). From this broad prohibition, HB20 also carves out two facially content-based exceptions for expression (1) that involves specific threats or incitement directed at a few protected classes; and (2) flagged by a handful of state-selected organizations. *Id.* § 143A.006(a)(2)-(3). Because HB20 covers Texas users both submitting and "receiv[ing]" expression, HB20 regulates all expression on platforms worldwide. *Id.* § 143A.002(a). Section 7 even appears to try to *require* platforms to continue operating in Texas under the State's compelled terms. *Id.* § 143A.002(a)(3).

Section 7 prohibits virtually any "viewpoint"-based editorial choice platforms make and compels dissemination of almost all speech on equal terms—including odious hate speech. *See, e.g.*, *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391-92 (1992) (hate-speech policy treats hateful "viewpoints" differently from non-hateful viewpoints). For example, platforms' recommendation and search functions necessarily "discriminate" among speech by presenting content differently. These are key features of platforms' services and business models, all of which HB20 prohibits.

b. HB20's Section 2 also imposes speech-chilling, onerous disclosure and operational requirements, which entail substantial compliance costs. These requirements are discussed below (at pp.36-39), but in brief:

First, platforms must adopt specific notice-complaint-appeal procedures for users to challenge individual editorial decisions that occur millions of times every day. Tex. Bus. & Com. Code §§ 120.101-104. *Second*, platforms must provide wildly broad "disclosures" about their "content management, data management, and business

practices." *Id.* § 120.051(a). *Third*, they must "publish an acceptable use policy." *Id.* § 120.052. *Fourth*, they must publish a "biannual transparency report," requiring disclosure of large swaths of private business information from across a business's operations about each action platforms take to enforce their policies across billions of pieces of content. *Id.* § 120.053.

C. Applicants sued and obtained a preliminary injunction in a thorough District Court opinion, which was stayed months later by the Fifth Circuit panel majority's unreasoned one-sentence order.

The Texas Governor signed HB20 into effect on September 9, 2021, with an effective date of December 2. Applicants sued on September 22, 2021, and moved for a preliminary injunction on September 30, alleging violations of the First Amendment and the Commerce Clause, as well as preemption under 47 U.S.C. § 230. App.9a-10a. The District Court permitted a discovery period including document production from the Applicants and two of their members (Facebook and YouTube) and seven depositions by Defendant of all declarants in support of the preliminary injunction. In a detailed opinion issued December 1, the District Court enjoined Defendant's enforcement of HB20. The District Court did not reach Applicants' Commerce Clause or preemption challenges. The district court denied Defendant's motion to stay its injunction on December 9.

Defendant appealed the district court's preliminary injunction. Defendant moved for an opposed stay in the Fifth Circuit on December 15, 2021, and stay briefing completed on December 30. On March 10, 2022, a three-judge motions panel of the Fifth Circuit issued a per curiam order carrying the stay motion with the case and expediting oral argument. App.4a. After merits briefing was completed, oral argument

occurred before a different three-judge panel on May 9, 2022. Two days later, on May 11, 2022, this merits panel majority granted Defendant's five-month-old stay motion in a one-line order without any explanation or reasoning—although a footnote stated: "The panel is not unanimous." App.2a.

REASONS FOR GRANTING THE APPLICATION

This Court "has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the [lower court] is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *W. Airlines, Inc. v. Int'l Broth. Of Teamsters & Air Transp. Emps.*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (citation omitted); *see Nken*, 556 U.S. at 434. This Court has often granted emergency relief when applicants show "a reasonable probability" this Court will grant review, a "fair prospect" of prevailing on the merits, and "a likelihood that irreparable harm will result." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

Applicants plainly meet these standards here. HB20 is a flatly unconstitutional law that compels government-preferred speech from select private entities and would require enormous upheaval to the worldwide operations of covered Internet websites.

I. This Court should vacate the Fifth Circuit's unreasoned stay order to preserve an orderly appellate review over important issues at the heart of the First Amendment.

The cursory manner in which the Fifth Circuit panel majority allowed HB20 to take effect alone justifies the granting of this Application. *See Nken*, 556 U.S. at 427.

Last year, both Texas and Florida embarked on an unprecedented effort to override the editorial discretion of social media platforms and to compel them to disseminate a plethora of speech the platforms deem objectionable and antithetical to the speech they want to present to users (and advertisers). App.6a-7a; *NetChoice*, 546 F. Supp. 3d at 1085. Both laws are an undisguised effort to level the speech playing field and control "Big Tech." To that end, both laws override editorial discretion and compel speech—imposing their burdens only on selected speakers and carving out favored content. App.28a-29a; *NetChoice*, 546 F. Supp. 3d at 1093-94. In short, the laws defy established First Amendment doctrine by taking virtually every action forbidden to state actors by the First Amendment.

Both states recognized that their laws would transform the Internet and fundamentally change the way platforms exercise editorial discretion and disseminate speech, so they delayed their effective dates to allow regulated platforms to try to come into compliance. App.9a; *NetChoice*, 546 F. Supp. 3d at 1085. Applicants took advantage of that interval to seek preliminary injunctive relief that would prevent the laws from taking immediate transformative effect, while allowing the parties to debate the legal issues and giving jurists time to consider all the issues as part of an orderly review process. The results were two well-reasoned district court opinions carefully explaining the provisions of the respective laws and each preliminarily enjoining those laws as rather obvious affronts to the First Amendment.

Those two decisions paved the way for an orderly appellate process in the courts of appeals. Florida did not even seek a stay of that preliminary injunction, but pursued a modestly expedited appeal that is fully briefed and was argued late last month.

See Docket, 11th Cir. No. 21-12355. While Texas sought a stay, a Fifth Circuit motions panel referred that stay to the merits panel, which considered the important issues pursuant to an orderly appellate process that included full briefing and an oral argument. App.4a. But on Wednesday, a divided panel threw both the Internet and the orderly appellate process into chaos by issuing a one-sentence order purporting to allow the Texas Attorney General to enforce HB20 immediately. App.2a.

