No. 22-555

In the Supreme Court of the United States

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

v.

ANGELA COLMENERO, IN HER OFFICIAL CAPACITY AS PROVISIONAL ATTORNEY GENERAL OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

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In accordance with Rule 15.8, Respondent respectfully submits this supplemental brief in response to the United States' invited amicus brief of August 14, 2023.[1]

INTRODUCTION

The United States' brief confirms (at 13) what all parties to this case and *Moody v. NetChoice*, Nos. 22-277 (U.S. Sept. 21, 2022), 22-393 (U.S. Oct. 24, 2022), acknowledge: these cases present the exceptionally important question of whether the First Amendment precludes the government from requiring large social-media platforms to provide equal, non-discriminatory access to the public regardless of viewpoint. And the United States agrees (at 13) with Respondent that, if the Court grants review in one of these cases, it "should grant review in both."

Nevertheless, the United States' brief fails to adequately advise the Court about the implications of its positions. It misapplies this Court's precedents and offers a view of the First Amendment that would imperil some of its own regulatory programs. If adopted, the United States' position would also leave governments—State and federal—with little, if any, guidance on how to draw the line between regulable and non-regulable activities of social-media platforms. In fact, by characterizing the central feature of the platforms—hosting third-party content—as speech, the federal government all but immunizes social-media companies from *any* substantive regulation. The First Amendment does not mandate such a result.

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[1] By operation of law, Angela Colmenero has been substituted as the respondent. *See* Tex. Const. art. XV, § 5; Fed. R. App. P. 43(c)(2).

By contrast, Respondent does not agree with all of the United States' characterizations of H.B. 20's disclosure requirements. But it does not object the United States' recommendation (at 21) to deny certiorari "on the general-disclosure provisions" lest the Court "further complicate what would already be a complex process of merits briefing and argument."

ARGUMENT

I. This Case and *Moody* Present Questions Worthy of Review.

All parties to this case and *Moody* agree that the petitions raise "issues of great importance that . . . plainly merit this Court's review." *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting); *see* Pet. 8. And the United States agrees (at 13) with Respondent, Cert. Resp. 13-17, that granting certiorari in "both" this case and *Moody* would be appropriate to resolve the "fundamental question about the First Amendment status of the platforms' content-moderation activities." *Contra* Pet. 36 (asking that this case be held pending *Moody*).

As the federal government recognizes (at 13), the Texas and Florida laws "target different types of content moderation and impose different obligations." And while the United States is agonistic (at 13) about whether "[t]hose differences" are "material to the Court's First Amendment analysis,"—and, indeed, frequently conflates the two laws in its brief—it is correct that "considering the two laws together would give the Court the fullest opportunity to address the relevant issues."

II. The United States Is Wrong About H.B. 20's Merits, and Its First Amendment Position Has Troubling Implications.

The United States is wrong, however, about the constitutionality of H.B. 20's equal, non-discriminatory access requirement. As Respondent has explained, akin to a digital public-accommodations rule, H.B. 20 constitutionally regulates conduct, not speech. Cert. Resp. 18-20. And H.B. 20 constitutionally adopts a modern-day analogue to Founding-era rules regulating common carriers. *Id.* at 6-7, 11-12, 20.

Without addressing many of Respondent's positions, the United States endorses (at 13-16) the Platforms' theory that they engage in First Amendment protected conduct through "select[ion], edit[ing], and arrange[ment] of third-party speech." That is factually false, Cert. Resp. 22-23, and legally irreconcilable with this Court's precedents. The United States also conspicuously ignores that its position would doom several of its own regulatory programs. Its attempt to cabin its own newly discovered view by vaguely assuring the Court that "the platforms' business practices more generally are not immune from regulation" if only States "articulate[] interests that justify the burdens imposed" falls distinctly flat. U.S. Br. 13; *id. at* 16-18.

A. The United States' position on the Platforms "expressive" activity is wrong.

The United States' view that the Platforms' social-media content-moderation practices constitute a form of constitutionally protected "expressive activity" depends upon the proposition that these social-media platforms are indistinguishable from parade organizers, newspapers, and cable operators. *Id.* at 13-14. But they are materially different because—among other reasons—no

reasonable viewer could possibly attribute what a user says to the Platforms themselves. *Contra Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 577 (1995). And given the Platforms' virtually unlimited capacity to carry content, requiring them to provide users equal access regardless of viewpoint will do nothing to crowd out the Platforms' own speech. *Contra Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). Respondent, however, has already explained the dispositive differences at length. *See, e.g.*, Cert. Resp. at 24-27. As the United States does little more than parrot the Platforms on these points, Respondent will not burden the Court by repeating them here.

