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.

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

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

REPLY BRIEF FOR PETITIONERS

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Respondent has advanced a revolutionary interpretation of the First Amendment that would require this Court to overturn multiple lines of cases. Under Respondent's theory, governments would have virtually unchecked authority to control and burden the editorial choices of private parties who publish and disseminate speech. But Respondent's brief is replete with arguments that this Court has repeatedly rejected, as Petitioners detailed in their opening brief. Those cases confirm that Texas House Bill 20 ("HB20") interferes with Petitioners' First Amendment rights.

Respondent comes nowhere close to carrying his heavy burden of demonstrating that HB20 satisfies strict—or even intermediate—scrutiny. To the contrary, his arguments both flout this Court's cases and ignore the evidentiary record developed below.

This Court should reaffirm its First Amendment precedent, reject Respondent's dangerous assertion of governmental power over private speech, and reverse the Fifth Circuit's judgment.

I. HB20 Section 7 violates the First Amendment.

A. The First Amendment protects private parties' right to choose whether and how to publish, display, and disseminate speech.

1. This Court's precedent protects private entities' right to choose whether and how to disseminate speech.

When private parties organize, display, and publicly disseminate collections of speech—whether third-party and/or their own—the First Amendment protects their

right to decide what speech to include and how to present it.

Instead of grappling with this Court's body of caselaw reaffirming that bedrock rule, Respondent fixates on a few inapposite cases and ignores that their distinctive facts have no applicability here. In reality, the default rule is that governmental efforts to interfere with the editorial discretion of private parties is forbidden censorship.

a. Respondent insists that there is "no free-standing" right to editorial discretion. Resp. Br. 28. But cases as varied as *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986) ("*PG&E*"), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), recognize precisely such a right. They confirm: (1) the First Amendment protects a wide range of speech dissemination by private entities; and (2) entities that publicly disseminate speech may choose the content of that speech. Pet. Br. 18-23; U.S. Br. 14-16.

Side-stepping those cases, Respondent suggests that *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), silently overruled this settled law. Resp. Br. 28. To the contrary, *FAIR* distinguished *Tornillo*, *PG&E*, and *Hurley* as cases where private parties "determine[d] the content of their" publications. 547 U.S. at 63. This Court rejected a state effort to elevate *FAIR* over this body of precedent just last term in *303 Creative LLC v. Elenis*, 600 U.S. 570, 596 (2023). Respondent suggests that *303 Creative* is "distinct" because the Colorado statute required the designer to *create* speech. Resp. Br. 35. But this Court has made clear that

First Amendment protection extends beyond creation of speech to the dissemination of speech created by others. Pet. Br. 20-21.[1]

Perhaps recognizing the continued vitality of this Court's editorial discretion caselaw, Respondent asserts that covered websites are more "like the mall in *PruneYard*" and "the law schools in *FAIR*." Resp. Br. 21, 34. But those cases involved access to physical spaces, not publishers making editorial choices. Pet. Br. 29-30; *see* AFP Br. 6-7; U.S. Chamber Br. 11-12 n.8; U.S. Br. 20-21. Moreover, the mall owner in *PruneYard* asserted no expressive interests whatsoever, and *FAIR* was limited to recruiting access. Pet. Br. 29-30. HB20 is hardly limited to job postings.

b. With no answer to precedent, Respondent invites this Court to invent a multi-factor (and reverse-engineered) test that private entities must satisfy to earn First Amendment protection for their editorial choices. Resp. Br. 28-36. Yet to provide meaningful protection and avoid chilling speech, the law must be clear and "eschew 'the open-ended rough-and-tumble of factors.'" *Citizens United v. FEC*, 558 U.S. 310, 336 (2010) (citation omitted). Most of Respondent's proposed factors have already been rejected by this Court anyway.

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[1] For that reason (among others), Respondent's reliance on U.S. copyright law's conception of "authorship" is misplaced. Resp. Br. 30. Respondent invokes *Associated Press v. NLRB*, 301 U.S. 103, 127 (1937), but that case just discusses a newspaper editor's job responsibilities—hardly an exhaustive statement of editorial discretion. And notably, this Court upheld the National Labor Relations Act as applied to publishers only because it did *not* interfere with editorial control. *Id.* at 132-33.

First, Respondent invites this Court to consider "market power," contending covered websites are different from other publishers because "dominant market shares" purportedly allow them to exercise "unprecedented" and "concentrated control" over speech. Resp. Br. 21, 23. But the same arguments were made and rejected in *PG&E* and *Tornillo*.

