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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

1. Petitioner NetChoice is a 501(c)(6) District of Columbia organization. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

2. Petitioner CCIA is a 501(c)(6) non-stock Virginia corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Supplemental Brief for Petitioners 1
I. This Court should grant review and reverse the Fifth Circuit's holding that the First Amendment does not protect social media websites' editorial choices. 3
II. This Court should grant Petitioners' Question Presented in full and not artificially limit its own review. 4
A. This Court should grant review of all of HB20's challenged operational and disclosure provisions, as they all unlawfully compel speech and chill the exercise of protected editorial discretion. 4
B. This Court should not artificially exclude Petitioners' arguments about viewpoint-discriminatory purpose from its review. 12
Conclusion 13

TABLE OF AUTHORITIES

Page(s)

303 Creative LLC v. Elenis,
143 S. Ct. 2298 (2023) 3

NetChoice, LLC v. Paxton,
142 S. Ct. 1715 (2022) 1

Twitter, Inc. v. Taamneh,
598 U.S. 471 (2023) 11

Wash. Post v. McManus,
944 F.3d 506 (4th Cir. 2019) 11

Zauderer v. Office of Disciplinary Counsel of Supreme Court,
471 U.S. 626 (1985) 5

Statutes

Tex. Bus. & Com. Code § 120.001 5

Tex. Bus. & Com. Code § 120.002 ..... 5, 13

Tex. Bus. & Com. Code § 120.051 ..... 2, 5, 8, 9

Tex. Bus. & Com. Code § 120.052 ..... 5, 9

Tex. Bus. & Com. Code § 120.053 ..... 2, 5, 8

Tex. Bus. & Com. Code § 120.101 ..... 2, 3, 5, 7

Tex. Bus. & Com. Code § 120.102 ..... 3, 5, 7

Tex. Bus. & Com. Code § 120.103 3

Tex. Bus. & Com. Code § 120.104 3

Tex. Civ. Prac. & Rem. Code § 143A.002 3

Other Authorities

Appellees' Br., *NetChoice v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178), 2022 WL 1046833 (Apr. 1, 2022) 5, 10, 13

CCIA, Content Moderation: State Legislation, perma.cc/67TF-3F6H 4

Emergency Application to Vacate Stay, *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022) (No. 21A720), 2022 WL 2358461 (May 13, 2022) 10, 13

SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners submit this supplemental brief in response to the Brief of the United States as Amicus Curiae as it pertains to this case challenging parts of Texas House Bill 20 ("HB20").

The United States confirms that this case is exceptionally important and warrants the Court's review, as this Court has also recognized. *See NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1715-16 (2022); *see id.* at 1716 (Alito, J., dissenting).

Petitioners and the United States agree that social media websites have the First Amendment right to engage in editorial discretion over the speech they disseminate. *See* U.S.Br.13-16. Accordingly, they agree that this Court should reverse the Fifth Circuit's upholding of (1) HB20 Section 7's "content-moderation restrictions," U.S.Br.13-18; and (2) HB20 Section 2's "individualized-explanation requirements," U.S.Br.18-20.

The United States and Petitioners are thus largely in agreement. Petitioners, however, disagree with the United States' suggestion that this Court reconfigure the Question Presented to decline review of (1) what the United States calls HB20 Section 2's "general-disclosure provisions," U.S.Br.20-22; and (2) whether HB20 was motivated by "viewpoint-discriminatory purpose," U.S.Br.22-24.

This Court should not artificially cabin its review of the Fifth Circuit's judgment. The Question Presented by the Petition implicates all HB20 provisions that the district court preliminarily enjoined; all provisions that this Court allowed to remain enjoined, *see Paxton*, 142 S. Ct. at 1715-16; and all parts of HB20's scheme to regulate the editorial discretion of disfavored social media websites.