As this Court explained in *Nken*, appellate courts may not enter stays pending appeal "reflexively," but only after the movant has satisfied its "heavy burden," and only after the panel has conducted "careful review" and issued a "meaningful decision." 556 U.S. at 427; *id.* at 439 (Kennedy, J., concurring). Yet this one-sentence order explains nothing—in stark contrast to the extensively reasoned district court opinions that explained the various provisions of the laws, suggested some possible limiting constructions, and identified the precise constitutional defects. The Fifth Circuit's order creates immediate obligations, compels all sorts of speech, and essentially forces Applicants to try to conform their global operations to Texas's vision of how they should operate—and they must do so essentially overnight. Equally important, the order undermines the orderly appellate process in this Court (and the Eleventh Circuit), which necessitates this emergency application.

It did not have to be this way. Even if a majority of the Fifth Circuit panel disagrees with the well-reasoned opinion of the district court, it could have explained its reasoning in an opinion subject to the normal rules for issuing appellate mandates, which would then have permitted Applicants to seek rehearing and petition for certiorari. That course would have allowed an appellate process that gave this Court the

same opportunity for the calm and orderly consideration that every other court has enjoyed in considering these momentous legal issues that go to the heart of the First Amendment.

This Court should therefore vacate the stay to restore the orderly appellate process. Applicants are confident that HB20 is wholly incompatible with the First Amendment and that all the traditional vacatur factors are amply satisfied. But even apart from those factors, vacatur is warranted to protect the orderly appellate process and restore the status quo that existed until Wednesday. Indeed, to date the only reasoned decisions addressing HB20 and Florida's similar law have found them to be antithetical to the First Amendment. Whether or not this Court ultimately agrees or disagrees, Texas should not be allowed to transform the Internet before a single judge explains why Texas's effort complies with the First Amendment. And this Court should not have to sort through these issues based on truncated briefing and without the benefit of at least one fully reasoned appellate decision. The issues here are too important to be dispensed with in summary fashion. This Court should vacate the stay to preserve the orderly appellate process.

II. This Court is very likely to grant certiorari review if the Fifth Circuit ultimately upholds HB20's content- and speaker-based infringements on protected editorial discretion, which allow government to compel Internet websites to disseminate speech.

Texas's attempt to transform the Internet and compel speech from private entities (contrary to those entities' editorial policies) readily satisfies this Court's standards for certiorari review. Without providing any explanation for its order, the Fifth Circuit panel upended both how the Internet functions and how the First Amendment

applies to the Internet—questions of exceptional national importance. Sup. Ct. R. 10(a), (c). Given the global footprint of Applicants' members, the Fifth Circuit panel majority has in effect issued something akin to a nationwide (or even worldwide) injunction that disrupts the First Amendment rights of Applicants everywhere that the Internet exists—and without a word of reasoning, not even to provide clarity on the scope of certain provisions in light of constitutional avoidance principles or otherwise. This stay also conflicts with the preliminary injunction that remains in place on Florida's similar law.

This Court routinely grants review of lower courts' important First Amendment rulings even in the absence of square circuit splits. *E.g.*, *Harris v. Quinn*, 573 U.S. 616, 627 (2014) (granting certiorari not to resolve a split, but rather "[i]n light of the important First Amendment questions these laws raise"); *Snyder v. Phelps*, 562 U.S. 443, 451 (2011); *United States v. Stevens*, 559 U.S. 460, 468 (2010). The deprivation of First Amendment rights requiring major corporations to overhaul their worldwide operations satisfies this Court's standards for granting review.

And as explained throughout this Application, the panel "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The stay order runs roughshod over this Court's seminal Internet ruling in *Reno v. ACLU*, and it disregards myriad other precedents protecting the rights of private entities to control what speech they disseminate and how they do so. Indeed, many district courts have recognized platforms' First Amendment rights, and

most of those decisions were not even appealed.[6]

III. The Fifth Circuit panel's stay order is demonstrably wrong, and Applicants are likely to succeed on the merits of their First Amendment claims.

A. HB20 Section 7's prohibition on viewpoint-based editorial discretion violates the First Amendment.

1. This Court's precedents establish the core First Amendment principle that private entities disseminating speech have the constitutional right to exercise editorial discretion.

a. The First Amendment prohibits government from restricting private Internet websites' editorial discretion over what speech to disseminate. This fundamental First Amendment principle is exemplified by *Tornillo*, *PG&E*, and *Hurley*, which protected the rights of private entities (a newspaper with market power, a monopoly public utility, and parade organizers) not to disseminate speech generated by others (candidates, customers, and parade participants). *Hurley*, 515 U.S. at 561, 576; *PG&E*, 475 U.S. at 5, 20-21; *Tornillo*, 418 U.S. at 247, 258. At its core, the speech platforms choose to disseminate—and not to disseminate—expresses the platforms' messages about what speech is "worthy of presentation." *Hurley*, 515 U.S. at 575.

This Court's seminal case on the compelled publication of another's speech, *Tornillo*, held that any "compulsion to publish that which 'reason tells them should

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[6] *O'Handley v. Padilla*, 2022 WL 93625, at *15 (N.D. Cal. Jan. 10, 2022), *appeal docketed*, No. 22-15071 (9th Cir. Jan. 18, 2022); *NetChoice*, 557 F. Supp. 3d at 1093; *Isaac v. Twitter*, 557 F. Supp. 3d 1251, 1261 (S.D. Fla. 2021); *Davison v. Facebook, Inc.*, 370 F. Supp. 3d 621, 629 (E.D. Va. 2019), *aff'd*, 774 F. App'x 162 (4th Cir. 2019) *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1008 (E.D. Cal. 2017); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 437, 440 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007).

not be published' is unconstitutional." 418 U.S. at 256. Private publication choices—"*whether fair or unfair*—constitute the exercise of editorial control and judgment" protected by the First Amendment. *Id.* at 258 (emphasis added). So, any "intrusion into the function of editors" is unconstitutional. *Id.*

And since *Tornillo*, this Court has repeatedly vindicated private entities' editorial discretion. For example:

- A "private entity may thus exercise editorial discretion over the speech and speakers in the forum"—when that "private entity provides a forum for speech." *Halleck*, 139 S. Ct. at 1930.