Second, Respondent argues that courts should consider "whether a law alters . . . expression," and insists that Section 7 will not "interfere" with covered websites' messages. Resp. Br. 28, 33 (citation omitted). But government compulsion to include messages an entity would not otherwise include necessarily changes the speech compilation and the entity's expression. Pet. Br. 36 (citing *Hurley*, 515 U.S. at 572-73).

Third, Respondent claims that courts should consider space constraints, asserting that different rules apply to *physical* newspapers, newsletters, and parades given their "finite amount of space" for speech, whereas the Internet has "essentially infinite space." Resp. Br. 34. But *Tornillo* rejected this precise limitation. 418 U.S. at 258. And the Internet allows online bookstores and newspapers unprecedented capacity, yet no one suggests that Barnes & Noble and the New York Times lose First Amendment rights by migrating to the Internet.

Fourth, Respondent argues that courts must consider the "risk that an audience will '*mis*attribut[e]' speech," suggesting that *Hurley* and *PG&E* turned on that consideration. Resp. Br. 32. But *Hurley* disclaimed the need to determine "the precise significance of the likelihood of misattribution," 515 U.S. at 577, and there was zero risk of misattribution in *PG&E* (and *Tornillo*). Respondent's

reliance on *Turner* (Resp. Br. 29) proves the opposite point: Whatever the misattribution risk, this Court held that, because cable operators "*engage in and transmit speech*, . . . they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (emphasis added).

In any event, as with other publishers serving both readers and advertisers, the undisputed record demonstrates that the public does perceive the speech websites disseminate as reflecting views about what speech is "worthy of presentation." *Hurley*, 515 U.S. at 575; *e.g.*, Pet. App. 183a-84a; J. A. 97a-100a, 103a, 208a-09a, 212a; *see* Anti-Defamation League Br. 24-25; U.S. Chamber Br. 6; Chamber of Progress Br. 13-14. Respondent contends that "[f]ailing to remove content can cause reputational damage only if third parties expect [websites] to remove content." Resp. Br. 31. That actually proves the point: The websites publicly represent that they have editorial policies, require users to agree to those policies, sell advertisements in light of those policies, and implement those policies—so users and advertisers naturally expect enforcement of those policies. Pet. Br. 4-7.

Finally, Respondent argues courts must consider how selective a publication is, distinguishing covered websites from newspapers. Resp. Br. 34. But *Hurley* rejected that the degree of selectivity determines whether the First Amendment applies. 515 U.S. at 569.

c. Respondent's reliance on 47 U.S.C. § 230 is misplaced.

Respondent maintains that other publishers take legal "responsibility" for the speech they disseminate, whereas

§ 230 "instruct[s] courts not to 'treat[]'" websites "as 'publisher[s] or speaker[s]' of other people's speech." Resp. Br. 24, 30. But Congress's decision to protect websites from certain liability—so they can exercise editorial discretion—via *statute* has nothing to do with the *constitutional* questions here. And nothing in *Hurley*, *Tornillo*, or *PG&E* turned on whether the private party was legally responsible for the speech it was compelled to disseminate. Bookstores, newsstands, and libraries generally do not face defamation liability for third-party content they disseminate. *See* Restatement (Second) of Torts § 581 cmts. d & e (1977). Yet the First Amendment protects their editorial choices just the same.[2] No government can impose liability on a bookstore for declining to sell an author's book or for failing to display that author's book at the front of the store.

If anything, contrary to Respondent's argument (Resp. Br. 33-34), § 230 reinforces that websites publish speech. *See* Cox Br. 3-10. Congress would not have needed to protect Internet websites from publisher liability if websites were mere "conduits." Resp. Br. 36. Moreover, § 230(c)(2) exists to ensure that websites *can* decline to disseminate objectionable content. Cox Br. 3-6.

Respondent conversely argues that, if websites engage in their own expression when disseminating third-

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[2] Respondent contends that covered websites "routinely *disclaim* responsibility for objectionable content and insist that 'objective observers would not conclude' that they 'intended . . . to promote' such content." Resp. Br. 31 (quoting Pet. App. 37a). But the filing Respondent cites says only that objective observers would not believe covered websites "promote" content that *violates* their policies. Mot. to Dismiss at 6 n.2, *Gonzalez v. Twitter, Inc.*, No. 4:16-cv-03282, 2017 WL 1532386 (N.D. Cal. Jan. 13, 2017), cited in Pet. App. 37a.

party content, then they are "information content providers" under § 230(f)(3) and therefore entitled to "no immunity." Resp. Br. 35. Not so. Rather, § 230(c)(1) provides that "interactive computer service[s]" may not be treated as the speaker or publisher of "information" "provided by another information content provider." So even if a website acts as both an "interactive computer service" and an "information content provider"—which the word "another" expressly contemplates—it still cannot be treated as the publisher of "information" provided by "another information content provider."