Many arguments demonstrating the unconstitutionality of HB20's "content-moderation restrictions" and "individualized-explanation requirements" apply equally to the so-called "general-disclosure provisions." Moreover, the line that the United States divines between "individualized-explanation" and "general-disclosure provisions" would actually create even more ambiguity. Some of the provisions that the United States labels "general-disclosure[s]" actually require "individualized" explanations of essentially everything that a social media website does—for example, providing "track[ing]" of individualized complaints, disclosing "content management, data management, and business practices," and "a description of *each* tool, practice, *action*, or technique used in enforcing the acceptable use policy." Tex. Bus. & Com. Code §§ 120.051(a), 120.053(a)(7), 120.101 (emphases added). Presumably that is why the district court preliminarily enjoined those provisions too. The United States cannot deny that which First Amendment standard applies to governmental requirements to disclose editorial policies is increasingly recurring and important.

Finally, Petitioners have demonstrated throughout this case that HB20 was motivated by a "viewpoint-discriminatory purpose," the Petition plainly raises this First Amendment argument, and there is no "cross-petition" in this case. U.S.Br.24. Petitioners' case here raises the First Amendment question whether HB20 Sections 2 and 7 are constitutional, and this Court should be able to consider all arguments supporting challenges to HB20.

I. This Court should grant review and reverse the Fifth Circuit's holding that the First Amendment does not protect social media websites' editorial choices.

The United States agrees with the parties that the Court should grant review in this case and in No. 22-277, *Moody v. NetChoice, LLC*, to resolve acknowledged splits between the Fifth and Eleventh Circuits. *See* U.S.Br.11-13, 18-20. The United States also agrees that this Court should review HB20's (1) prohibition on "viewpoint"-based editorial discretion, *see* U.S.Br.8, 12-13; Pet.6, 12-26 (discussing Tex. Civ. Prac. & Rem. Code § 143A.002); and (2) requirement that covered social media websites provide users with notice, complaint, and appeal procedures for expression that websites remove while exercising their editorial discretion, *see* U.S.Br.9, 18-20; Pet.9, 30-33 (discussing Tex. Bus. & Com. Code §§ 120.101-04).

The United States further agrees with Petitioners that the Court should reverse the Fifth Circuit and confirm that social media websites' editorial judgment is protected by the First Amendment. Thus, the State lacks authority to dictate how websites exercise that editorial discretion. *See* U.S.Br.13-18. Likewise, the State cannot "impose heavy burdens on the platforms' expressive activity" by requiring websites to provide notice-complaint-appeal procedures for removed content. U.S.Br.18-20. As the United States explains, those conclusions were clear under decades-old precedent, and they are inescapable after this Court's recent decision in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023). *See* U.S.Br.15-16, 18.

This Court's review has become even more urgent since this Petition was filed. As Petitioners forecasted

(Pet.35), States across the country continue to consider legislation regulating social media websites' editorial discretion. *E.g.*, CCIA, Content Moderation: State Legislation, perma.cc/N8XQ-69M4.

In short, all parties agree this Court should review the First Amendment implications of HB20 Section 7's "content-moderation restrictions," U.S.Br.13-18; and HB20 Section 2's "individualized-explanation requirements," U.S.Br.18-20.

II. This Court should grant Petitioners' Question Presented in full and not artificially limit its own review.

Petitioners disagree, however, with the United States' suggestion that this Court limit its review of the issues and arguments raised in the Petition. Notably, the United States does not part with Petitioners on the merits—even as to Petitioners' arguments the United States suggests should not be reviewed. Rather, the United States asserts this Court should not review (1) HB20's "general-disclosure provisions"; and (2) whether challenged HB20 provisions are motivated by a viewpoint-discriminatory purpose. But that would artificially limit this Court's review, and it would risk letting a series of circuit splits persist among the lower courts.

A. This Court should grant review of all of HB20's challenged operational and disclosure provisions, as they all unlawfully compel speech and chill the exercise of protected editorial discretion.

This Court should review what the United States calls HB20's "general-disclosure provisions": Texas Business

& Commerce Code Sections 120.051, 120.052, 120.053, and parts of 120.101-02. *See* U.S.Br.20-22.