The only new theory the United States proffers (at 14-15)—that "the act of culling and curating the content users see is inherently expressive"—is both legally incorrect and highly concerning. Just last Term this Court unanimously agreed that—unlike the newspapermen and parade organizers from which the United States insists the Platforms are indistinguishable—"there is not even reason to think that [Platforms] carefully screen[] any content before allowing users to upload it onto their platform." *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1226 (2023). Nor do the Platforms meaningfully "associate[] themselves with" underlying user content. *Id.* This "inaction[] or nonfeasance" is why the Platforms do not share the same exposure to liability as newspapermen or parade organizers who promote expression that leads to harm. *See id.* at 1220-21; *see also* 47 U.S.C. § 230(c)(1). The Platforms cannot simultaneously demand First Amendment *protection* for this same conduct. *Compare 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023) (holding that the First Amendment protects "original, customized" websites representing the owner's own

speech) *with Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (refusing to extend such protection to the act of hosting others' speech).

The United States concedes (at 16) at least the legal liability point, but nevertheless insists that the Platforms' "selecti[on], curati[on], and arranging" of content qualifies as "expressive." But "[e]veryone before [the Court] agree[d]" just last Term that what the United States calls "culling" and "curating," is really just the use of "algorithms that *automatically* match advertisements and content with [a] user" and "generate those outputs based on" information from and about the user. *Taamneh*, 143 S. Ct. at 1216 (emphasis added). That is, the Platforms have a "passive" and "highly attenuated" relationship to the user and his activities. *Id.* at 1227. As a result, the Platforms' functionalities resemble those available with "cell phones, email, or the internet generally." *Id.* at 1226. Telephone companies do not have a First Amendment right to refuse equal service to individuals based on color, creed, or credo. Cert. Resp. 19-20. Neither do the Platforms.

B. The United States elides the implications of its overbroad position regarding the First Amendment in the digital sphere.

The United States has also failed to explain the implications of—or limitations on—its First Amendment argument. Specifically, if accepted in its entirety, the argument would appear to doom any future FCC attempt to revive its net-neutrality regulations, and it could be fatal for several active initiatives under the Cable Act. The United States has vigorously defended the constitutionality of these programs in the recent past and makes no effort to explain what has changed about the First Amendment in the interim.

1. Consider the FCC's net-neutrality regulations. In 2015, the FCC promulgated common-carrier rules for internet service providers ("ISPs"). Those rules commanded that ISPs not (1) "block lawful content"; (2) "impair or degrade lawful Internet traffic on the basis of Internet content"; or (3) "prioritiz[e]" certain content in exchange for payment. *See In re Protecting & Promoting the Open Internet* ("Net Neutrality Order"), 30 FCC Rcd. 5601, 5607-08 ¶¶ 15, 16, 18 (2015). Those rules, collectively, are materially similar to H.B. 20's equal, anti-discriminatory access rule, which enforces a viewpoint-discrimination prohibition with a ban on "block[ing]," "de-boost[ing]," or otherwise "deny[ing] equal access or visibility to" content on the basis of viewpoint. Tex. Civ. Prac. & Rem. Code §§ 143A.001(1); 143A.002.

The FCC, in defending its regulations against a First Amendment challenge by the ISPs, correctly concluded that when ISPs transmit user speech, "they act as conduits for the speech of others, not as speakers themselves." Net Neutrality Order, 30 FCC Rcd. at 5868 ¶¶ 544, 546. This conduit function, the FCC explained, is a form of unprotected "conduct." *Id.* at 5868-69 ¶¶ 547-58. And while the FCC acknowledged that this Court has in some areas recognized a publisher's right to edit speech it promotes—such as with newspapers—it ultimately concluded that the Internet's functional particulars support different regulation, including because the Internet "is not subject to the same limited carriage decisions that characterize" those other mediums. *Id.* at 5870 ¶ 550.

The United States advanced these same arguments on review, and the D.C. Circuit largely agreed, concluding that speech carriers like ISPs do not have a First Amendment right to reject "equal access mandates" that

"merely facilitate the transmission of the speech of others." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 741 (D.C. Cir. 2016). The court therefore held that requiring ISPs to "offer a standardized service that transmits data on a nondiscriminatory basis" was not unconstitutional but instead fell "squarely within the bounds of traditional common carriage regulation." *Id.* at 740.

The federal government now stakes out the opposite position. It adopts the view that the ISPs asserted—unsuccessfully—that when social-media companies "select, exclude, arrange, or otherwise moderate the content they present to the public, they are exercising the same sort of 'editorial discretion'" in which newspapers, parade organizers, and cable companies engage. *Compare* U.S. Br. 14, *with U.S. Telecom Ass'n*, 825 F.3d at 742-43.

The text of the First Amendment has not changed in the last seven years. And the United States cannot wave away the discrepancy by saying "that was ISP programs; this is social-media platforms." As then-Judge Kavanaugh recognized, "there is no *principled* distinction" that would allow common-carrier regulation of the ISPs, but not of "Facebook" and "YouTube and Twitter." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 433 (D.C. Cir. 2017) (per curiam) (Kavanaugh, J., dissenting from denial of rehearing en banc).[2] So, if the federal government's First Amendment theory is correct here, it would appear to doom any future version of the FCC's own net-neutrality program.