2. Neither Respondent's interpretation of the First Amendment's original meaning nor common carrier regulation support HB20.

a. Respondent's interpretation of the First Amendment's original meaning would overturn scores of bedrock precedents by limiting First Amendment protection to "barring" (1) "prior restraints"; and (2) "prosecution for speaking in good faith on matters of public concern." Resp. Br. 21. Respondent offers no response to Petitioners' arguments explaining the First Amendment's protections have always been broader. Pet. Br. 22-24; *see* Professors of History ("Historians") Br. 21-27. Nor does Respondent have any response to Petitioners' arguments that HB20 violates even Respondent's cramped view of the First Amendment. Pet. Br. 23-24.

b. Respondent's reliance on historical common-carrier regulation is equally meritless. Respondent insists that covered websites "are today's descendants of" mail, telephone, and telegraph carriers. Resp. Br. 22. But covered websites do not passively carry unaltered messages from point to point; they disseminate curated collections of

third-party speech to broader audiences (while selling advertising made attractive because of those audiences) in a similar way that movie theaters, newspapers, and cable programmers do. *Moody* Resp. Br. 49-50; Public Knowledge Br. 7-8; U.S. Br. 2-3, 25. "[I]mpos[ing] a form of common carrier obligation" to restrict editorial discretion therefore "burdens [their] constitutionally protected speech rights." *Denver Area Educ. Telecoms. Consortium, Inc. v. FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in part and dissenting in part); *see* Pet. Br. 32; Yoo Br. 4-7; TechFreedom Br. 28-29. Tellingly, Respondent provides *no* evidence of any historical tradition of imposing common-carrier obligations on American *publishers* of collections of speech. *See Moody* Resp. Br. 48-49; Protect the First Foundation ("PFF") Br. 5, 11, 17-18. Nor does he grapple with the history refuting any such tradition.

"At the time of the Founding, . . . the Federal Government could not compel book publishers to accept and promote all books on equal terms or to publish books from authors with different perspectives." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 427 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc). Nor could governments compel newspapers to print all comers—even though Founding-era newspapers did *not* "wr[i]te all or any considerable parts of their papers." Frank Luther Mott, American Journalism – A History 1690-1960 47 (3d ed. 1962). While they "usually wrote what few local items appeared," they "compiled foreign news and miscellany by means of scissors and paste-pot," "edited the meagre news from other colonial towns," accepted "contributed letters or essays addressed to the editors," and included

"extracts from published books and pamphlets." *Id.* at 47-54. While some believed "that the principles of liberty of the press required the publisher of a paper to open his columns to any and all controversialists, especially if paid for it," the Framers did not. *Id.* at 55. As Benjamin Franklin explained, his newspaper was no "stagecoach, in which any one who would pay had a right to a place." Benjamin Franklin, Autobiography of Benjamin Franklin 94 (1901 ed.); *see* Historians' Br. 3-4, 7-21; PFF Br. 10-18.

Consistent with that history, this Court has both long and recently recognized the difference between ensuring equal access to non-expressive services like inns, railroads, and telephone lines, and forcing an expressive business to change the message it delivers to the public by accepting all comers. *E.g.*, *303 Creative*, 600 U.S. at 588-89.

Contrary to Respondent's claims (*e.g.*, Resp. Br. 22-23, 34), covered websites *do not* take all comers. *See* Pet. Br. 31; *Moody* Resp. Br. 51; U.S. Chamber Br. 14-16; TechFreedom Br. 20; Yoo Br. 9-10. They have always publicly promulgated and enforced their own policies about what speech they will disseminate. *E.g.*, J. A. 111a; TechFreedom Br. 12-13 (policies from 2005 to 2023). Respondent emphasizes that covered websites contract with all users on the same terms. Resp. Br. 36. But Respondent's emphasis on the *form* of the contracts ignores their *terms*, which specify that covered websites retain editorial control. *See* J. A. 405a-479a (collecting policies).

In fact, Respondent does not claim that covered websites have already taken on any obligation to disseminate all speech. By his own telling, Section 7 allows websites to remove "any categories of content they wish." Resp. Br. 14. Respondent identified no historical common

carrier that was free to adopt such policies. *E.g.*, *Moody* Resp. Br. 51-52; TechFreedom Br. 29-31.

c. Rather than confront the historical treatment of publishers, Respondent proposes a multi-factor test "to determine whether common-carriage treatment is warranted"—while conceding "[i]t is unclear" if any of the factors "state[] a requirement, or even reflect[] good law." Resp. Br. 23 (citations omitted). No multi-factor test could justify stripping publishers of their First Amendment rights. *See supra* p.3 In all events, Respondent's factors are ahistorical, inapplicable, or both. *E.g.*, Yoo Br. 2-3, 14-24.

