No. 21A720

In the Supreme Court of the United States

NETCHOICE, L.L.C., A 501(C)(6) DISTRICT OF COLUMBIA ORGANIZATION DOING BUSINESS AS NETCHOICE; COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, A 501(C) (6) NON-STOCK VIRGINIA CORPORATION DOING BUSINESS AS CCIA,
Applicants,

v.

KEN PAXTON, in his official capacity as Attorney General of Texas,
Respondent.

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF ON 8 ½ BY 11 INCH PAPER IN SUPPORT OF RESPONDENT BY THE STATE OF FLORIDA AND 11 OTHER STATES

On Emergency Application to Vacate Stay of Preliminary Injunction Issued by the United States Court of Appeals for the Fifth Circuit

ASHLEY MOODY
Attorney General

HENRY C. WHITAKER
Solicitor General
Counsel of Record
DANIEL W. BELL
Chief Deputy Solicitor General
EVAN EZRAY
Deputy Solicitor General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
henry.whitaker@myfloridalegal.com

Counsel for the State of Florida

Given the expedited briefing schedule, amici could not provide 10 days' notice of their intent to file. Amici nonetheless sought and received the consent of both parties to submit this amicus brief. The State of Florida and 11 other States therefore respectfully move for leave to file a brief of amici curiae in support of Respondent's Opposition to the Application to Vacate the Stay Pending Appeal without 10 days' notice to the parties. Amici also respectfully move for leave of Court to file this brief on 8 1/2 by 11 inch paper rather than in booklet form.

Applicants ask the Court to reinstate a sweeping injunction against the operation of Texas's law, which fosters the free flow of information and ideas on the internet. In doing so, Applicants repeatedly invoke their parallel, equally broad constitutional challenge to Florida's social media law. Amici states have a strong interest in defending the regulatory authority of sovereign states in this area. Indeed, many states have enacted, or are considering, laws that resemble Texas's and Florida's laws, and believe that the Fifth Circuit was correct to stay the district court's injunction pending appeal.

In light of the expedited schedule, amici request the Court grant this motion and accept the paper filing.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ *Henry C. Whitaker*
HENRY C. WHITAKER
Solicitor General
Counsel of Record

DANIEL W. BELL
Chief Deputy Solicitor General
EVAN EZRAY
Deputy Solicitor General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
henry.whitaker@myfloridalegal.com
Counsel for the State of Florida

No. 21A720

In the Supreme Court of the United States

NETCHOICE, L.L.C., A 501(C)(6) DISTRICT OF COLUMBIA ORGANIZATION DOING BUSINESS AS NETCHOICE; COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, A 501(C) (6) NON-STOCK VIRGINIA CORPORATION DOING BUSINESS AS CCIA,
Applicants,

v.

KEN PAXTON, in his official capacity as Attorney General of Texas,
Respondent.

AMICUS BRIEF OF THE STATE OF FLORIDA AND 11 OTHER STATES IN SUPPORT OF RESPONDENT

On Emergency Application to Vacate Stay of Preliminary Injunction Issued by the United States Court of Appeals for the Fifth Circuit

ASHLEY MOODY
Attorney General

HENRY C. WHITAKER
Solicitor General
Counsel of Record
DANIEL W. BELL
Chief Deputy Solicitor General
EVAN EZRAY
Deputy Solicitor General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
henry.whitaker@myfloridalegal.com

Counsel for the State of Florida

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Constitutional Provisions & Statutes

Regulations

Other Authorities

INTERESTS OF AMICI CURIAE

Our constitutional structure is premised on the free flow of ideas, which the First Amendment shields from government censorship. Because the government is not the only threat to the free flow of ideas, the federal government and the states have long demanded that certain "communications enterprises" provide equal rights of access to all comers. *Cellco P'ship v. FCC*, 700 F.3d 534, 545 (D.C. Cir. 2012). Those demands drove measures to preclude purveyors of new technology, like the telegraph, telephone, and cable television, among others, from arrogating to themselves the power to "decide what" messages "millions" of people may communicate and consume, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring in part, dissenting in part).

