No. 21A720

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,

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

BRIEF OF PROFESSOR ERIC GOLDMAN AS *AMICUS CURIAE* IN SUPPORT OF APPLICANTS' EMERGENCY APPLICATION

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

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INTEREST OF AMICUS CURIAE

Amicus Professor Eric Goldman is Associate Dean for Research, Professor of Law, co-director of the High Tech Law Institute, and supervisor of the Privacy Law Certificate at Santa Clara University School of Law in California. His research and teaching focuses on Internet Law, especially user-generated content, and he has published dozens of papers on this topic in the past quarter-century. He first started practicing Internet Law in 1994 and has taught an Internet Law course since 1996. He is an elected member of the American Law Institute.

Professor Goldman submits this brief to explain why, based on his nearly 30 years of research into online speech, Texas House Bill 20's ("HB 20") transparency requirements pose significant risks to user-generated content and free speech online.

INTRODUCTION

Although HB 20's transparency requirements may superficially appear less obviously unconstitutional compared to other parts of HB 20, this brief explains why the "transparency" provisions of HB 20, standing alone, violate the First Amendment and must be enjoined alongside the bill's other provisions.

Legislatures do not require traditional publishers, such as newspapers or book publishers, to disclose details about their editorial operations and decisions. For example, no laws require book publishers to explain to prospective authors why they rejected certain manuscripts or newspapers to

disclose statistics about how many letters to the editor and op-eds they received and chose not to publish. Indeed, any such legislative mandates would undoubtedly violate the First Amendment's protections of speech and press freedoms.

Yet, Texas enacted a "social media censorship" law called HB 20, with the completely unprecedented requirement that online publishers[1] make disclosures about their editorial operations and policies that no offline publishers have been required to make—or could be required to make.[2] These disclosures are qualitatively different from other types of constitutionally permissible commercial disclosure requirements because they will affect online publishers' editorial decisions. These mandates also carry discovery implications that will further distort online publishers' editorial decisions by entangling the government into every aspect of the publishers' editorial operations. Such inevitable distortions of publishers' editorial decisions and operations are intolerable under the First Amendment.

For that reason, this Court should grant the emergency application for

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[1] The law applies to "social media platforms" that meet specified criteria, but the essential statutory requirement of the regulated entities is that they gather, organize, and disseminate third-party content. In other words, they function as publishers of third-party content online. The brief refers to the regulated entities as publishers, rather than "social media platforms," to ensure this essential point is not lost.

[2] In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court held that precedent provided "no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet." *Id.* at 870. As a result, the First Amendment applies to online and offline publishers equally.

administrative relief and vacate the Fifth Circuit's stay of the district court's preliminary injunction.

BACKGROUND

HB 20 compels online publishers to make three types of disclosures: (1) editorial policies, (2) explanations of editorial decisions, and (3) statistics about editorial decisions.

Editorial Policies. HB 20 requires publishers to publish "acceptable use policies," i.e., to codify and disclose all of their editorial policies. Tex. Bus. & Com. Code § 120.052. HB 20 also requires that publishers "publicly disclose accurate information regarding [their] content management, data management, and business practices." *Id.* § 120.051(a). This requirement demands "specific information regarding the manner in which the social media platform":

> (1) curates and targets content to users;
> (2) places and promotes content, services, and products, including its own content, services, and products;
> (3) moderates content;
> (4) uses search, ranking, or other algorithms or procedures that determine results on the platform; and
> (5) provides users' performance data on the use of the platform and its products and services.

Id. § 120.051(a)(1)-(5). The law requires that these disclosures "be sufficient to enable users to make an informed choice regarding the purchase of or use of access to or services from the platform," *id.* § 120.051(b), though it is unclear what disclosures will satisfy this requirement.

Explanations. The law requires publishers to explain their decisions to users affected by their editorial policies. *Id.* § 120.103(a)(1). Publishers must notify any user whose content is removed due to its editorial decision and "explain the reason the content was removed." *Id.* If the publisher reverses its decision to remove a user's content after the user's appeal, it must further explain the reversal. *Id.* § 120.103(a)(3).

Statistics. HB 20 mandates that publishers release biannual reports containing an extensive list of statistics, such as the total number of instances when the publisher was alerted to and took action against illegal content. *Id.* § 120.053.

ARGUMENT

I. HB 20's mandatory editorial transparency requirements violate the First Amendment

This Court helpfully analyzed the constitutionality of mandatory editorial disclosures in *Herbert v. Lando*, 441 U.S. 153 (1979). There, the plaintiff, a public figure, sued a television show for defamation, and the defendants responded that they did not act with actual malice. *Id.* at 156. To assess the actual malice defense, the plaintiff propounded discovery requests seeking details about the show's decision to publish the alleged defamation. *Id.* at 157. The defendants declined to answer. *Id.*

The Court ordered the requested discovery, with numerous caveats. First, the plaintiff's discovery request arose in the context of a defamation litigation, so it was appropriate to investigate the defendant's scienter about

the alleged falsity. The Court cautioned, however, that "if inquiry into editorial conclusions threatens the suppression . . . of truthful information, the issue would be quite different." *Id.* at 172. Second, because only a small fraction of a publisher's editorial decisions trigger defamation lawsuits, the Court said that discovery into editorial decisions should be rare, not commonplace—i.e., "in the tiny percentage of instances in which error is claimed and litigation ensues." *Id.* at 174. Third, the discovery disclosures would be supervised by judges who would be required to "firmly appl[y]" the Federal Rules of Civil Procedure's relevancy requirements. *Id.* at 177. Fourth, the Court emphasized that "[t]here is no 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; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed." *Id.* at 174.