First, covered websites are not in the "communications industry" (Resp. Br. 23) in the way common-carrier cases contemplate—*i.e.*, *carrying* communications from point-to-point. Covered websites engage in dissemination, not "carriage" as that term has been understood for centuries. *See* U.S. Chamber Br. 15-16; Public Knowledge Br. 10; TechFreedom Br. 6-11. That difference is clear to Congress, which distinguishes between websites and telecommunications services. *See* Phoenix Center Br. 15-16, 25-26. The former are in the "communications" business only in the way newspapers, movie theaters, and book publishers are.

Second, Respondent's "market power" discussion is legally confused and factually mistaken. Resp. Br. 23. Legally, what matters is whether an industry has characteristics that limit entry and thereby foreclose additional speakers.[3] Respondent cannot identify anything like that

[3] Respondent claims that there was "competit[ion]" and no " barriers" to entry in the telegraph and telephone industries, Resp. Br. 38, but

here. The "social media" market is dynamic; no single service has a monopoly, and new Internet websites constantly arise. *See* Center for Growth & Opportunity Br. 20-25; U.S. Chamber Br. 16-17; ICLE Br. 27-28. This case alone concerns at least six different services, and none has the means to impede users' access to the Internet or other, unregulated websites like Truth Social. Furthermore, the First Amendment prohibits the infringement of speech as a replacement for economic regulation. Phoenix Center Br. 9-10.

Respondent vaguely alludes to "network effects" that are neither substantiated by any record evidence nor discussed in the legislative findings. Resp. Br. 23. But building successful "networks" that are difficult to replicate does not constitute "unfairly disadvantaging" competitors, or even necessarily evince "market power." Economists' Br. 22-25. And as Petitioners have explained (Pet. Br. 44-45), that certain websites are perceived to have "influence" (Resp. Br. 4) is not a permissible basis to subject them to common-carrier status, let alone to deprive them of First Amendment rights. Indeed, Respondent has no response to this Court's precedent upholding the First Amendment rights of even state-sanctioned monopolies. *See* Pet. Br. 32; U.S. Chamber Br. 17-18; Yoo Br. 12, 21-22.

Third, covered websites have not received the kind of "government support" (Resp. Br. 24) common carriers receive, which typically entails "quid pro quo" benefits like being granted a monopoly in exchange for agreeing to serve all. Yoo Br. 25-26. If it were enough to scour the

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that is wrong. *E.g.*, *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 371 (1999).

federal code for "tax breaks" (Resp. Br. 24 (capitalization altered)), most American businesses might be deemed "common carriers." And in pointing to § 230's protections for *all* websites, Respondent disregards that Congress determined websites should *not* be treated "as common carriers," Pet. Br. 32, and expressly allows all websites to "filter, screen, . . . disallow[,] pick, [and] choose . . . content." 47 U.S.C. § 230(f)(4); *see* Pet. Br. 33. Congress thus "has not imposed . . . nondiscrimination" as a condition of § 230 protection. *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring in vacatur). And Respondent has no explanation for why HB20 disfavors a small subset of websites protected by § 230.

Fourth, this Court long ago set aside any "public interest" test for common-carrier regulation. *See Nebbia v. New York*, 291 U.S. 502, 536 (1934); Yoo Br. 17-18 (collecting authorities). Such a test is "hardly helpful, for most things can be described as 'of public interest.'" *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring).[4]

d. As a last-ditch effort, Respondent tries to rewrite HB20's statutory text. He insists for the first time that Section 7 primarily prohibits status-based discrimination, and that so long as any of its provisions is valid in the main, Petitioners' entire challenge must fail. Resp. Br. 19. These arguments were not raised below—even though Petitioners have consistently challenged *all* of Section 7—

[4] To the extent Respondent suggests that Section 7 is permissible as a public-accommodations law, Resp. Br. 25, he ignores this Court's holdings that governments cannot "declar[e] . . . speech itself to be [a] public accommodation," *Hurley*, 515 U.S. at 573; *see* Pet. Br. 21.

so they are "forfeited." *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37 (2015). They are also wrong.

At the outset, Respondent fundamentally "misunderstands how courts analyze facial challenges." *City of L.A. v. Patel*, 576 U.S. 409, 418 (2015). When assessing whether a law is unconstitutional in all (or most) applications, the Court must focus on each challenged provision. That is why the severability doctrine applies in facial challenges and requires examining each statutory provision and preserving valid and severable provisions—rather than rejecting the facial challenge entirely if any valid provision is found. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010).