Social media platforms—Twitter, Facebook, and others—are thus a familiar danger, but one altogether different in magnitude than what we have faced in those traditional mediums. Never far from the palm of any citizen, social media use by average Americans reportedly exceeded 1,300 hours per year, or 3.5 hours per day in 2021. *See* Peter Suciu, *Americans Spent On Average More Than 1,300 Hours On Social Media Last Year* (June 24, 2021), https://tinyurl.com/2p8za3x7. These platforms have supplanted (and far surpassed) the telephone for interpersonal communication, traditional television for news consumption, and the 24-hour cable news cycle in the potential to swing an election. They are, as this Court has recognized, "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

The platforms' recent, unfortunate history of "unfairly censor[ing]" users is

fundamentally inconsistent with that status. An Act Relating to Social Media Platforms, Ch. 2021-32 (S.B. 7072) § 1(9) (Fla. 2021). While censorship by smaller outfits might have little impact, the "concentration" of power and attendant "network effects" enjoyed by behemoths like Twitter and Facebook gives them "enormous control over speech." *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring). And the states have a strong interest in seeing that it is not abused.

Pertinent here, Texas's HB 20 requires that social media companies (defined to be those with over 50 million monthly users, Tex. Bus. & Com. Code § 120.002) disclose facts about their content moderation. Tex. Bus. & Com. Code §§ 120.051–53. It also prohibits social media platforms from censoring based on viewpoint or location. Tex. Civ. Prac. & Rem. Code § 143A.002.

Texas is not alone. Florida's S.B. 7072 (2021) requires covered platforms to "publish the standards . . . used for determining how to censor, deplatform, and shadow ban." Fla. Stat. § 501.2041(2)(a). Platforms must notify users when censoring, deplatforming, or shadow banning users or their posts, *id.* § 501.2041(2)(d)(1). Related to all this disclosure, the Florida statute requires that platforms apply their own content moderation rules "in a consistent manner among [their] users." *Id.* § 501.2041(2)(b). And finally, for certain users likely to have uniquely important contributions to the public square—qualified political candidates and journalistic enterprises—the Florida statute requires platforms to host certain speech. *Id.* §§ 106.072(2); 501.2041(1)(d), (2)(j).

Many states are considering similar legislation. *See, e.g.*, Jake Zuckerman, *Committee passes bill to block social media from "censoring" users* (May 9, 2022) (describing a proposed law in Ohio), https://tinyurl.com/2p89fjdx; Jeff Amy, *Georgia Senate Panel Advances Ban on Social Media Censorship* (Feb. 15, 2022), https://tinyurl.com/2p8whx2m; Agenda, *Business & Labor Interim Comm.*, 2021 Leg. (Utah Sept. 15, 2021), https://tinyurl.com/3zavhy9m; *Hearing*, *H. Comm. on Sci. & Tech.*, 2021 Leg. (Ga. May 20, 2021), https://tinyurl.com/muxjpyyn; *Social Media Censorship Complaint Form*, Ala. Att'y Gen. Office, https://tinyurl.com/nb8rpz3j; *Social Media Complaint Form*, Att'y Gen., La. Dep't of Justice, https://tinyurl.com/338meu8h. By one count, "[a]t least 30 state legislatures have introduced some form of a content-moderation bill in this [past] legislative session." Jennifer Huddleston & Liam Fulling, *Examining State Tech Policy Actions in 2021*, Am. Action Forum (July 21, 2021), https://tinyurl.com/2vhftt42. And more states are expected to consider such legislation in the 2022 term. *See* Margaret Harding McGill & Ashley Gold, *The state tech policy battles that will rage in 2022*, Axios (Jan. 4, 2022), https://tinyurl.com/2p9xuzk4.

Although these state efforts vary considerably, Applicants want to stop them all in their tracks—in the crucible of the emergency docket no less. Indeed, although Texas and Florida passed different social media laws, Applicants lump them together as categorically improper—though rejecting Applicants' facial challenge would not prevent as-applied ones addressing their multifarious complaints. Applicants' effort to wall off social media from essentially any form of meaningful regulation is wrong:

Wrong on the merits, wrong on the equities, wrong in seeking a sweeping result in this emergency posture, and wrong in "den[ying]" states "the right" "to experimentation in things social and economic." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The Court should deny Applicants' request to hamstring the authority of states to prevent online censorship and to foster the free flow of information and ideas on the internet.

