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

REPLY BRIEF FOR THE 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.

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I. Respondent agrees that this Court should grant review to resolve the important First Amendment issues raised by the Fifth Circuit's split with the Eleventh Circuit.

Respondent agrees with Petitioners that the First Amendment issues presented by laws like Texas House Bill 20 ("HB20") are of "extraordinary importance" and warrant this Court's review—especially in light of the split with the Eleventh Circuit's decision in *NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196 (11th Cir. 2022) [hereinafter "*Moody*"]. *See* Resp. to Pet. for Writ of Cert. 1-13, *NetChoice v. Paxton* (U.S. No. 22-555) [hereinafter "Resp."]. The parties also agree that this case cleanly presents those issues for the Court's review. Resp.13-15.[1] The Court should grant both *Moody* certiorari petitions (Nos. 22-277 & 22-393) and then hold this Petition. Alternatively, the Court can grant this Petition as well.

Respondent contends that resolution of the *Moody* petitions may not answer the issues presented here because of differences between the Florida and Texas laws. Resp.15-17. But in *Moody*, as here, this Court will necessarily address whether websites have First Amendment rights to choose whether and how to publish and disseminate speech. Regardless of any differences between the States' laws, both single out disfavored websites and compel them to publish speech. The Eleventh Circuit held that such laws cannot meet even intermediate scrutiny. *Moody*, 34 F.4th at 1226-27. Affirming that holding would resolve the constitutionality of HB20 Section 7.

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[1] Respondent does not contest that Petitioners have raised and preserved both traditional no-set-of-circumstances and overbreadth facial challenges to HB20 Sections 2 and 7. *See* Pet.35-36.

Likewise, both cases ask whether government may compel websites to provide "notice and a detailed justification for every content-moderation action." *Id.* at 1230. And the pending *Moody* cross-petition implicates the remaining disclosure and operational provisions. *See* Cond. Cross Pet. 28-37, *NetChoice v. Moody* (U.S. No. 22-393). Rulings on these issues will resolve the constitutionality of HB20 Section 2. *See* Pet.6-7, 29-31.

In any event, the Texas Attorney General, NetChoice, and CCIA agree that this Court should grant review and resolve these issues.

II. Respondent fails to demonstrate that HB20's prohibition on editorial discretion or its operational and disclosure provisions survive First Amendment scrutiny.

A. HB20 Section 7 violates the First Amendment by compelling select websites to publish viewpoints they do not want to disseminate.

1. Respondent's attempts to defend the Fifth Circuit majority's decision—and deny covered websites' First Amendment rights—fail. Resp.18-26.

Websites publish and disseminate speech according to their editorial policies, fostering their unique communities. Respondent does not dispute that. Yet Respondent refuses to acknowledge that the First Amendment protects all Internet websites' speech publication and dissemination. *See* Pet.15; *Reno v. ACLU*, 521 U.S. 844, 853 (1997). These protections are deeply rooted in this Nation's history and reflected in myriad decisions protecting many different kinds of publishers. Pet.12-16 (collecting cases). Indeed, Respondent does not dispute that "the original public meaning of freedom of the press extends

far beyond mainstream mass media" to all means of publishing speech. Pet.27.[2]

Instead, ignoring this Court's established precedent, Respondent contends government has the power to control private entities' publication and dissemination of speech. Respondent makes the novel claim that the First Amendment "permits a State to step in to . . . guard its citizens' rights to equal access to modern means of communication." Resp.2. No historical tradition or precedent supports this assertion.[3]

Similarly, Respondent invokes an interest in "the preservation of a 'multiplicity of information sources.'" Resp.10-11 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994)). Under this theory, many of this Court's decisions would have come out differently. Government could compel (1) newspapers to publish articles, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *PG&E v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 12

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[2] Respondent is thus incorrect to say that websites "provided no basis for asserting that they warrant similar treatment to the press." Resp.31 (citation omitted).

[3] Contrary to Respondent's implication, HB20 does not address websites acting as "agent[s] of the federal government's desire[s]," and it would be vastly overbroad regardless. Resp.21. Moreover, even if HB20 had tried to target government agents, States cannot regulate federal government actors. *E.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). In any event, Respondent forfeited this argument by not raising it below.