At any rate, Respondent's novel effort to refocus Section 7 primarily towards status-based discrimination is atextual and illogical. Respondent contends that many applications of Section 7 concern "discrimination" based on status, "associational" relationships, or membership in particular organizations. Resp. Br. 8-9, 16-19. But by their terms, the first two Section 7 provisions prohibit taking various editorial actions based on expressive "viewpoint." Tex. Civ. Prac. & Rem. Code § 143A.002(a)(1)-(2). *Tornillo* held that governments can do no such thing. 418 U.S. at 258. Indeed, "forbidding acts of discrimination" *among viewpoints* is "a decidedly fatal objective" for the First Amendment's "free speech commands." *Hurley*, 515 U.S. at 578-79.

True, HB20 references both the "viewpoint" of the user or "another person." But that is because Section 7 prohibits *both* "censor[ing] a user" *and* restricting a user's "ability to *receive* the expression of another person." Tex. Civ. Prac. & Rem. Code § 143A.002(a) (emphasis added).

That likely explains why Respondent has never before advanced the suggestion that these provisions are concerned with the views of a user's "family member, employer, neighbor, acquaintance, or co-religionist." Resp. Br. 16.[5]

As for Section 7's third prohibition based on geographic location in Texas, Tex. Civ. Prac. & Rem. Code § 143A.002(a)(3), the plain import is to prevent websites from responding to Texas's censorship by withdrawing from the market. The original motivation for HB20 had everything to do with the perceived editorial bias of the targeted websites, rather than their unwillingness to serve Texans. In any event, this effort to force targeted websites to continue operating in Texas (subject to HB20) is a First Amendment vice, not a virtue. The First Amendment prohibits States from compelling private actors to publish speech within that State. A State could not require the New York Times to sell its newspapers in Texas, or Netflix to stream there. *E.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 768 (1988) ("the circulation of newspapers . . . is constitutionally protected"); *Tornillo*, 418 U.S. at 258. It can no more require covered websites to operate in Texas. (Petitioners also have a Commerce Clause claim against this provision pending in the district court. J. A. 34a, 50a-51a. This makes it even more egregious that Respondent did not raise these arguments below.)

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[5] Regardless, governments cannot infringe associational objections against publishing speech. *E.g.*, *303 Creative*, 600 U.S. at 586. For instance, a book publisher has no obligation to publish books from authors associated with extremist groups like the Proud Boys, even if the viewpoint expressed by the author in the book has nothing to do with the group's extremist views.

B. HB20's "social media platform" definition and HB20 Section 7 trigger strict scrutiny.

HB20's central coverage definition and Section 7 are plainly content-, speaker-, and viewpoint-based. Pet. Br. 36-41.

First, Section 7 is content-based because it compels websites to alter the content they disseminate. Pet. Br. 36. Respondent insists that "a law compelling . . . speech is content-based only when the 'extent of the interference . . . depend[s] upon the content of the' Platforms' service." Resp. Br. 39 (quoting *Turner*, 512 U.S. at 643-44). But that ignores cases squarely holding that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed. of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988) (citing *Tornillo*, 418 U.S. at 256); *see also Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*").

In fact, HB20 is content-based twice over because it excludes certain categories of content from its prohibition. Pet. Br. 37. Respondent asserts that the exception for threats and incitement against certain protected classes regulates unprotected speech. Resp. Br. 39. But Respondent ignores the separate exception for referrals from state-preferred organizations. *See* Pet. Br. 37. And singling out certain unprotected speech renders Section 7 a viewpoint-based regulation of speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992). Respondent suggests severing these exceptions (Resp. Br. 40), but this would only deepen the law's constitutional flaws. Respondent relies on these same exceptions to argue that Section 7 is properly tailored. *See* Resp. Br. 32.

HB20's definition of "social media platform" is also content-based. Pet. Br. 37. Respondent has no explanation for why HB20 exempts websites that "consist[] primarily of *news*, *sports*, [and] *entertainment*." Tex. Bus. & Com. Code § 120.001(1)(C)(i) (emphases added). He just insists that "almost every law applies only to a certain subset of individuals." Resp. Br. 40. But that ignores that websites are subject to the statute's onerous requirements only because of the content of the speech they disseminate (and their perceived viewpoints).