REASONS FOR DENYING THE APPLICATION

Applicants (at 14–17) scold the Fifth Circuit for supposedly departing from the "ordinary appellate process." Here is what happened. In the Fifth Circuit, Texas moved to stay the district court's injunction pending appeal. That motion was fully briefed, and a motions panel determined it should be decided by a merits panel. The merits panel received full merits briefing and oral argument. Following oral argument, but before issuing a merits decision, the panel granted a stay. Applicants fault the Fifth Circuit for promptly vacating the district court's preliminary injunction with reasoning to follow. Curiously, though, Applicants now ask this Court to vacate that stay immediately, without full briefing and argument.

The Court should not do so. HB 20 does not violate Applicants' First Amendment rights, and in any event, Applicants have not demonstrated serious or irreparable harm.

I. APPLICANTS HAVE NOT DEMONSTRATED ANY LIKELIHOOD OF SUCCESS ON THE MERITS.

A. HB 20's hosting rules are not impermissible simply because they interfere with "editorial" judgments.

HB 20 requires social media platforms to host on equal terms the speech they have invited onto their platforms—and from which they reap billions of dollars in profits. Applicants (at 23) treat HB 20 as if it required the platforms to speak in certain ways. But that is the wrong analysis: there is a fundamental difference between a requirement that a speaker voice the government's message and a requirement that a speaker host another's speech. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931 n.2 (2019) (noting the distinction). The former may be constitutionally suspect, but the latter is "often . . . perfectly legitimate." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2098 (2020) (Breyer, J., dissenting).

When it comes to hosting, this Court has left plenty of room for states to regulate. For example, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court held that the First Amendment was no obstacle to a California mandate that the owner of a shopping center allow Applicants to collect signatures and distribute handbills on shopping center property—even if the shopping center had a policy against such expressive activity. *Id.* at 86–88. Likewise, in *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47 (2006), this Court held that law schools had no First Amendment right to flout Congress's mandate in the Solomon Amendment that schools "afford equal access to military recruiters." *Id.* at 60–68. Chief Justice Roberts explained for a unanimous court that "[a]s a general matter, the Solomon Amendment regulates

conduct, not speech. It affects what law schools must do—afford equal access to military recruiters—not what they may or may not say." *Id.* at 60.

All that makes sense: If the First Amendment prohibited mandatory hosting rules, then telephone companies could refuse to connect calls based on the viewpoint of the caller; internet providers could shut off access to people they dislike; and delivery drivers could decline to deliver content with which they disagree.

HB 20 is a limited hosting rule. Under HB 20, social media companies need not host all their users' speech. They can remove speech that (a) federal law specifically requires to be removed; (b) concerns sexual exploitation of children, or harassment of sexual abuse survivors; (c) incites criminal activity or violence in various ways; or (d) is otherwise unlawful. Tex. Civ. Prac. & Rem. Code § 143A.006. They can also adopt their own content-moderation standards that limit the types of speech they are willing to host. They cannot, however, censor speech based on viewpoint or location. *Id.* § 143A.002.

In that way, HB 20 mirrors the law this Court upheld in *FAIR*. Like the Solomon Amendment, HB 20 requires the platforms to host speech even if the platform disagrees with the viewpoint the speech expresses. That was the dispute in *FAIR*. The law schools did not want to host the military because they disagreed with its viewpoint. *FAIR*, 547 U.S. at 64–65. The Court nevertheless held that they could be required to do so. And in many ways, HB 20 is less intrusive than the Solomon Amendment, which required law schools to express viewpoints that they disagreed with. That is, law schools could be required to "send e-mails or post notices on bulletin

boards on [the military] employer's behalf." *Id.* at 61–62. HB 20 does nothing like that.