- When a private party "exercises editorial discretion in the selection and presentation" of expression, "it engages in [protected] speech activity." *Arkansas Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 674 (1998).

- "[T]he editorial function itself is an aspect of speech.'" *Denver*, 518 U.S. at 737 (plurality op.); *accord id.* at 825 (Thomas, J., concurring in the judgment in part and dissenting in part) (protecting "editorial discretion").

- A "private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech," even if it is "rather lenient in admitting participants." *Hurley*, 515 U.S. at 569-70.

- "Compelled access . . . both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set," so government may not "compel[] a private corporation to provide a forum for views other than its own." *PG&E*, 475 U.S. at 9.

The Court therefore has recognized that the First Amendment's protections apply equally to the dissemination and "presentation of an edited compilation of speech *generated by other persons*." *Hurley*, 515 U.S. at 570 (emphasis added). Consequently, "publishing," presenting, and even just "dissemination" of information are all protected "speech within the meaning of the First Amendment." *Sorrell*, 564 U.S. at 570;

Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 792 n.1 (2011) ("distributing"); *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("disclosing and publishing") (citation omitted); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 768 (1988) ("Liberty of circulating is as essential to freedom of expression as liberty of publishing") (cleaned up); *Smith v. California*, 361 U.S. 147, 150 (1959) ("free publication and dissemination of books and other forms of the printed word"); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963) ("circulation of books").

b. Because the Fifth Circuit did not explain its departure from these settled principles, Applicants cannot address its reasoning. But to the extent the panel majority relied *sub silentio* on Defendant's arguments below, those arguments all misunderstand the law and demonstrate the First Amendment's robust protections.

First, *Hurley* made clear that the "enviable" "size and success" of private entities does not "support[] a claim that [platforms] enjoy an abiding monopoly of access to spectators." 515 U.S. at 577-78. Even if there may be only one St. Patrick's Day parade in South Boston, that did not diminish the parade platform organizer's First Amendment rights. Platforms are not monopolies, and there is no record evidence to the contrary. In any event, this Court has upheld the First Amendment rights of even those entities considered to have "monopoly of the means of communication." *Tornillo*, 418 U.S. at 250. And the law that this Court invalidated in *Tornillo* was specifically aimed to counteract the "abuses of bias and manipulative reportage" resulting from "the vast accumulations of unreviewable power in the modern media empires." *Id.* Likewise, *PG&E* involved a state-sanctioned energy monopoly. 475 U.S. at 17-18 n.14. Yet this Court vindicated both private entities' editorial right not to

disseminate speech. Similarly, this Court has already granted review in a case to determine whether government can compel speech and override First Amendment rights under a "monopoly of one" theory. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1204 (10th Cir. 2021) (Tymkovich, C.J., dissenting), *cert. granted in part*, 142 S. Ct. 1106 (2022).

Second, "the Internet can hardly be considered a 'scarce' expressive commodity" justifying intrusions on First Amendment rights. *Reno*, 521 U.S. at 870. Thus, the fact that the Internet provides websites with "relatively unlimited" space does not reduce First Amendment protections or justify compelling speech from those websites. *Id.* In fact, *Reno* expressly held that a "scarcity" rationale had no place in evaluating speech publication on the "Internet," where a user remains free to communicate on different platforms and through different services. *Id.* at 868 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-38 (1994)); *id.* at 868-69 ("special justifications for regulation of the broadcast media [] are not applicable to other speakers," like "forums of the Internet").[7]

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[7] Although *Reno*'s distinction is dispositive, *Turner* is inapposite because it hinged on cable television operators' physical bottleneck that would have allowed them to destroy broadcast television. *Turner* recognized that a must-carry obligation implicated the First Amendment rights of cable operators and thus required heightened First Amendment scrutiny. 512 U.S. at 636-41. But in upholding that content-neutral law, ultimately *Turner* emphasized "the unique physical characteristics of cable [television] transmission"—physical cable lines, obtained through government easements, running into houses. *Id.* at 639. This provided cable companies a physical "bottleneck, or gatekeeper, control over most (if not all) of the television programming." *Id.* at 656. Because of that physical bottleneck, there would have been an "elimination of broadcast television" if cable companies nationwide had not been required to carry the

Third, a private entity need not present a "particularized message," as the First Amendment protects both singular expression and compilations of diverse expression. As this Court explained in *Hurley*, "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." 515 U.S. at 569-70; *see, e.g.*, *Denver*, 518 U.S. at 737-78 (plurality op.) (protecting cable operators); *accord id.* at 825 (Thomas, J., concurring in the judgment in part and dissenting in part).

Fourth, private entities cannot be compelled to disseminate speech even if they could "dissociate" themselves from the compelled publication by "simply post[ing] a disclaimer," as that would "justify any law compelling speech." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring). A publisher's ability to disclaim compelled speech was present in *Tornillo*, *PG&E*, *Hurley*, and *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). And the Court consistently held that government could not compel speech. (In any event, HB20 prohibits platforms from disclaiming compelled speech, because they are not permitted to "discriminate" among speech on their platform. Tex. Civ. Prac. & Rem. Code § 143A.001(1).)