Respondent also ignores that HB20 distinguishes even among "social media platforms." He claims that those distinctions are justified by covered websites' "considerable market power." Resp. Br. 40. Yet he does not explain how news, sports, and entertainment websites or websites with 49 million monthly users lack comparable "market power." And the newspapers in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), had market power, yet the Court still applied strict scrutiny to a tax singling them out. Respondent insists that the differential treatment there "was evidence of the government's effort to 'suppress the expression of particular ideas or viewpoints.'" Resp. Br. 41 (citation omitted). That misdescribes the Minnesota statute, to which the Court applied strict scrutiny without evidence of "any impermissible or censorial motive." *Minneapolis Star*, 460 U.S. at 580, 582-83.

Here, by contrast, there is overwhelming evidence that HB20's entire point is to *suppress covered websites'* viewpoints. Pet. Br. 40. Respondent asserts that *United States v. O'Brien*, 391 U.S. 367 (1968), precludes courts from looking to the signing statement of the Governor and

key legislative proponents. But *O'Brien* did not involve express content-based and speaker-based discrimination, each of which *demands* an inquiry into whether the textual distinction "reflects a content [or viewpoint] preference." *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015) (citation omitted); *e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011); *cf. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534-35 (1993).

C. HB20 Section 7 fails strict scrutiny and any other form of heightened First Amendment scrutiny.

1. The State lacks a sufficient governmental interest in HB20 Section 7. Respondent invokes *Turner* to assert an interest in "the widespread dissemination of information from a multiplicity of sources." Resp. Br. 25-26.[6] But covered websites have no "physical" "bottleneck" control over access to expression on the Internet. *Turner*, 512 U.S. at 656.[7] Petitioners explained all of that in their opening brief. Pet. Br. 41-43; *see also* Reporters Committee Br. 22-23; TechFreedom Br. 25-28; U.S. Br. 30-32. Yet Respondent nowhere responds.

Respondent argues that the *Turner* dissenters would have upheld common-carrier regulation of cable operators, implying they would uphold Section 7 too. Resp. Br. 26. But the *Turner* dissent is a peculiar opinion for Respondent to invoke. The dissenters *agreed* that the First Amendment protects those who "[s]elect[] which

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[6] Respondent also cites *Associated Press v. United States*, 326 U.S. 1 (1945), an antitrust case that did not uphold a regulation of editorial discretion. Resp. Br. 26-27.

[7] Whether such bottleneck control justifies other regulations of the cable industry is not before this Court. *Cf.* Resp. Br. 29.

speech to retransmit"—like "publishing houses, movie theaters, bookstores, and Reader's Digest"—because their activities are "no less communication than is creating the speech in the first place." *Turner*, 512 at 675 (O'Connor, J., dissenting in part). Moreover, the dissenters distinguished between true common-carrier laws—laws that require entities to be "open to all"—and laws (like HB20) that "suffer from the defect of preferring one speaker to another." *Id.* at 676-80, 684. If anything, the *Turner* dissent confirms that HB20 is not a common-carrier regulation and reinforces that HB20's speaker and content distinctions are unconstitutional.

Similarly, Respondent cannot rely on the speech rights of Texas users. Resp. Br. I. This appeal to "free speech" erases "a critical boundary between the government and the individual." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2019). The First Amendment is a "shield" against *governmental* power, not a "sword" government can use to "impose[] obligations on the owners of the press." *Tornillo*, 418 U.S. at 251. While private speakers exercise editorial discretion, governmental efforts to control the editorial function or level the playing field are censorship, pure and simple. *Hudgens* says nothing to the contrary. *Cf.* Resp. Br. I, 13-14. That case reaffirms that "the constitutional guarantee of free speech is a guarantee only against abridgment by government." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (citation omitted).

At bottom, Section 7 is little more than Texas's attempt to impose its view of balance in public discussion, which this Court has repeatedly rejected. Pet. Br. 41-42.

2. Respondent has not carried his burden to demonstrate that HB20 Section 7 is "the least restrictive means of achieving a compelling state interest"—without being either over- or underinclusive. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

Respondent has no answer to most of the tailoring flaws Petitioners identified. Pet. Br. 43-45. Strikingly, Respondent does not defend Section 7's definition of "censor," which prohibits covered websites from treating any content differently based on viewpoint.