1. Many arguments that Petitioners have raised in this Court and below would render unconstitutional both the "individualized-explanation" and "general-disclosure provisions." So there is no *doctrinal* reason to limit this Court's review of the purportedly "general-disclosure provisions." And there are efficiencies in reviewing them together.

HB20's "general-disclosure provisions" are based on the same unconstitutional content- and speaker-based definition of regulated "social media platforms." Pet.28. There is no constitutionally permissible reason to limit these disclosures to websites with 50 million monthly U.S. users—or to exclude websites that "consist[] primarily of news, sports, [and] entertainment." Tex. Bus. & Com. Code §§ 120.001(1)(C), 120.002(b). For those reasons and more, strict scrutiny should apply to all these compelled-speech provisions, and neither the commercial-speech doctrine nor the *Zauderer* doctrine applies. *See* Pet.28-31. As Petitioners argued below, "editorial policies are not subject to the 'commercial speech' doctrine." Appellees' CA5 Br.51, 2022 WL 1046833. Even if they were, as Petitioners argued below, "the *Zauderer* test for compelled speech in 'commercial advertising'" does not apply here to disclosures about editorial practices and policies. Appellees' CA5 Br.52; *see Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985).

In short, the government is not entitled to *Zauderer*'s lower scrutiny where it compels businesses whose service is speech dissemination to disclose their editorial policies or practices. *See* Pet.29. This Court should confirm that,

just as the government cannot compel bookstores and newspapers to make disclosures about their editorial choices, it cannot require the same of social media websites. *See* Pet.29; Reply.9-10. In light of these purely legal reasons to declare HB20 Section 2's operational and disclosure provisions facially unconstitutional, this Court should review the "general-disclosure" provisions rather than wait for "as-applied challenges." U.S.Br.22 (citation omitted).

Zauderer's scope is hotly debated among the federal courts of appeals. Though the United States' brief does not address them, Petitioners have identified at least five circuit splits about when and how *Zauderer* applies—and what scrutiny applies when *Zauderer* does not. Pet.10-12. This case will allow the Court to provide greatly needed clarity to this area of law.

2. The United States' distinction between HB20's "general-disclosure provisions" and HB20's "individualized-explanation" requirements is illusory at best and should not preclude this Court's review of Petitioners' entire Question Presented. Many of the provisions the United States deems "general" nevertheless require similarly burdensome "individualized explanations." Thus, even under the United States' framework, they should be included in this Court's review.

The United States recognizes that requiring an "individualized explanation each time [websites] exercise their editorial discretion by removing user content" will "impose heavy burdens on the platforms' expressive activity that the States have failed to justify." U.S.Br.18-19. At the size of the covered websites, "the sheer volume of content removal . . . makes it impracticable for the businesses to

comply with those mandates." U.S.Br.19. Additionally, providing detailed information about websites' editorial processes would enable users to evade detection and harm other users. Pet.34.

The same is also broadly true of what the United States calls the "general" disclosures. Those provisions require tracking or reporting of *individual* editorial decisions. Plus, they enable Respondent to pursue disfavored websites for their exercise of editorial discretion. They operate as follows.

Complaint Procedures for Billions of Pieces of Expression on Covered Websites. HB20's requirement to field consumer complaints for expression that might violate the law—and to provide for "track[ing]" of those complaints—demands that websites "evaluate the legality of" every individual piece of flagged expression "within 48 hours of receiving the notice." Tex. Bus. & Com. Code § 120.101-02. Covered websites disseminate billions of pieces of expression, which could give rise to billions of potential legal obligations to investigate complaints within a compressed time period. To avoid liability, websites would need to divert extensive resources away from their editorial activities to prioritize engaging in individualized review of any pieces of expression users can identify. That will infringe websites' rights and lead to less useful and less secure services. *See* Pet.4-5.

Biannual Transparency Report Requiring Reports of "Each" Editorial "Action" That Websites Take. HB20 demands that covered websites produce and publish a biannual transparency report that requires them to track, calculate, and report countless editorial decisions. These

reports include multiple onerous requirements, but a couple deserve special attention.