Nor does it matter that websites consider commercial factors. Resp.21. Expression "published and sold for profit" is still "safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). Plus, the factual record in this case of advertiser and user responses to certain expression (*see* Pet.5) dispels Respondent's speculation that websites lack "reputational[]" responsibility for expression they publish. Resp.22.

(1986) (plurality op.); (2) parade organizers to include floats, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 570 (1995); (3) cable channels to air shows, *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996) (plurality op.); (4) bookstores to carry particular books, *Smith v. California*, 361 U.S. 147, 152-54 (1959); or (5) any number of private entities to disseminate speech against their will.

Nevertheless, Respondent contends that HB20 is a permissible "public accommodations" or "common carrier" law ensuring "undifferentiated access" to "all comers." Resp.18-20 & n.13. This position did not command a majority of the Fifth Circuit below. *See* Pet.26 n.16. For good reason: There is no precedent for treating speech publishers as public accommodations or common carriers. These websites—unlike "telegraph and telephone services" (Resp.20)—"publish" speech and are therefore inherently "expressive." *Reno*, 521 U.S. at 853, 883.[4] This Court already held that government cannot "declar[e] . . . speech itself"—here, websites' curated publication of speech—"to be the public accommodation." *Hurley*, 515 U.S. at 573. Besides, "Facebook . . . Twitter, and YouTube . . . are not considered common carriers." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 392 (D.C. Cir. 2017) (Srinivasan, J., concurring in denial of reh'g en banc); *accord id.*

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[4] Advancing an erroneous theory that websites are telecommunications companies, Respondent cites 47 U.S.C. § 230. Resp.17, 23. But Section 230's protections exist and have meaningful effect precisely *because* Internet websites publish speech. Pet.20 n.13. Respondent ignores that Section 230(f)(3) ensures that Section 230 applies to Internet websites that, for instance, "filter, screen, allow, . . . disallow[,] pick, [and] choose" expression they publish.

at 433 (Kavanaugh, J., dissenting in denial of reh'g en banc).[5]

From there, Respondent makes a series of arguments that, in combination, propose an impermissible multi-factor test for determining whether a private entity has First Amendment rights. The First Amendment, however, must "eschew 'the open-ended rough-and-tumble of factors.'" *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (controlling op. of Roberts, C.J.).

For example, Respondent contends that *Tornillo*, *PG&E*, and *Hurley* are limited to specific facts. Respondent begins by arguing *Hurley* is limited to cases in which there is a "risk of misattribution" of *authorship*. Resp.24. But there was no such risk in *Tornillo*, where a State compelled newspapers to publish replies clearly authored by political candidates the newspapers criticized. *Tornillo*, 418 U.S. at 247. In *Tornillo*, the problem was that a newspaper was being forced to *publish* and *disseminate* the speech authored by others. *Id.* at 258; *see also Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (unconstitutional for government to require "participat[ion] in the dissemination" of speech, even when there was no risk of misidentifying the speech disseminator as the author). Then, Respondent incorrectly recasts *Tornillo* and *PG&E* as cases about "finite space," positing those cases do not apply to the allegedly "infinite space" on websites. Resp.25.[6] But

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[5] Respondent incorrectly argues that covered websites' invocation of editorial discretion is new. Resp.3-4, 24. These websites have always had editorial policies. *E.g.*, R.200-01; R.220-21. Thus, covered websites are "open" only to those who agree to abide by websites' policies regarding acceptable expression. R.1664-1721.

[6] Websites have their own version of space constraints: what shows up at the top of individual viewers' feeds.

Tornillo itself rejected this contention, observing that its holding would apply "[e]ven if a newspaper . . . would not be forced to forgo publication . . . by the inclusion of a reply." *Tornillo*, 418 U.S. at 258. *Reno* then reaffirmed that the Internet's "relatively unlimited" space does not reduce First Amendment protections. 521 U.S. at 870.