Applicants say (at 26) that neither *Pruneyard* nor *FAIR* involved "private editorial choices." But that is the exact argument rejected in *FAIR*. There, the law schools argued that "[j]ust as the government may not force a newspaper to publish specified opinion pieces, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974), it cannot force a school to print specified recruiting messages." Brief for the Respondents, *Rumsfeld v. FAIR*, 2005 WL 2347175, at *22 (U.S.). In drawing out the newspaper analogy, the law schools asserted that "a school has the right to make the *same editorial judgments* as to which messages it will facilitate and which it will resist." *Id.* at *27 (emphasis added). The law schools even claimed they "exercise[d] their editorial function vigilantly—much more vigilantly than the St. Patrick's Day parade organizers" in *Hurley*, a case in which this Court held that parade organizers had a First Amendment right to exclude marchers who expressed a message with which they did not agree. *Id.* at *28 (discussing *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557 (1995)).

This Court unanimously rejected the argument. What mattered was not whether the schools exercised an editorial function but rather whether "the complaining speaker's own message was affected by the speech it was forced to accommodate." *FAIR*, 547 U.S. at 63. *FAIR* thus makes clear that the First Amendment is not violated just because the speaker can draw analogies to newspaper editors or is required to host unwanted speech.

Applicants complain (at 25) that if mandatory hosting is constitutionally permissible then "absurd consequences" will follow. But Applicants mistakenly assume that the rule must either be that all hosting rules are constitutional or that none are. That is not how this Court has treated hosting. Instead, this Court has permitted some hosting rules (*FAIR* and *Pruneyard*) and rejected others (*Tornillo* and *Hurley*). And under this Court's precedents the line between permissible and impermissible hosting rules depends on three guiding principles: (i) the ability of the host to speak and dissociate from hosted speakers; (ii) the risk that listeners will mistakenly attribute the hosted speech to the host; and (iii) whether the host curates the speech of others to create its own unified speech product. *See FAIR*, 547 U.S. at 63–65. Here, all three factors support HB 20's constitutionality.

Ability to Speak. Like the laws upheld in *FAIR* and *PruneYard*, the hosting regulations here do not meaningfully "interfere with any message" the platforms would otherwise communicate. *Id.* at 64. As this Court explained in *FAIR*, "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* at 65. The owner of the shopping center in *PruneYard* could likewise "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." 447 U.S. at 87. By contrast, the same could not be said about parades, which lacked a "customary practice whereby private sponsors disavow any identity of viewpoint between themselves and the selected participants." *Hurley*, 515 U.S. at 576 (quotation marks omitted). Nor was

such distancing practical on the editorial page of a newspaper or in an envelope of a quarterly utility newsletter sent in the mail to customers. In both instances, the limitations of the host's physical medium meant the hosted speech took up scarce space that "could be devoted to other material the newspaper" and utility operator "may have preferred to print." *FAIR*, 547 U.S. at 64 (quoting *Tornillo*, 418 U.S. at 256, and citing *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Ca.*, 475 U.S. 1, 16–18 (1986) (plurality op.)).

The hosting regulations here leave social media platforms free to speak on their own behalf and express their own views. Social media platforms are free to tell the public at large that hosted users "are communicating their own messages by virtue of state law." *PruneYard*, 447 U.S. at 87. And social media platforms remain free and perfectly able to speak with their own voice on any issue both on their own platforms and outside them.

In fact, the platforms do just that. The platforms are careful to explicitly disassociate themselves from their users' speech. *See, e.g.*, Facebook, Terms of Service § 4.3 ("We do not control or direct what people and others do or say, and we are not responsible for their actions or conduct . . . or any content they share[.]"); Twitter, Terms of Service § 3 (similar). And the platforms frequently invoke these disclaimers to obtain dismissal of lawsuits seeking to hold them liable for their users' posts. *E.g.*, *Morton v. Twitter, Inc.*, No. 20-cv-10434, 2021 WL 1181753 (C.D. Cal. Feb. 19, 2021); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056 (N.D. Cal. 2016). These disclaimers thus make clear what every reasonable user already understands: the content posted

by the platforms' users is not the platforms' own speech.

On top of all that, the platforms—unlike even the malls in *PruneYard* or the law schools in *FAIR*—have a nearly infinite capacity to speak. "[S]pace constraints on digital platforms are practically nonexistent . . . so a regulation restricting a digital platform's right to exclude might not appreciably impede the platform from speaking." *Knight First Amendment Inst.*, 141 S. Ct. at 1226 (Thomas, J., concurring).