First, reports must include "a description of *each* tool, practice, *action*, or technique used in enforcing the acceptable use policy." Tex. Bus. & Com. Code § 120.053(a)(7) (emphases added). In other words, twice a year, websites must find a way to publish a description of "each" and every editorial "action" the websites took over the previous six months. Record evidence demonstrates that content removals *alone* (not including other actions like age restrictions) can number in the billions. Pet.5. Second, websites must track, calculate, and report "the number of instances in which the social media platform took action with respect to illegal content, illegal activity, or potentially policy-violating content." Tex. Bus. & Com. Code § 120.053(a)(2). Covered social media websites can take such "actions" millions (if not billions) of times daily—including through a range of automated and human-oversight processes—and thus these requirements are as resource-intensive as the "individualized-explanation" requirements. Pet.33. As one of Petitioners' declarants stated, "I don't even know or understand the math that you would need to go through to be able to calculate that." R.1176.[1] These requirements will chill the exercise of editorial discretion by incentivizing covered websites to reduce the "number of . . . action[s]" they take. Tex. Bus. & Com. Code § 120.053(a)(2).

Sweeping and Undefined Business Disclosures. HB20 requires disclosure of "content management, data management, and business practices"—which is virtually *everything* websites do. *Id.* § 120.051(a). These

[1] "R.__" refers to the Fifth Circuit's record on appeal.

disclosures include, but are not limited to, "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.* At no point has Respondent disclaimed that these undefined categories would require granular reporting of individual editorial decisions. *See* Pet.34; Reply.11.

Acceptable Use Policy, Which Respondent Refuses to Say Websites Currently Comply With. HB20 requires websites to publish an "acceptable use policy" that includes their editorial policies and enforcement mechanisms. Tex. Bus. & Com. Code § 120.052. As detailed as websites' existing publicly available policies are, Respondent has repeatedly declined to confirm that these existing policies meet this requirement. *See* Reply.11.

In sum, the "general-disclosure provisions" impose many of the same unconstitutional burdens on editorial discretion as the "individualized-explanation" disclosures the United States agrees this Court should review.

3. This Court should review what the United States labels as HB20's "general" disclosures, notwithstanding the practical concerns raised by the United States. U.S.Br.20-22.

First, the United States argues that HB20's disclosure requirements "have not been the focus of this litigation." U.S.Br.20. To the contrary, HB20's disclosure provisions have been central to the litigation. Texas enacted a

statutory framework that would allow Respondent multiple ways to infringe and chill social media websites' editorial discretion—including through challenging their compliance with onerous "general-disclosure" requirements. After nearly a month of discovery, Petitioners successfully challenged those provisions and secured a pre-enforcement preliminary injunction. *E.g.*, R.44-46; R.294-97. Petitioners defended the full scope of that preliminary injunction on appeal, in emergency proceedings before this Court, and in their Petition. *See* Appellees' CA5 Br.49-55; Emergency Application to Vacate Stay, *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022) (No. 21A720), 2022 WL 2358461, at *34-39 (May 13, 2022) ("Emergency Application"); Pet.28-34.

The United States cites the "few pages" (U.S.Br.20) that Petitioners dedicated *exclusively* to the "general" disclosures. But Petitioners' arguments about those provisions incorporate the same overarching arguments that social media websites have First Amendment rights to editorial discretion and that HB20's content- and speaker-based provisions are unconstitutional. Pet.28. Those arguments apply to all of the challenged HB20 provisions.

Second, the United States asserts that the record is not developed enough to review the "general" disclosures. U.S.Br.20-21. But Petitioners provided seven detailed declarations and Respondent took the depositions of all seven declarants via a month of expedited discovery, which also included written discovery and document production. R.965. The result of that process is a record replete with evidence of how covered websites exercise editorial discretion and the significant burdens that HB20 imposes on those websites. *See* Pet.33-34 (collecting

evidence); *cf. Twitter, Inc. v. Taamneh*, 598 U.S. 471, 482 (2023) (motion-to-dismiss posture where allegations in complaint must be assumed to be true). In any event, which First Amendment standard applies to such compelled disclosures is a question of law, not fact. Consequently, there is no need to wait for further factual development in this case or for "as-applied challenges." U.S.Br.22 (citation omitted).