Respondent further suggests that the First Amendment's freedom of "*association*"—although not the freedoms of speech and the press—applies only to "website[s] designed *for specific expressive purposes*." Resp.18 n.12 (emphases added). There is no basis for limiting the First Amendment in this way. *Reno* recognized that Internet websites are inherently "expressive." 521 U.S. at 883. And *Hurley* held that private entities retain their First Amendment rights even when they "combin[e] multifarious voices" rather than presenting a single "particularized message." 515 U.S. at 569. Putting aside all those problems, Respondent does not identify the constitutional source of government's authority to determine which websites have sufficiently "specific" expressive purposes to qualify for First Amendment protection. Resp.18. n.12.[7] This Court should decline to create a new "test" that would undercut the First Amendment and invite subjective governmental enforcement.

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[7] Respondent acknowledges HB20 could have constitutional problems if applied to "small businesses." Resp.14, 29-30. Respondent does not explain the First Amendment significance between small versus large companies. Moreover, the concurrence Respondent relies on undermines this argument: Justice Powell's *PruneYard* concurrence expressly distinguished cases like *Tornillo* and *Wooley* because they involved "[t]he selection of material for publication." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 99 (1980) (Powell, J., concurring in part).

2. Respondent's arguments that HB20 does not trigger strict scrutiny are similarly unavailing. Resp.20-24, 28-29. As an initial matter, Respondent broadly ignores that compelled speech triggers strict scrutiny. Pet.22. Respondent also makes no effort to rebut that Section 7 is "viewpoint"-based, Tex. Civ. Prac. & Rem. Code § 143A.002(a)—or that it was enacted for the expressed purpose of "protecting conservative speech," Resp.29.

Section 7, additionally, is content-based, because it allows editorial discretion over certain content-based categories. Pet.22-23. Respondent's attempts to limit those exceptions to only unprotected speech (Resp.8) make the exceptions viewpoint-based instead. Pet.22-23.

Finally, Respondent does not dispute that HB20's "social media platform" definition singles out select speech publishers by applying only to those websites with 50 million monthly U.S. users. *See* Pet.20-21.[8] He provides no explanation why HB20 excludes "news, sports, [and] entertainment" Internet websites that offer their viewers the ability to submit comments. Tex. Bus. & Com. Code § 120.001(1)(C).

3. Respondent cannot justify HB20 Section 7 under any level of heightened scrutiny. Resp.26-30.

Contrary to Respondent's contentions, *Turner*'s fact-dependent intermediate-scrutiny analysis is inapposite. Resp.26-28. *Turner* upheld a requirement that cable companies carry certain "broadcast television" channels to prevent "the elimination of [free] broadcast television."

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[8] Respondent continues to incorrectly assert that HB20 covers only Facebook, Twitter, and YouTube. Resp.6-7 & n.8. HB20 regulates at least several more of Petitioners' members. Pet.6. Plus, HB20 has fatal tailoring problems no matter which specific websites it covers. *See* Pet.25-26.

Turner, 512 U.S. at 646. At that time, cable companies' "bottleneck" control over the "physical" cable lines into homes meant their refusal to carry broadcast channels would have eliminated most viewers' access to broadcast television. *Id.* at 656. Confirming that *Turner* was limited to *broadcast* television channels, *Denver Area* later recognized that cable operators may choose what *cable* channels to disseminate. 518 U.S. at 737-38 (plurality op.); *id.* at 823-24 (Thomas, J., concurring in the judgment in part). Unlike cable, Internet websites possess no physical bottleneck. *Reno*, 521 U.S. at 870.

Otherwise, Respondent does little to defend HB20's arbitrary threshold of 50 million monthly U.S. users, except to inaptly contend that covered websites have "market power." Resp.20 n.13, 30. These websites compete vigorously in an increasingly competitive and dynamic market.[9] Regardless, Respondent does not dispute that this Court's precedent recognizes that companies of all sizes retain First Amendment rights. Pet.26. His arguments have yet to provide any limiting principle explaining why a State could not strip Internet websites with 25 or 49 million monthly users of First Amendment protection.[10]

Tellingly, Respondent does not defend HB20's prohibition on viewpoint-based decisions about "monetiz[ation]." *See* Pet.25. Respondent also concedes that

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[9] For example, TikTok is now the Internet's most-visited website with 1 billion active users worldwide after launching in 2016. TikTok, Thanks a Billion (Sept. 27, 2021), https://bit.ly/36IunqA.