Fifth, it does not matter exactly *when* platforms exercise their editorial

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broadcast television channels the federal government had spent decades cultivating. *Id.* at 646; *see Hurley*, 515 U.S. at 577 (distinguishing *Turner*). In all events, *Turner* applied heightened First Amendment scrutiny. 512 U.S. at 641. And *Turner*'s broadcast-television governmental interest required cable operators to carry a "certain minimum number of broadcast stations"—not common carriage of all channels irrespective of content. *Id.* at 643-44, 662.

discretion. If a platform first disseminates speech, but then removes that speech from its platform, this editorial choice is fully protected by the First Amendment. Government cannot compel *continued dissemination* any more than it can compel initial dissemination. And many other entities like "community bulletin boards" and "[c]omedy club[]" open-mic nights do not "pre-screen" content, yet they undisputedly retain First Amendment rights to cease speech dissemination. *Halleck*, 139 S. Ct. at 1930. Plus, platforms *do* evaluate expression in deciding whether, how, when, and where (if at all) that expression is presented to users, and they moderate certain policy-violating content before users see it. App.150a-61a, 173a-76a; NetChoice, *By the Numbers* 5-6, https://bit.ly/3Gn54Hj. For instance, around 90% of Facebook's removals take place before "anyone reports it." App.175a, 332a-33a.

Sixth, private Internet websites are not "public forum[s]" under this Court's established precedents. Public-forum analysis is limited to its "historic confines." *Arkansas Educ.*, 523 U.S. at 678. And its historic confines dictate that the doctrine applies only when "*government* seeks to place [restrictions] on the use of *its* property." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (emphases added); *see Halleck*, 139 S. Ct. at 1930. That is because the First Amendment is a restriction on "*government[t]* control"—not private entities' "individual liberty" to choose whether they want to disseminate speech. *Id.* at 1934 (emphasis added). So, if government has "immemorially . . . time out of mind" held property in the public trust for citizens to speak on that government property, then it has become a traditional public forum. *Krishna*, 505 U.S. at 680 (citation omitted). Only under those circumstances, "the government ordinarily may not exclude speech or speakers from the

forum on the basis of viewpoint." *Halleck*, 139 S. Ct. at 1930. But "when a private entity provides a forum for speech," it is not a public forum and it "may thus exercise editorial discretion over the speech and speakers in the forum." *Id.* Private Internet websites obviously do not qualify for government-property public-forum designation under this Court's precedents. *See Reno*, 521 U.S. at 870.[8] And private entities' choices of what speech to disseminate even in the "public square" is fully protected, as *Hurley* vindicated private editorial choices about what speech to disseminate throughout the public streets of Boston. 515 U.S. at 577-78.

Seventh, this Court's precedents already rejected Defendant's theory that "hosting" speech generated by others is unprotected "conduct" (and HB20's restrictions go much further than simply requiring platforms to "host" speech, as explained above at p.12). The Court expressly recognized that government compelled "hosting" violates the First Amendment: "[T]he constitutional issue in [*PG&E* and *Hurley*] arose because the State forced one speaker to *host* another speaker's speech." *Agency for Int'l Dev. (USAID) v. All. For Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2088 (2020) (emphasis added). Logically extended, Defendant's "hosting" theory would have the absurd consequence of giving government complete power over what and how various entities disseminate speech: bookstores, book publishers, essay-compilation editors, art

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[8] *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), is not to the contrary. That case considered whether *government* can bar sex offenders from social media platforms—not whether *private platforms* have the right to editorial discretion. *Id.* at 1735. Furthermore, the majority's description of the Internet was "undisciplined dicta," and this "loose rhetoric" belies that "there are important differences between cyberspace and the physical world"—namely, that private websites are not government property like "public streets and parks." *Id.* at 1738, 1743 (Alito, J., concurring in the judgment).

galleries, community bulletin-boards, cable operators choosing what cable television channels to disseminate, live television guest interviews, radio call-in shows, and comedy clubs. That is not and should not be the law.

Neither *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), nor *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), justify HB20 or Defendant's "hosting" theory. Neither case involved private editorial choices about what speech to disseminate. *See FAIR*, 547 U.S. at 64 ("A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper."); *PruneYard*, 447 U.S. at 88 (no "intrusion into the function of editors"). In *PruneYard*, the shopping mall "owner did not even allege that he objected to the content of the [speech]; nor was the access right content based." *PG&E*, 475 U.S. at 12 (discussing *PruneYard*). And *FAIR* distinguished the "conduct" of a law school's employment recruitment assistance from a "number of instances" where the Court "limited the government's ability to force one speaker to *host* or accommodate another speaker's message"—citing *Hurley*, *PG&E*, and *Tornillo*. *FAIR*, 547 U.S. at 63 (emphasis added).

Seventh, social media platforms are not common carriers, and the First Amendment analysis would not change if they were. "A common carrier does not make individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). Far from "hold[ing] themselves out as affording *neutral, indiscriminate access* to their platform *without any editorial filtering*," unrebutted evidence establishes that platforms constantly engage in editorial filtering, providing unique experiences to each user and limiting both who may access their platforms and how they may use the platforms, as discussed above (at pp.5-9).

USTA, 855 F.3d at 392 (Srinivasan & Tatel, JJ., concurring in the denial of reh'g en banc) (emphasis added). Consequently, "web platforms such as Facebook, Google, Twitter, and YouTube . . . are not considered common carriers." *Id.*; *see also Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1321-22 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) ("A video programming distributor . . . is constitutionally entitled to exercise 'editorial discretion over which stations or programs to include in its repertoire.' As a result, the Government cannot compel video programming distributors to operate like 'dumb pipes' or 'common carriers' that exercise no editorial control.") (citations omitted).[9]

This Court's precedents likewise recognize that government cannot convert private entities that exercise editorial judgments into common carriers. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 379 (1984) (compelled publication unlawful because it would "transform broadcasters into common carriers and would intrude unnecessarily upon the editorial discretion of broadcasters"). This Court recognized that even television broadcasters have protected editorial discretion, *id.*, though broadcasters receive less First Amendment protection than Internet websites. *See Reno*, 521 U.S. at 870.