Respondent argues that it is no problem that Section 7 permits—or even incentivizes—covered websites to prohibit categories of content because Petitioners assert "the unqualified right to remove categories of speech." Resp. Br. 41. But if the State's true interest were in maximizing speech, it would not allow websites to block, for instance, all content discussing literature. Respondent also contends that "Section 7's exceptions defeat the Platforms' asserted need to exercise 'editorial discretion.'" Resp. Br. 32. But the only purported exceptions Respondent identifies are for "pro-terrorist" speech, as "unlawful speech" or "speech that incites violence." Resp. Br. 32. Not all content that reflects a viewpoint sympathetic to terrorism is illegal. Nevertheless, pro-terrorist expression is just one example of prohibited speech on the websites. *See* J. A. 405a-479a (collecting policies). Hate speech, for instance, is prohibited on covered websites even if it is neither unprotected nor illegal. *E.g.*, *Matal v. Tam*, 582 U.S. 218, 246 (2017). User attempts to submit hate speech are not "fanciful," Resp. Br. 32 (citation omitted), as the record demonstrates, *e.g.*, Pet. Br. 6-7.

Respondent insists that Section 7's interference with speech is minor because it otherwise "permits" covered websites to "say anything they wish" and "disavow" user-generated expression. Resp. Br. 27. But "the ability to disclaim would 'justify any law compelling speech.'" Pet. Br. 21 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring in part)).

Finally, Respondent repeatedly refers to covered websites as the "public square." Resp. Br. 1, 3, 28, 32. But he has no response to public-forum doctrine being limited to *government* property. Pet. Br. 33; *see* U.S. Br. 23. And while Respondent complains a state-run website would not have the same "network effects," Resp. Br. 27-28, that is an admission that the State's true interest is in commandeering covered websites' "enviable vehicle[s] for [the] dissemination" of expression. Pet. Br. 43 (citation omitted).

II. HB20 Section 2's individualized-explanation requirements violate the First Amendment.

A. HB20 Section 2 triggers strict scrutiny—not *Zauderer*'s limited exception to general rules against compelled speech.

1. HB20's requirements for covered websites to disclose and explain individual editorial actions trigger strict scrutiny in multiple ways. As an initial matter, Section 2 relies on the same content-, speaker-, and viewpoint-based definition of covered "social media platform" discussed above. *See supra* pp.15-17; Pet. Br. 37-40.

Section 2's individualized-explanation requirements independently trigger strict scrutiny by compelling

speech about billions of editorial decisions. Pet. Br. 46-48; *see* Reporters Committee Br. 26-29. The notice-complaint-appeal provisions require websites to provide notice and explanations for content removals and tracking information about internal editorial processes. Pet. Br. 46-47. Much as *Tornillo*'s right-of-reply statute burdened the exercise of editorial discretion by requiring newspapers to run opposing views only if they criticized a political candidate, *see* 418 U.S. at 256-57, HB20's duty-to-explain requirement imposes onerous burdens on covered websites if they refuse to disseminate content. They are akin to requiring the New York Times to provide notice-complaint-appeal processes when it declines to run letters to the editor—except on a much larger scale. And Respondent has not disclaimed that Section 2's compulsion to disclose "specific information regarding the manner in which the social media platform . . . curates and targets content to users" requires websites to disclose individual content-moderation decisions. Tex. Bus. & Com. Code § 120.051(a). That could require explanations of potentially every editorial action the websites take.[8]

2. *Zauderer*'s limited exception to heightened First Amendment scrutiny for compelled speech does not apply here. Pet. Br. 47-48; *see* AFP Br. 18-24; U.S. Chamber Br. 18-22; Washington Legal Foundation Br. 5-15.

[8] After years of litigation, Respondent belatedly offers a limiting construction of Section 2's mandate for "a description of each . . . action," Tex. Bus. & Com. Code § 120.053(a)(7), as requiring only "describing platform-wide decisions, rather than specific implementations of those decisions." Resp. Br. 47. That does not cure the constitutional deficiency, as Respondent does not concede that websites' current disclosures suffice. Otherwise, explaining how "platform-wide decisions" potentially apply to billions of pieces of content is burdensome.

Respondent does not dispute that this Court has *never* applied *Zauderer* outside the context of correcting misleading commercial advertising. Respondent nevertheless insists that *NIFLA* somehow broadens *Zauderer* to govern speech about "commercial products" more broadly. Resp. Br. 43. That is backwards. *NIFLA* distinguished *Zauderer* en route to condemning the disclosure requirement at issue there under the First Amendment. *NIFLA*, 138 S. Ct. at 2372.

Likewise, Section 2 is nothing like requiring a public utility to "carry . . . notices of upcoming Commission proceedings or of changes in the way rates are calculated." *PG&E*, 475 U.S. at 15 n.12. Editorial decisions are also unlike "calorie content," "radiation levels," and "country of origin" disclosures. Resp. Br. 43. Those are facts that can be identified without subjective evaluation. That makes them unlike describing why a website declines to disseminate particular content. *See* Reporters Committee Br. 25.