Applicants do not dispute any of this. Rather, they say (at 22) that their ability to speak does not matter. They rely on *Reno v. ACLU*, 521 U.S. 844 (1997) for the observation that the internet offers "unlimited, low-cost capacity for communication." *Id.* at 870. But that observation cuts the other way; it proves that HB 20 does nothing to diminish the virtually unlimited capacity the platforms have to speak and to host the speech of others. It also distinguishes platforms from traditional newspapers with limited physical capacity to host speech. *See Tornillo*, 418 U.S. at 256–57 & n.22; Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. of Free Speech L. 377, 404–05 (2021). Nothing in *Reno* prohibits the type of hosting HB 20 envisions—no one thought, for example, that the hosting rule in *FAIR* was impermissible because job fairs are plentiful.

Risk of Listener Confusion. This Court's compelled-speech cases also place significant weight on the extent to which a reasonable listener would (mis)identify the hosted speaker's views with those of the host. *FAIR*, 547 U.S. at 65. There is no interference with a host's speech when observers "can appreciate the difference" between speakers whom a host endorses and speakers whom a host "permits because

legally required to do so, pursuant to an equal access policy." *Id.* Under the Act's hosting regulations, a reasonable user of a typical social media platform would not identify the views expressed on the platform as those of the platform itself. On most platforms, users are designated with usernames and other identifying information. That information allows a reasonable viewer to understand that the user, not the platform, is speaking.

Regardless of whether a social media platform applauds or rejects the speech it hosts, no reasonable user thinks that the platform is the entity speaking when viewing other users' posts. *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (rejecting misattribution fear as implausible). Indeed, "the proposition that" social media platforms "do not endorse everything they fail to censor is not complicated." *Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.). And any "fear of a mistaken inference of endorsement" by a social media platform "is largely self-imposed, because" the platform "itself has control over any impressions it gives its" users. *Id.* at 251.

Applicants try (at 23) to diminish this factor by noting that the government cannot compel speech even when the compelled speaker could dissociate. But that misses the point. In a hosting regime, the government is not compelling speech; it is compelling hosting. This Court consistently distinguishes between laws that require someone to "personally speak the government's message" and those that merely force someone "to host or accommodate another speaker's message." *FAIR*, 547 U.S. at 63. Applicants' attempt to blur that distinction "trivializes the freedom protected" by this

Court's compelled speech cases. *Id.* at 62.

Unified Speech Product. Finally, in asking whether a host of speech has a First Amendment right to be free of regulation, it matters whether the speech "comports with" or "contribute[s] something to a common theme." *Hurley*, 515 U.S. at 574, 576. This Court has held, for instance, that mandates to accommodate speech in a parade, *id.* at 566, a utility newsletter, *Pacific Gas & Elec. Co.*, 475 U.S. at 20–21 (plurality op.); *id.* at 25 (Marshall, J., concurring in judgment), and a newspaper, *Tornillo*, 418 U.S. at 258, were unconstitutional. In those instances, however, the hosted speech formed a unified speech product in which each unit of hosted speech "affect[ed] the message conveyed," thus "alter[ing] the expressive content" of the whole. *Hurley*, 515 U.S. at 572–73.

But hosting regulation is perfectly fine to impose on an entity that does not produce a unified speech product. This Court upheld hosting regulation in *FAIR* because it concluded that the law schools did not have such a product. Although the law schools in *FAIR* intended to "send[] the message" that they opposed the military's policies, the activity involved—providing recruiting services to law students—"lack[ed] the expressive quality of a parade, a newsletter, or the editorial page of a newspaper." 547 U.S. at 64–65. The school's "accommodation of a military recruiter's message [was] not compelled speech because the accommodation [did] not sufficiently interfere with any message of the school." *Id.*

The same is true here. In general—which is all that matters in the context of this pre-enforcement facial challenge—social media companies do not produce a

unified speech product like a newspaper. As "could . . . be said of the recruiting in various law school rooms in [*FAIR*], or the leafleteers' and signature gatherers' speech in various places at the mall in *PruneYard*," the posts hosted by typical social media platforms are "individual, unrelated segments that happen to be [hosted] together." Volokh, *supra*, at 426 (quotations omitted). "Twitter letting people go to individual pages . . . , Facebook letting people go to individual Facebook pages, YouTube letting people view individual videos, and the like" in no way contributes to a "common theme" or "overall message." *Id.* There is no common theme in the forums that a social media platform hosts and allows users to access.