In all events, even common carriers retain the "right to be free from state

[9] Any effort to treat platforms as common carriers contradicts federal law. Congress specifically protected platforms' rights to exclude speakers and speech in 47 U.S.C. § 230(c), and further disclaimed any intent that they be treated "as common carriers," 47 U.S.C. § 223(e)(6). Congress wanted websites to remove content they "consider[]" objectionable, *id.* § 230(c)(2)(A), without fear of liability—exactly the opposite of requiring them to indifferently carry all users and expression.

regulation that burdens" speech. *PG&E*, 475 U.S. at 17-18 & n.14. So HB20's label as "a common carrier scheme has no real First Amendment consequences," because "impos[ing] a form of common carrier obligation" cannot justify a law that "burdens the constitutionally protected speech rights" of platforms "to expand the speaking opportunities" of others. *Denver*, 518 U.S. at 824-26 (Thomas, J., concurring in the judgment in part and dissenting in part). Similarly, government cannot declare private entities' dissemination of speech as a "public accommodation." *Hurley*, 515 U.S. at 573.[10]

Finally, the First Amendment and 47 U.S.C. § 230 together mutually reinforce protections for all websites' editorial discretion not to disseminate speech generated by others. In the limited circumstances when government can constitutionally punish speech dissemination (*e.g.*, defamation), Congress in § 230 provided that websites cannot be "*treated as* the publisher or speaker" of user-generated speech—and are thus generally protected from legal claims arising from disseminating user-generated speech. 47 U.S.C. § 230(c)(1) (emphasis added). A separate provision of § 230 expressly

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[10] In the District Court (and in a passing citation in the Fifth Circuit), Defendant invoked a certiorari-stage statement by Justice Thomas in *Biden v. Knight First Amendment Inst.*, 141 S. Ct. 1220, 1227 (2021) (vacating for mootness). But *Knight* dealt with whether government officials' Twitter accounts could constitute First Amendment-designated "public forums," so *Knight* "afford[ed] [the Court] no opportunity to confront" this issue. 141 S. Ct. at 1227. Thus, the *Knight* litigants had not presented (1) the fact that labeling a law "a common carrier scheme has no real First Amendment consequences," *Denver*, 518 U.S. at 825 26 (Thomas, J., concurring in the judgment in part and dissenting in part); or (2) *Hurley*'s holding that government cannot declare "speech itself to be the public accommodation," 515 U.S. at 573. Justice Thomas's *Knight* statement similarly acknowledged that the idea that platforms are "public forum[s] . . . has problems." 141 S. Ct. at 1225.

protects the right of websites "to restrict access to or availability of material that the provider or user considers . . . otherwise objectionable." 47 U.S.C. § 230(c)(2)(A). Regardless, no matter how § 230 is interpreted or applied by the courts, no statute can override constitutional rights, as Congress cannot change the substance of a constitutional provision. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

2. HB20 discriminates based on viewpoint, content, and speaker.

HB20 independently triggers strict scrutiny because it discriminates based on viewpoint, content, and speaker. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (content and viewpoint); *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591 (1983) (speaker).

a. On its face, HB20's "social media platform" definition discriminates based on content, speaker, and viewpoint.

First, this definition is content based, because it excludes certain websites based on content—like news, sports, and entertainment. *Supra* p.10; *Reed*, 576 U.S. at 163.

Second, the definition is speaker based, which is "all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Laws "that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns" because such laws present very real "dangers of suppression and manipulation" of the medium. *Turner*, 512 U.S. at 659, 661. This principle applies with special force to entities that disseminate expression. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987). Far from applying "evenhandedly" to "smalltime" and "giant" entities, *Florida. Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989), HB20 singles out a select subset of websites: social media

platforms with over 50-million-monthly U.S. users. HB20 therefore excludes small, favored businesses. This arbitrary user threshold—unsupported by legislative findings and amended without deliberation—can be explained only as viewpoint discrimination against "Big Tech." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (requiring more than "mere speculation or conjecture"); App.77a. Likewise, the Texas Legislature rejected lowering the threshold to include other businesses "popular among conservatives." App.77a.

By discriminating among social media platforms, HB20 raises "serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Nat'l Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018) ("*NIFLA*") (citation omitted). Confirming HB20's viewpoint-based purpose, the "history of [HB20's] passage" demonstrates that HB20's arbitrary user threshold is a proxy for targeting platforms some perceive as disfavoring "conservative" viewpoints. *Id.* at 2379 (Kennedy, J., concurring). The Governor's signing statement and HB20's key legislative proponents expressly stated that HB20 was necessary to stop platforms from "silencing conservatives views." *See supra* pp.9-10.

b. Section 7's editorial-discretion prohibition imposes even more viewpoint-, content-, and speaker-based distinctions. HB20 requires platforms to disseminate viewpoints that platforms do not want to disseminate—while also including, what Defendant admits, is a "carveout that let the Platforms continue to viewpoint-censor in a few limited areas." Defendants' Fifth Cir. Opening Br. at 31 ("Def. Br."). This central prohibition on "viewpoint"-based moderation "applies to particular speech because of

the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163 (collecting cases).

HB20 further excludes editorial discretion over speech that (1) involves threats or incitement directed at a few protected classes; and (2) is flagged by a handful of state-selected organizations. Tex. Civ. Prac. & Rem. Code § 143A.006(a)(2)-(3). Thus, the only way to determine whether an editorial choice is lawful is to review the content at issue. "That is about as content-based as it gets." *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2346 (2020).