2. The United States' First Amendment theory would also imperil still-active regulatory initiatives

[2] Then-Judge Kavanaugh suggested in *U.S. Telecom* that market power was a pre-requisite for imposing such regulations. If necessary, Texas will offer evidence to confirm the obvious: entities subject to H.B. 20 have market power. Cert. Resp. 20 n.13.

under the Cable Act. In the *Turner* cases, this Court upheld the Cable Act's channel set-aside rules against a First Amendment challenge even though it concluded that requiring cable operators to reserve channels for designated stations infringed on the operators' "editorial discretion." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 644 (1994) ("*Turner I*"). The Court later held that this set-aside requirement was content neutral, and it survived intermediate scrutiny because it advanced the government's interest in ensuring the "widest possible dissemination of information from diverse and antagonistic sources." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 192 (1997) ("*Turner II*").

The courts of appeals have, for years, employed *Turner II*'s reasoning to uphold many Cable Act restrictions on editorial discretion. *See, e.g.*, *Time Warner Ent. Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (per curiam); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137 (2d Cir. 2013); *see also Time Warner Ent. Co. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000). But if the federal government's newfound conception of "editorial discretion" and its cramped reading of *Turner II*, *see infra* Part II.C, were to become law, it would appear to threaten various FCC regulations implementing the Cable Act's provisions. For example, the FCC bans cable operators from discriminating against unaffiliated programming. *See* 47 C.F.R. § 76.1301; *see, e.g.*, Memorandum Opinion and Order, *In re Applications of AT&T Inc & Directv, Ent. Holdings*, 36 FCC Rcd. 10965 (2021). It likewise requires cable operators to set aside channels for unaffiliated programmers to lease. *See* 47 C.F.R. §§ 76.970-75; Final Rule, Leased Commercial Access; Modernization of Media Regulation Initiative, 85 Fed. Reg. 51363 (Aug. 20, 2020). The United States makes no

attempt to explain why the First Amendment would not apply to these extant regulatory programs.

C. The United States' attempt to cabin its own First Amendment theory fails.

Perhaps recognizing that its view would prevent *it* from regulating the Platforms, the United States waffles (at 16) and insists that it is *not* saying the Platforms' content-moderation "activities are immune from regulation," such as "public-accommodations laws or other generally applicable cable regulations targeting conduct." The United States makes no attempt to explain what that means. After all, the United States acknowledges (at 11) and does not seem to contest the Fifth Circuit's conclusion that H.B. 20 is generally applicable and content neutral. But, the United States says (at 13), H.B. 20 is still unconstitutional because Texas "ha[s] not articulated interests that justify the burdens imposed by the content-moderation restrictions under any potentially applicable form of First Amendment scrutiny." That is meritless for at least two reasons.

First, H.B. 20's equal, non-discriminatory access requirement *is* akin to a public-accommodations law or generally applicable regulation targeting conduct. Resp. 18-19. The United States can reach the opposite conclusion only by bifurcating (at 13) the Platforms' activities of hosting and displaying third-party content using algorithms from their "business practices more generally" and defining the former as First-Amendment-protected speech rather than conduct. But, as this Court has already recognized, algorithms are integral to everything the Platforms *do*: they are "part of th[e] infrastructure" of their webpages and what allow the Platforms to match content "with any user who is more likely to view that content." *Taamneh*, 143 S. Ct. at 1226-27. In turn,

that matching process—and the targeted advertising it permits—is how the Platforms make their money. *Id.* at 1216; *see also, e.g.*, Mike Isaac, *Facebook's profit surges 101 percent on strong add sales*, N.Y. TIMES (July 28, 2021), https://www.nytimes.com/2021/07/28/business/facebook-q2-earnings.html. As a result, by placing the Platforms' algorithms behind the protective shield of the First Amendment, the federal government has done precisely what it disclaims: immunize vast swaths of the Platforms' activities from (among other things) public-accommodations laws. U.S. Br. 16.

Second, the United States' explanation behind its statement (at 13) that H.B. 20 does not advance an interest that can survive any scrutiny is irreconcilable with *Turner II*. The United States suggests (at 17) that the only governmental interest that could survive intermediate scrutiny would be "ensuring the 'survival' of an important medium of communication." But *Turner II* made unambiguously clear that the governmental interest in ensuring the "widest possible dissemination of information from diverse and antagonistic sources" was one of the principal reasons that the Cable Act's set-aside provisions passed constitutional muster. *Turner II*, 520 U.S. at 192; *see also United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality op.) ("the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"). And it is that latter interest that applies here and would permit H.B. 20 to survive constitutional scrutiny. *See* Cert. Resp. 27-28.

III. Respondent Does Not Object to the Recommendation to Deny Certiorari on H.B. 20's General-Disclosure Provisions.

Finally, Respondent does not object to the United States' recommendation (at 21) to deny review of H.B. 20's disclosure provisions. As Respondent previously explained, there is "confusion" among the lower courts over how to evaluate disclosure requirements, which "merits this Court's attention" in an appropriate case. Cert Resp. 3. But the United States is correct (at 20) that the "general-disclosure provisions have not been the focus of this litigation." As a result, Respondent does not object to denying review to avoid "further complicat[ing] what would already be a complex process of merits briefing and argument." U.S. Br. 21.

CONCLUSION

The Court should accept the United States' recommendation regarding review but reject its views on the merits.

Respectfully submitted.

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