* * *

The ultimate question is whether "the complaining speaker's own message [is] affected by the speech it [i]s forced to accommodate." *FAIR*, 547 U.S. at 63. Here, Applicants' members have made clear that their speech is distinct from their users' speech. They have said so in their terms of service. They have said so to win dismissal of lawsuit after lawsuit. And they have said so in their public statements. A users' speech on a social media network is therefore not the platform's speech. Regulating how a platform hosts the speech of others, as HB 20 does, is thus constitutional.

B. Applicants are wrong to challenge HB 20's hosting rules as content- and speaker-based.

Applicants (at 29–31) next argue that HB 20 is constitutionally suspect because its hosting rules are content- and speaker-based. Those arguments are irreconcilable with *FAIR*, which upheld Congress's decision to require law schools to host military recruiting—and only military recruiting—content. 547 U.S. at 51, 70. If

such preferences doomed a hosting regulation, then surely a rule that required hosting of only military recruiters—who espouse a pro-military recruiting message—would have failed.

FAIR broke no new doctrinal ground. Hosting regulation could not function without differentiating among types of content or speakers. That is why federal law has long required that employers host certain labor-organizing speech, but not other types of speech. 29 U.S.C. §§ 157, 158; *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803, 805 (1945).

Nor is it problematic that Texas limited its law to large social media companies. This Court has rejected the notion that "the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 660 (1994). "[H]eightened scrutiny is unwarranted when the differential treatment is justified by some special characteristic of the particular medium being regulated." *Id.* at 660–61 (quotation marks omitted). And here, the Texas Legislature was clear that it was regulating the networks with the largest number of users because of "their market dominance." HB 20 § 1(4). That is the exact "special characteristic" that this Court endorsed in *Turner*. *See Turner Broad. Sys.*, 512 U.S. at 660–61; *see also Knight First Amendment Inst.*, 141 S. Ct. at 1224 (Thomas, J., concurring) ("Much like with a communications utility, this concentration gives some digital platforms enormous control over speech.").

Ultimately, Applicants (at 29–30) retreat to the argument that HB 20 has a

speaker-based problem because they speculate that it was passed with illegitimate intentions. But "[w]e are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment). Here, the law regulates neutrally—it protects Texans of all viewpoints and locations.

C. HB 20's disclosure requirements are constitutional.

In addition to regulating how platforms host speech, HB 20 also requires a narrow set of disclosures. It demands that platforms (1) describe how they moderate and manage content, Tex. Bus. & Com. Code § 120.051; (2) publish an "acceptable use policy" informing users what content is permitted, *id.* § 120.052; (3) publish a biannual transparency report documenting certain facts about how the platform managed content during a specific time period, *id.* § 120.053; and (4) maintain a complaint-and-appeal system for users who believe action contrary to the disclosures has taken place, *id.* § 120.101–04.

The First Amendment does not prohibit this type of neutral disclosure regime. *E.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 248–53 (2010). For example, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, this Court rejected a First Amendment challenge to a requirement that legal advertisers disclose certain costs that clients might incur. *See* 471 U.S. 626, 650–53 (1985). The Court recognized the "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. And the Court reasoned that disclosure requirements are substantially less onerous because they do not prevent businesses "from conveying information to the public," but "only require[] them to provide somewhat more information than they might otherwise be inclined

to present." *Id.* Because a business's interest in withholding information from consumers is minimal, the Court concluded that mandatory disclosure rules are permissible if they "are reasonably related to the [government's] interest in preventing deception of consumers." *Id.* at 651.

Applicants (at 35–36) claim that *Zauderer* is inapplicable because they believe that most of the speech regulated by HB 20 is not commercial speech. But *Zauderer* extends further; "health and safety warnings," for example, even without a commercial component, have long been permissible. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2376 (2018). In any event, HB 20 does target commercial speech. The large platforms regulated by the Act are in the business of gaining and keeping users; indeed, "digital platforms derive much of their value from network size." *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring). To a great extent, users join a platform so that they can speak and consume other users' speech. Accordingly, the exchange where a platform allows a user to speak on its site is a commercial transaction in which the platform provides the user a forum and in return the platform receives a user (whom the platform often markets to advertisers). Thus, communication about what speech the platforms will allow is commercial speech because it (1) proposes the terms of a commercial transaction with the user, (2) refers to the specific product the platform offers, and (3) arises from the platform's economic motivation to enlist or retain a user. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983).