3. HB20 fails any level of heightened scrutiny.

HB20 triggers strict scrutiny, and therefore must be "the least restrictive means of achieving a compelling state interest." *Ams. for Prosperity Found. (AFP) v. Bonta*, 141 S. Ct. 2373, 2377 (2021) (citation omitted); *Reed*, 576 U.S. at 163. Even under "intermediate scrutiny," HB20 must be "narrowly tailored to serve a significant government interest." *Packingham*, 137 S. Ct. at 1736; *see AFP*, 141 S. Ct. at 2384 (same, under "exacting scrutiny").[11] Defendant's briefing below did not even attempt to argue that HB20 satisfies strict scrutiny.

[11] HB20 is facially invalid. HB20 unconstitutionally abridges editorial discretion and compels speech—in all circumstances when it would compel platforms to disseminate speech they find objectionable. *City of L.A. v. Patel*, 576 U.S. 409, 418 (2015). Similarly, *Tornillo* facially invalidated a law compelling speech. 418 U.S. at 250-51. And *NIFLA* facially invalidated a law compelling disclosures. 138 S. Ct. 2378. Here, too, Texas lacks a sufficient governmental interest for HB20, and HB20 is not properly tailored—so the law is facially invalid in all applications. Regardless, HB20 is facially invalid under the overbreadth doctrine as well, and overbroad statutes cannot be saved through severability. *AFP*, 141 S. Ct. at 2387; *Reno*, 521 U.S. at 884-85 n.49.

a. Defendant lacks a sufficient governmental interest.

HB20 does not serve compelling governmental interest. In the court of appeals, Defendant asserted a single governmental interest: "protecting the free exchange of ideas and information." Def. Br. at 30. But government cannot regulate private speech "to enhance the relative voice of others," *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam), or to "level the playing field." *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 749-50 (2011). If Defendant were correct that government has an interest in maximizing the flow of information and enhancing others' speech, then various governments throughout the country could each compel all sorts of speech dissemination.

But this Court has repeatedly rejected attempts to correct perceived imbalances in speech. *Tornillo* brushed aside many of the same interests that Defendant offers here. This Court held that government cannot mandate "enforced access," to "enhance[]" speech, promote "fairness," prevent "abuses of bias and manipulative reportage," address purported "vast accumulations of unreviewable power in the modern media empires," or address the contention that "the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues." 418 U.S. at 245, 250-51, 255. *Tornillo* established that even a "noncompetitive and enormously powerful" company with a "monopoly" on the "marketplace of ideas" retains First Amendment protections. *Id.* at 249, 250-51.

Tellingly, Defendant's stay motion below invoked *Red Lion*'s approval of the "fairness doctrine," App.448a—which required that "each side of [public] issues must be given fair coverage." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969). *Red Lion*

was properly cabined to the "unique physical limitations of the broadcast medium." *Turner*, 512 U.S. at 637. Plus, Members of this Court have since questioned *Red Lion*'s "deep intrusion" into "First Amendment rights." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 531 (2009) (Thomas, J., concurring) (*Red Lion* especially unjustified today given technological change and widespread Internet access); *Denver*, 518 U.S. 727, 813-14 (1996) (Thomas, J., concurring in part) ("First Amendment distinctions between media" are "dubious").

b. HB20 is not properly tailored.

HB20 is neither narrowly tailored nor the "least restrictive" means of furthering any governmental interest. *AFP*, 141 S. Ct. at 2383.

HB20's 50-million-monthly-U.S.-user threshold does not further Defendant's purported interest in the "free exchange of ideas and information." If that were actually the State's purpose, HB20's mandate would need to apply to *all* online services that disseminate user expression. There is no evidence in the legislative record supporting a legitimate reason for HB20's arbitrary 50-million-monthly-user threshold, while the cutoff is perfectly explained by viewpoint-based retaliation against so-called "Big Tech."

HB20's lack of tailoring extends to the speech HB20 purports to protect. HB20 includes multiple content- and viewpoint-based exceptions, meaning that HB20 does not further the "free exchange" of *all* information, but only state-approved ideas. Defendant concedes that HB20 permits "removal of entire categories of 'content.'" Def. Br. at 11. Likewise, as addressed above (at p.12), HB20 allows viewpoint-based moderation on government-disfavored topics, underscoring that HB20 picks and chooses

what information is worthy of "free exchange."

Furthermore, HB20 "burden[s] substantially more speech than is necessary to further" the State's interest because HB20 broadly limits the full scope of platforms' editorial tools—and does not merely impose a "hosting" requirement. *Turner*, 512 U.S. at 662 (citation omitted). For instance, Defendant cannot justify why platforms with an objection to pro-Nazi expression must both permit pro-Nazi expression *and* recommend and monetize such expression on equal terms as non-objectionable expression.

B. HB20 Section 2's burdensome operational and disclosure requirements violate the First Amendment.

1. HB20 Section 2's requirements are content-, speaker-, and viewpoint-based because they rely on the same "social media platform" definition as Section 7. *Supra* pp.10-11. Accordingly, Section 2 is subject to strict scrutiny on this independent basis. *NIFLA*, 138 S. Ct. at 2374 (collecting cases); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000) ("content-based burdens must satisfy the same rigorous scrutiny as . . . content-based bans"); *Sorrell*, 564 U.S. at 565-66.[12] Section 2 cannot survive strict scrutiny because (1) Defendant's purported interest in enacting HB20 is constitutionally illegitimate (*supra* pp.32-33); and (2) Defendant's interest also lacks any substantial connection to the broad disclosure requirements imposed by HB20.

[12] At minimum, "exacting scrutiny"—used for campaign-finance disclosures—should apply. *AFP v. Bonta*, 141 S. Ct. 2373, 2383 (2021). HB20 fails exacting scrutiny because it does not further sufficient governmental *Buckley*, 424 U.S. at 66.