B. HB20 Section 2 fails any form of heightened First Amendment scrutiny, and even fails *Zauderer*'s test.

Respondent's attempt to argue that only some aspects of Section 2 satisfy heightened First Amendment scrutiny is unconvincing. Resp. Br. 44-45; U.S. Br. 33.

1. Respondent offers a scattershot set of governmental interests, none of which supports Section 2's burdens on editorial discretion. Respondent maintains that the "notice" and "initial explanation" provisions "ensur[e] that the Platforms comply with their own policies." Resp. Br. 44-45. This new argument lacks foundation in HB20's text, is an illegitimate reason to compel speech

about editorial decisions, and is not furthered by Section 2. HB20 does not provide recourse for violations of terms of service. And this newfound defense for Section 2's requirements ignores multiple arguments in Petitioners' opening brief. Pet. Br. 49-50. For instance, Respondent says nothing about Texas's existing consumer-protection laws, which apply more broadly than HB20. *See* Pet. Br. 49.

Rather than respond to Petitioners' arguments, Respondent offers justifications that fail to engage with Section 2's actual requirements. Respondent suggests that a covered website declining to disseminate expression without an individualized explanation is akin to "sell[ing] a classified ad, pocket[ing] the money, [not] run[ning] the ad, and refus[ing] to explain itself." Resp. Br. 46. Of course, covered websites do not *sell* users space in which to post any speech they choose. Rather, they simply require users to agree to their terms of service, which clearly say that the website retains discretion over which speech to disseminate.

For the first time, Respondent attempts to shift from deliberate editorial actions to "glitch[es]" and asserts that "a State can require a company to . . . explain why its product doesn't work." Resp. Br. 46. This Court has never recognized a compelling governmental interest in burdening editorial discretion to address perceived mistakes. Editorial discretion is protected whether it is perceived as "fair or unfair." *Tornillo*, 418 U.S. at 258; *see Moody* Pet. App. 59a (similar).

Regardless, if any of these justifications were Texas's true purpose, the State would not have excluded services

that similarly moderate user-submitted content, like Gab and Truth Social. *See* Pet. App. 175a.

2. Even assuming the State had a legitimate interest, Section 2 is not properly tailored.

Respondent asserts that *Zauderer* is not concerned with "administrative" or "financial burdens." Resp. Br. 47 (citation omitted). If true, that assumes even-handed disclosure requirements. Just as governments cannot impose differential taxation—as even Respondent concedes, Resp. Br. 41—it cannot selectively burden particular speakers with costly duty-to-explain obligations.

For the first time, Respondent deems some of Section 2's burdens "exaggerated," because "it is not difficult to identify the term of service that has allegedly been violated" and "can be met with an automated process." Resp. Br. 14, 44, 47. Respondent cites no evidence, and the record contains ample evidence of Section 2's enormous burdens. *E.g.*, Pet. Br. 51; *see* FIRE Br. 29-31; Trust & Safety Foundation Br. 9-12. Whatever "automated" processes Respondent envisions will require investments. J. A. 133a.

It is not the case that Section 2's burdens "largely flow from the companies' size." Resp. Br. 48. These requirements would be *more* burdensome for smaller websites with less developed technical infrastructure or fewer resources. Engine Advocacy Br. 13-17.

Though Respondent has finally forsworn his ability to secure "penalt[ies]" for violations, Resp. Br. 47, he does not address the chill on editorial discretion arising from repeated disclosure—plus the threat of investigation and enforcement. Pet. Br. 47; *see* FIRE Br. 29.

Respondent's efforts to analogize Section 2 to corporate-proxy-vote-solicitation statements and the Fair Credit Reporting Act fail. Resp. Br. 45. Those disclosures do not require individualized explanations of *editorial* decisions. This Court has also invoked the constitutional-avoidance doctrine to limit the SEC's power over "publishers." *Lowe v. SEC*, 472 U.S. 181, 205 & n.50 (1985). Similarly, lower courts have rejected SEC disclosures to the extent they applied to "editorial policy." *SEC v. McGoff*, 647 F.2d 185, 191 (D.C. Cir. 1981). Beyond publishers, lower courts have limited the SEC's authority to compel disclosures. *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) ("conflict minerals" disclosure unconstitutional).

In sum, holding Section 2's duty-to-explain requirements unconstitutional will not have "catastrophic consequences." Resp. Br. 45. Rather, it will ensure that Respondent cannot "accomplish[] indirectly" what he cannot "command[] directly": altering covered websites' editorial discretion. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77-78 (1990).

CONCLUSION

The Court should reverse the Fifth Circuit's judgment.

Respectfully submitted.

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