Applicants next argue (at 36–39) that HB 20's disclosure rules are too burdensome given the size of most platforms. But the burden of making most of the

disclosures that HB 20 requires does not depend on the number of posts that a platform hosts. The requirements to publish the rules, an "acceptable use" policy, and a biannual transparency report with topline numbers, Tex. Bus. & Com. Code §§ 120.051–53, for example, require the type of point-in-time disclosures that are familiar to corporate life. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Indeed, if requiring a biannual transparency report and the like offends the First Amendment, then the SEC's voluminous annual reporting, the FTC's merger disclosure rules, or even many tax filing obligations might likewise be constitutionally suspect.

Applicants also attack (at 36–37) the requirement that social media companies set up a complaint-and-appeal system. It is true that a well-functioning appeal system may trigger many users to appeal decisions to moderate content, which in turn might trigger many notices. Yet Applicants' own members—including Facebook, Twitter, and YouTube—have endorsed industry-wide calls to "provide notice to each user whose content is removed, whose account is suspended, or when some other action is taken due to non-compliance with the service's rules and policies, about the reason for the removal, suspension or action" and to offer "detailed guidance" about "[w]hat types of content are prohibited."[1] Regardless, the requirement to set up a complaint-and-appeals system is not regulation of "speech" that triggers the

[1] *The Santa Clara Principles on Transparency and Accountability in Content Moderation*, Santa Clara Principles, https://tinyurl.com/4shb6n4x; *see also* Gennie Gebhart, *Who Has Your Back? Censorship Edition 2019*, Electronic Frontier Foundation (June 12, 2019), https://tinyurl.com/2p93z6bc.

(minimal) First Amendment scrutiny that applies to compelled disclosures. Rather, it is an economic regulation that demands businesses be responsive to their users. Such regulations are commonplace, *e.g.*, 12 C.F.R. § 1002.9(a)(2) (TILA creditors must provide reasons for their actions and a point of contact), and do not trigger First Amendment scrutiny.

D. Applicants inappropriately discount the state's interest.

Applicants (at 32–33) dismiss the compelling interest that HB 20 advances—ensuring that its citizens of all political and geographical stripes have full access to the free flow of information and ideas. But this Court has recognized that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner*, 512 U.S. at 663. Indeed, "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality op.).

HB 20 vindicates that critical interest. As the Texas Legislature found, "each person in this state has a fundamental interest in the free exchange of ideas and information, including the freedom of others to share and receive ideas and information," HB 20 § 1(1), and the state "has a fundamental interest in protecting the free exchange of ideas and information," *id.* § 1(2). Social media platforms now play a major role in disseminating those ideas—they are "central public forums for public debate." *Id.* § 1(3). Put differently, social media platforms have become "the modern public square." *Packingham*, 137 S. Ct. at 1737.

But unlike the traditional public square, which was generally open and

unregulated, the modern public square is dominated by "digital platforms" that exercise "enormous control over speech." *Knight First Amendment Inst.*, 141 S. Ct. at 1224 (Thomas, J., concurring). These social media companies "exercise[] . . . great[] control over access to the relevant medium," possess "the power to obstruct readers' access to" information, and can "prevent" the distribution of certain information that they do not like. *Turner*, 512 U.S. at 656; *see also Knight First Amendment Inst.*, 141 S. Ct. at 1224 (Thomas, J., concurring). Thus, "by virtue of its ownership of the essential pathway," a social media platform "can . . . silence the voice of competing speakers with a mere flick of the switch." *Turner*, 512 U.S. at 656; *see also Knight First Amendment Inst.*, 141 S. Ct. at 1224 (Thomas, J., concurring). "The potential for abuse of this private power over a central avenue of communication cannot be overlooked." *Turner*, 512 U.S. at 657. "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Id.*

HB 20 prevents "private interests" from restricting the "free flow of information." *Id.* Its hosting rules simply demand that Texas citizens have access to critical pathways of information no matter their viewpoint or location, and its disclosure rules allow citizens to understand the rules of the game when they join a social media network. It would turn the First Amendment on its head to rule that the Free Speech Clause disables the states from doing that.