Section 2 also unconstitutionally infringes platforms' protected editorial control by burdening and chilling the exercise of editorial discretion. *Herbert v. Lando*, 441 U.S. 153, 174 (1979) (First Amendment prohibits any "law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest"). HB20's mandates are like requiring select bookstores, cable operators, or art galleries to publicly declare their editorial processes, disclose which speech they choose not to disseminate, and provide a grievance procedure for those whose speech they decline to disseminate. This is unconstitutional.[13]

2. *Zauderer*'s test for compelled speech—which applies only to "commercial advertising" subject to lower scrutiny—does not apply. *NIFLA*, 138 S. Ct. at 2372 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)); *see Hurley*, 515 U.S. at 573 (*Zauderer* involved "commercial advertising"). Likewise, the commercial-speech doctrine does not apply because HB20 does not regulate "the proposal of a commercial transaction," which is "*the test* for identifying

[13] The Fourth Circuit held that Maryland's similar disclosure requirements on "online platforms" "intru[des] into the function of editors" and unconstitutionally compelled speech under "exacting scrutiny." *Washington Post v. McManus*, 944 F.3d 506, 518-20 (4th Cir. 2019). Maryland imposed two requirements: (1) "post certain information about the political ads" "within 48 hours of an ad being purchased"; and (2) maintain records of political ad purchasers for inspection. *Id.* at 511-12. Neither requirement included broad data-collection mandates or the publication of editorial policies, as HB20 does. Yet they were still held impermissible because "[i]t is the presence of compulsion from the state itself that compromises the First Amendment." *Id.* at 515. The Fourth Circuit further noted that "[w]ithout clear limits, the specter of a broad inspection authority, coupled with an expanded disclosure obligation, can chill speech and is a form of state power the Supreme Court would not countenance." *Id.* at 519.

commercial speech." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (cleaned up). Even if HB20 regulated some amount of commercial speech, the law is fatally overbroad—as platforms disseminate plenty of viewpoints having nothing to do with proposing a commercial transaction. Moreover, platforms' removal of objectionable content to foster, maintain, and protect their online communities and improve their services does not constitute "commercial speech."

At any rate, Section 2 fails even the commercial-speech or *Zauderer* doctrines, as the District Court correctly concluded. App.26a-27a. Generally, HB20's provisions compel speech (1) beyond "purely factual and uncontroversial information about the terms under which . . . services will be available," and (2) they are "unjustified or unduly burdensome." *NIFLA*, 138 S. Ct. at 2372 (cleaned up). HB20 does not regulate "the terms under which . . . services will be available." *Id.* And HB20 imposes procedures, requires voluminous data collection, and compels speech describing each exercise of editorial discretion for billions of pieces of content. This far exceeds the few lines of text that *NIFLA* concluded "drown[ed] out" speech in that case. *Id.* at 2378.

First, HB20's notice-complaint-and-appeal provisions are extremely burdensome as they require platforms to develop procedures applicable to *billions* of editorial judgments across platforms' international operations. Specifically, HB20 requires (1) a complaint system requiring some responses within 48 hours; (2) notice *each time* platforms remove *any* content, with an explanation of "the reason the content was removed"; and (3) an appeal process for content removal requiring decisions within 14 days. Tex. Bus. & Com. Code §§ 120.101-104. The District Court noted the vast amounts of editorial judgments to which these requirements would apply, App.26a:

In just a single three-month period in 2021, YouTube removed 9.5 million videos and *1.16 billion comments*. App.166a. Over a similar period, Facebook removed over 40 million pieces of bullying, harassing, and hateful content. App.26a. And YouTube currently provides appeals for video deletions but not comment deletions; so "YouTube would have to expand these systems' capacity by over 100X—from a volume handling millions of removals to that of over a billion removals." App.166a. Moreover, both Facebook and YouTube's declarants noted that their current notice systems did not provide the level of detail that HB20 requires. App.307a, 339a.

Second, HB20's required "public disclosures" into "content management, data management, and business practices" and its non-exhaustive list intrusively encompasses *everything* platforms do. Tex. Bus. & Com. Code § 120.051. HB20 requires these disclosures to "be sufficient to enable users to make an informed choice," but does not define this standard. *Id.* § 120.051(b). Defendant may sue because a platform's disclosure on enumerated topics is "insufficient" *and* because a platform did not provide *un*enumerated information. Unrebutted evidence demonstrates that these disclosure requirements will enable wrongdoers and "unscrupulous users" to evade detection and harm users. App.167a, 380a. And these disclosures—particularly with respect to "algorithms"—also reveal trade secrets and other competitively sensitive information. Tex. Bus. & Com. Code § 120.051(a)(4); App.167a, 179a-180a.

Third, the "acceptable use policy" that "reasonably inform[s]" and details all "steps" to enforce platform policies (Tex. Bus. & Com. Code § 120.052) is impermissible because editorial policies are not "factual and uncontroversial information." *NIFLA*, 138 S. Ct. at 2372. That said, Applicants believe their members covered by

HB20 are already complying with this provision. But Defendant apparently does not: Defendant, throughout this litigation, has refused to take a position on whether platforms are already in compliance, and Defendant has refused to disavow enforcement. This provision is an invitation for lawsuits into platforms' editorial judgments and will make Defendant the ultimate arbiter of how platforms should apply their policies.

Finally, the "biannual transparency report" requires platforms to collect voluminous detail, far exceeding platforms' current transparency efforts. Tex. Bus. & Com. Code § 120.053. For example, this provision requires a "*description of each* tool, practice, action, or technique used in enforcing the acceptable use policy"—all while platforms exercise editorial discretion over billions of pieces of content. *Id.* § 120.053(a)(7) (emphasis added). And even the provisions that appear to call just for statistics require voluminous data *collection* and *calculation*. For example, HB20 requires platforms to track every single "action" they take to, among other things, delete or "deprioritiz[e]" "illegal" or "potentially policy-violating" expression. *Id.* § 120.053(a)(1)-(2), (4)-(6), (b). And it requires platforms to track even more information about that content and how it was reported. *Id.* § 120.053(a)(3), (b). Even if complying with these provisions were feasible, they would still result in significant intrusion.