In contrast to discovery into a defamation defendant's state of mind, HB 20's disclosure requirements are exactly the kind of mandatory disclosures that the *Herbert* court said would be unconstitutional. Unlike in *Herbert*, HB 20 does not apply only to the "tiny percentage" of cases where defendants are accused of making tortious false statements. Instead, HB 20 requires explanations of potentially hundreds of millions, if not billions, of editorial decisions—each day—including decisions where the publisher violated no law and committed no tort. Furthermore, unlike the kind of tailored disclosures contemplated by the Federal Rules of Civil Procedure, HB 20's disclosure

requirements are categorical, broad-based, and burdensome—requiring disclosures ranging from an Internet service's editorial policies to proprietary statistics on editorial decisions. And no judge supervises the need for specific disclosures or their relevancy to any legal dispute.

In sum, HB 20 requires disclosures about core editorial activities without any showing of a prima facie case of a legal violation, without any plaintiffs justifying their need for discovery, and without any judicial oversight of the disclosure's necessity or appropriateness. While Texas justifies HB 20's onerous invasion into editorial decision-making on the ground that "social media platforms . . . are affected with a public interest," 2021 Tex. Sess. Law Serv. 2d Called Sess. Ch. 3, § 1(3) (West), that justification highlights that, in contrast to *Herbert*'s provisions, Texas is mandating the disclosures "to satisfy curiosity or to serve some general end such as the public interest." *Herbert*, 441 U.S. at 174. That is exactly what this Court concluded the First Amendment did not permit.

II. HB 20's editorial transparency requirements are not like disclosure requirements in other commercial contexts

Although HB 20 may look on its face like a standard commercial disclosure law that can be found throughout our economy, the law is quite different in ways that undermine its constitutionality. Standard commercial disclosure laws regulate the provision of goods and services, while HB 20 regulates the provision of speech. If a general disclosure law prompts a company to change its commercial offerings, the product or service changes do

not change constitutionally protected speech. For example, if a food-labeling law causes a manufacturer to modify the amount of saturated fat in its product, that product change does not infringe on the manufacturer's freedom of speech. In contrast, if a mandatory editorial transparency law causes a publisher to change its publication decisions, then the law implicates the publisher's freedom of speech and press. As discussed in the next part, HB 20 will undoubtedly cause online publishers to change their speech decisions.

Standard commercial disclosure laws are also distinguishable in that government regulators can investigate the accuracy of the disclosures without reviewing any editorial decisions. For example, regulators can validate the accuracy of a publisher's securities filing without investigating the publisher's editorial decision-making process. *See S.E.C. v. McGoff*, 647 F.2d 185, 190 (D.C. Cir. 1981) (government subpoena could not reach materials related to "editorial policy"). In contrast, the government can confirm the accuracy of HB 20's mandatory editorial disclosures only by actually investigating the publishers' editorial decisions (to see if they were accurately reported or described).

Finally, editorial transparency economically distorts publishers' editorial decisions. As the Fourth Circuit explained in striking down a Maryland campaign finance disclosure law regulating online publishers, "platform-based campaign finance regulations . . . make it financially irrational . . . for platforms to carry political speech when other, more profitable options

are available." *Washington Post v. McManus*, 944 F.3d 506, 516 (4th Cir. 2019). Thus, campaign finance disclosures may permissibly regulate the first-party speakers (the donors or recipients)—but extending those disclosure requirements to publishers of third-party content creates a financial deterrent to publishing the content at all.

In addition, "platform-based campaign finance regulations create freestanding legal liabilities and compliance burdens that independently deter hosting political speech." *Id.* As the Fourth Circuit observed, compliance with just the simplest portion of Maryland's campaign finance disclosure law would force publishers "to acquire new software for data collection; publish additional web pages; and disclose proprietary pricing models." *Id.* The court concluded: "Faced with this headache, there is good reason to suspect many platforms would simply conclude: Why bother?" *Id.* When governments impose mandatory disclosures on publishers of third-party content, it impermissibly inhibits the publishers' willingness to publish that third-party speech.

III. HB 20's disclosure requirements are impermissibly invasive

Though not explicit in HB 20's text, the law's mandatory transparency requirements implicitly require publishers to make their records available to government investigators and plaintiffs so that the disclosures' accuracy may be confirmed. This inspection process further distorts publishers' editorial decisions. Granting an inspection right to regulators "brings the state into an unhealthy entanglement with news outlets" because this inspection right

"lacks any readily discernable limits on the ability of government to supervise the operations of the newsroom." *Id.* at 518-19. And "[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.

What are those "unhealthy entanglements"? Government inspection puts the government in the role of second-guessing every publisher decision. Knowing this is coming, publishers make their editorial decisions to reduce the risk of costly, disruptive, and legally risky investigations or enforcement actions. In other words, rather than making the decisions it considers the best for its audience, the publisher makes editorial decisions to please regulators and keep them at bay. This substitution of editorial judgment, from the publisher's judgment to the regulator, is exactly what the First Amendment prohibits.

In *Herbert*, this Court tolerated the risk of judicial intrusion into editorial decisions only because it would lead to less publication of unconstitutional content such as defamatory material. By contrast, HB 20's categorical and indiscriminate disclosure obligations reach the editorial decision-making processes for constitutionally protected content, not just unprotected content—an impermissible outcome under *Herbert*.

CONCLUSION

HB 20's mandatory editorial transparency requirements constitute an unprecedented effort to censor publishers that the First Amendment does not permit at this (or any) stage of the dispute. This Court should grant the emergency application for administrative relief and vacate the Fifth Circuit's stay of the district court's preliminary injunction.

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Respectfully Submitted,

/s/ Tod Cohen

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