II. APPLICANTS CANNOT SHOW IRREPARABLE HARM.

Applicants will not suffer irreparable harm if the Fifth Circuit's stay is left in

place for at least three reasons.

First, Applicants say (at 39) that without reinstating the injunction, their First Amendment rights would be violated. But doing so would demand only that Applicants' members litigate their First Amendment claims as-applied, rather than facially, until the Fifth Circuit reaches a decision. Even if Texas's law is in effect, the platforms can still apply their moderation policies. True, the Attorney General might raise claims against Applicants' members under HB 20, but Applicants' members may raise First Amendment defenses in those suits. Indeed, that is what would happen right now if an individual Texan (who was never enjoined) brought a claim under HB 20. *See* Tex. Civ. Prac. & Rem. Code § 143A.007. That is the usual course of constitutional adjudication; "[t]his Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 537–38 (2021). And indeed, "many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases like this one." *Id.* (citing the use of a First Amendment defense).

Moreover, there is every reason to think that judicial determination of the issues would be aided by defensive litigation. If Applicants' members really exercise editorial power in the manner of a newspaper editor, they can demonstrate specifically how in individual proceedings—rather than in an amalgamated proceeding in which, in Applicants' words (at 6), "each platforms['] . . . own rules," "designs," and "policies" have to be litigated at once in the abstract.

Second, Applicants complain about the costs of regulation. They contend (at 40), for instance, that under HB 20, they will be forced to host "vile[]" speech, which will cause their advertisers to flee. But even if HB 20 is allowed to remain in effect, the platforms have federal protections, which are specifically incorporated into HB 20. *See* Tex. Civ. Prac. & Rem. Code § 143A.005. The platforms thus remain free to argue that they cannot "be held liable" if they take "good faith" action "to restrict access to or availability of material that" they or their users "consider[] to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A). True enough, Applicants' members might face liability for their bad faith content moderation (because it is not protected by § 230). But it is hardly irreparable harm for Applicants to internalize the societal cost of their bad faith.

That leaves Applicants with the generic claim (at 40) that complying with HB 20 will be costly. But that is not a harm warranting vacatur of the stay. "[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs," but such harms do not automatically permit pre-compliance review. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring).

Applicants also insinuate (at 15) that Texas (and Florida) designed their laws with delayed effective dates to permit a long compliance horizon. They are wrong. Both Texas and Florida have constitutional default rules that delay the effective date of legislation. Tex. Const. art. III, § 39; Fla. Const. art. III, § 9.

Third, Applicants (at 41) scant Texas's strong sovereign interest in enforcing a

law duly enacted by its legislature. But "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). Those concerns are particularly acute here. In state after state, the people through their legislators are confronting the question of how to regulate the modern town square. Applicants want to shut the door on all that regulation in emergency proceedings. That is not how important policy questions should be settled.

CONCLUSION

For the reasons stated in Respondent's brief, and for the reasons stated above, the Court should deny the Application.

Respectfully submitted.

ASHLEY MOODY
ATTORNEY GENERAL

/s/ *Henry C. Whitaker*
HENRY C. WHITAKER
Solicitor General
Counsel of Record

DANIEL W. BELL
Chief Deputy Solicitor General

EVAN EZRAY
Deputy Solicitor General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
henry.whitaker@myfloridalegal.com
Counsel for the State of Florida

STEVE MARSHALL
Attorney General of Alabama

TREG TAYLOR
Attorney General of Alaska

MARK BRNOVICH
Attorney General of Arizona

LESLIE RUTLEDGE
Attorney General of Arkansas

JEFFREY S. THOMPSON
Solicitor General of Iowa

DANIEL CAMERON
Attorney General of Kentucky

LYNN FITCH
Attorney General of Mississippi

ERIC SCHMITT
Attorney General of Missouri

AUSTIN KNUDSEN
Attorney General of Montana

DOUG PETERSON
Attorney General of Nebraska

ALAN WILSON
Attorney General of South Carolina

May 18, 2022