But these requirements are not feasible given the platforms' current capacities and configurations. As explained above (at pp.6-7), platforms make prioritization decisions about *every* piece of content, and thus take "action" countless times a day. App.180a ("deprioritization" "happens every time a user loads her or his News Feed"). As Facebook's declarant testified, "[t]hat prioritization does happen per individual

per piece of content. I don't even know or understand the math that you would need to go through to be able to calculate that." App.366a. Platforms track *some* of the information that HB20 requires, but they do so at enormous time and expense that HB20 would exponentially magnify.

IV. Applicants will suffer substantial irreparable harms without a vacatur, and the equities favor a vacatur, which will maintain the status quo.

Applicants satisfy all the equitable factors governing vacaturs and stays. *First*, the Fifth Circuit's stay will "substantially injure" Applicants and their members. *Nken*, 556 U.S. at 434. "There can be no question that the challenged restrictions, if enforced, will cause irreparable harm. 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)).

In addition to these First Amendment violations (which are alone enough to warrant reversal of the Fifth Circuit panel majority's extraordinary order), HB20 will require platforms to incur massive nonrecoverable financial injuries in efforts to attempt compliance with the law's mandates and to change platforms' worldwide operations. *E.g.*, *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam); *Chamber of Commerce v. EPA*, 577 U.S. 1127, 1127 (2016); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992). As the District Court concluded, compliance with HB20 will be incredibly burdensome. App.34a.

HB20 (1) will require platforms to transform their operations; (2) prohibits platforms from using tools that "make their platforms safe, useful, and enjoyable for

users"; and (3) will result in lost users and revenue. *Id.* As Facebook's declarant testified, even if given 10 years, "I think that we would not be able to comply in a meaningful way with these issues without undoing the whole way that we do business." App.365a. *accord* App.364a ("it would be such an undoing of the way that we moderate content, the way these systems have been built, the investments that have been made, whether it's a true impossibility or a practical impossibility, I'm pretty confident it's a practical impossibility."). The declarant estimated that, because Facebook "spent billions of dollars" on developing its editorial discretion tools since 2016, Facebook would need to "invest nearly as much to be able to comply with all that would undo our systems in such a fundamental way." App.350a.

Furthermore, platforms would lose millions of dollars in revenue. Instead of platforms engaging in editorial discretion, platforms will become havens of the vilest expression imaginable: pro-Nazi speech, hostile foreign government propaganda, pro-terrorist-organization speech, and countless more examples. This is not hypothetical: YouTube in 2017 "lost millions of dollars in advertising revenue after a number of major corporations . . . took down their ads after seeing them distributed next to videos containing extremist content and hate speech," and Facebook in 2020 "saw a nearly identical response as some of the largest businesses in the world . . . all pulled their ads and boycotted Facebook citing concerns of third parties' use of the website to spread hate speech and misinformation." App.139a-140a; *see* App.168a, 325a-27a, 359a. Furthermore, HB20 will require platforms to disclose non-public, competitively sensitive information (particularly about their algorithms). *E.g.*, App.63a, 154a-56a; 179a-80a.

Second, the irreparable harm to Applicants' members by permitting HB20's enforcement far outweighs any harm to the Defendant from an injunction. *Nken*, 556 U.S. at 434. Texas lacks a sufficient interest for HB20 (*see supra* pp.32-33), so the State will not be harmed if this unconstitutional law is enjoined.

Finally, allowing Applicants' members to exercise their First Amendment rights as they have for years is in the public interest. *Elrod*, 427 U.S. at 373; *Nken*, 556 U.S. at 434. The platforms' continued editorial control over their own websites will benefit users and the public more broadly. App.35a. And continued editorial control reflects Congress's judgment that platforms (like all other websites) should have "[p]rotection for private blocking and screening of offensive material." 47 U.S.C. § 230. Vacating the Fifth Circuit's stay will ensure an Internet "with a minimum of government regulation"—as both Congress and the Constitution demand. *Id.* § 230(a)(4). Moreover, as addressed above at pp.2-3, 14-17, the public-interest factor weighs heavily in favor of preserving the status quo while both the Fifth and Eleventh Circuits consider Applicants' First Amendment claims in the normal course.

Though Defendant contends that HB20's violations of platforms' rights will further the public interest, that argument inverts the First Amendment's protections. The First Amendment is not a sword the government may wield against disfavored speakers. It is a shield that private entities may use to protect against government-compelled speech. HB20 targets disfavored private entities for making editorial choices. A country permitting such a law is the real "discriminatory dystopia" that Defendant accuses private companies of promoting. Def. Br. at 4. Allowing such a gross invasion here will only facilitate further government control of private speech.

That, assuredly, is not in the public interest. Accordingly, all the factors justify granting the Application and maintaining the status quo.

CONCLUSION

This Court should immediately grant Applicants temporary administrative relief from the Fifth Circuit's stay pending consideration of this Application, and the Court should vacate the Fifth Circuit's stay of the District Court's preliminary injunction and leave that injunction in force pending both the Fifth Circuit's issuance of a decision on the merits and the opportunity to seek timely review of that decision from this Court on a petition for writ of certiorari.

Dated: May 13, 2022

Respectfully submitted,
/s/ Scott A. Keller

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No. _____

In the Supreme Court of the United States

NETCHOICE, LLC D/B/A NETCHOICE; AND
COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION D/B/A CCIA
Applicants,

V.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,
Respondent.

TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT
ON APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION
ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CRCUIT

APPENDIX TO EMERGENCY APPLICATION FOR IMMEDIATE ADMINISTRATIVE RELIEF AND TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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* The highlighting in these depositions was placed in the documents by Defendants.