Third, the United States asserts that granting review of the "general-disclosure provisions" would "further complicate" the case. U.S.Br.21. Not so. The same core First Amendment arguments apply to all challenged provisions of HB20: Websites have First Amendment rights to editorial discretion, HB20's disclosure provisions unconstitutionally infringe those rights by compelling *and* chilling speech, and neither the commercial-speech doctrine nor the *Zauderer* doctrine applies to any of these disclosure provisions.

Fourth, the United States argues that the "lower courts' analysis of the general-disclosure provisions does not conflict with any decision of another court of appeals." U.S.Br.21. As discussed above (at p.6), however, that claim ignores the myriad conflicts among the lower courts about when and how *Zauderer* applies to compelled disclosures—and what scrutiny applies when *Zauderer* does not apply. *See* Pet.10-12. Likewise, the United States does not address the circuit split that the Fifth and Eleventh Circuits have created with the Fourth Circuit's evaluation of analogous online disclosure provisions. *See* Pet.9-10 (citing *Wash. Post v. McManus*, 944 F.3d 506, 518-20 (4th Cir. 2019)).

Finally, the United States argues that "declining to review the general-disclosure provisions at this time would not prevent this Court from taking up some or all of those provisions if they prove to be constitutionally problematic." U.S.Br.22. Yet this case is before the Court now with a developed factual record from discovery after the district court preliminarily enjoined all the challenged HB20 provisions. There is no basis to artificially limit review of a judgment that offers this Court a timely opportunity to clarify an important area of law and commerce.

B. This Court should not artificially exclude Petitioners' arguments about viewpoint-discriminatory purpose from its review.

The United States' suggestion to exclude Petitioners' "viewpoint-discriminatory purpose" argument would also artificially constrain review of the important First Amendment Question Presented. U.S.Br.22-24.

As an initial matter, the United States' focus on issues raised in cross-petitions (U.S.Br.23-24) is inapplicable in this case—where arguments about HB20's viewpoint-based purpose are presented in the Petition. *See* Pet.5, 21.

HB20's viewpoint-discriminatory purpose is inextricable from its viewpoint-based regulation of editorial discretion. *E.g.*, Pet.20-22. The State singled out particular websites for burdensome regulation, and key legislators and the Governor made clear those websites were targeted based on the perceived viewpoints they did (and did not) disseminate. Pet.5, 21. Consequently, Petitioners have argued from the outset of this case that HB20's purpose is impermissibly viewpoint-discriminatory. *E.g.*, R.33-34, 50 (complaint); R.115-17 (motion for preliminary injunction); R.1746 (reply in support of motion for preliminary

injunction); Appellees' CA5 Br.8, 42; Emergency Application at *9-10, *29-30; Pet.5, 21; Reply.7.

The alleged factual "dispute" that the United States points to about what websites HB20 covers is not a barrier to review. U.S.Br.23. Despite well-established facts to the contrary, *see* Pet.6, Respondent insists that HB20 applies to only three websites: "Facebook, YouTube, and Twitter." U.S.Br.23 (quoting Respondent). That is incorrect, as Petitioners have explained throughout this case—and as the district court recognized. R.2572. On the statute's face, HB20 applies to social media websites that have, among other things, more than 50 million monthly users in the United States. Tex. Bus. & Com. Code § 120.002(b). Based on public information, at least several other services, including Pinterest, TikTok, and Vimeo are covered. R.2572. Regardless, even if Respondent were correct about HB20's coverage, that would make HB20's speaker-based discrimination—and its viewpoint-based purpose—even worse. *See* Reply.7 n.8; Pet.25-26.

In sum, Petitioners' Question Presented encompasses all of the issues and arguments necessary to review HB20's regulation of social media websites' editorial discretion.

CONCLUSION

The Court should grant the Petitions for Writs of Certiorari in Nos. 22-277, 22-393, and 22-555 in full.

Respectfully submitted.

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