[10] The closest Respondent comes to justifying HB20's precise scope is references to covered websites as the "public square." Resp.1, 3, 11, 12 n.11, 15. That (inaccurate) slogan is not a talisman that supplants proper constitutional analysis. No covered private website is anything akin to a government-run public forum. Pet.15 n.11.

large parts of Section 7 are overbroad to the extent they regulate "recommend[ations of] specific content to a user" or "warn[ings to] users against specific content." Resp.7.

B. HB20 Section 2 violates the First Amendment by imposing operational and disclosure provisions designed to burden editorial discretion.

The parties agree that this Court should review the Fifth Circuit's decision on HB20 Section 2. Resp.12-13.

1. Respondent incorrectly asserts that Section 2 does not trigger heightened scrutiny. Section 2 is content-, speaker-, and viewpoint-based just like Section 7. *Supra* pp.7-8; Pet.28-29.

At bottom, Section 2 intrudes into, or otherwise burdens, websites' editorial functions. Respondent's discussion of *Herbert v. Lando* (Resp.30-31) just underscores that government may intrude in the editorial process only in limited situations. 441 U.S. 153, 174 (1979). *Lando* observed that the First Amendment does not permit "examination" of "the editorial process" to serve "general end[s]" like "the public interest." *Id.* It permitted compelled disclosure of editorial processes for a civil defamation claim, in which plaintiffs must demonstrate "actual malice." *Id.* at 156-57 (discussing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)). But under Respondent's view, government would have limitless power to oversee the editorial choices of newspapers, television channels, bookstores, and all other speech publishers.

2. Respondent largely ignores that *Zauderer* has been limited to (1) "voluntary," *United States v. United Foods*, 533 U.S. 405, 416 (2001); (2) and "inherently misleading," *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559

U.S. 229, 250 (2010); (3) "commercial advertising," *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 647, 651 (1985). *See* Pet.29-31.

Respondent argues *Zauderer* extends beyond "commercial speech" (Resp.31) on the theory that this Court has approved of certain "health and safety warnings" about abortion. *Nat'l Inst. of Fam. & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018); *see id.* at 2381 (Breyer, J., dissenting). But Respondent fails to explain how editorial and publication policies, business-practice disclosures, notice-complaint-appeal processes, or calculation and reporting of editorial decisions constitute "health and safety warnings."

3. Section 2 does not withstand *Zauderer*, even if it applies.

a. HB20 Section 2 compels much more than the disclosure of "factual and uncontroversial information." *Zauderer*, 471 U.S. at 651; Pet.31. Furthermore, unrebutted evidence demonstrates that Section 2's provisions are "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651; *see* Pet.32-34.

For instance, the notice-complaint-appeal processes would permit users to challenge—and seek to overturn—millions of editorial decisions made by websites daily. Tex. Bus. & Com. Code §120.101-04. This requires far more than a "customer-service department" voluntarily receiving user feedback. Resp.33.

Similarly, the biannual transparency report would require enormous investment into data processing. Respondent ignores that this provision requires "a description of each . . . action"—when websites take billions of editorial actions. Tex. Bus. & Com. Code § 120.053(a)(7). And Respondent further mischaracterizes these burdens as

merely requiring "top-line figures," dismissing a declarant's undisputed observation that the necessary data *gathering* and *calculation* would be immense. Resp.33.[11]

Section 2 contains two more provisions Respondent says can be met with "succinct, easily replicated statements." Resp.32. But both requirements are unbounded and expose the targeted websites to arbitrary and discriminatory enforcement. Pet.34.

Section 2 requires disclosures into all "content management, data management, and business practices." Tex. Bus. & Com. Code § 120.051(a). These broad categories cover *everything* websites do, while piercing protections for trade secrets and editorial discretion. Respondent also dismisses (Resp.32) evidence from the President of Stop Child Predators that these "disclosure requirements give child predators a roadmap to escape detection." R.401.

Finally—after more than a year of litigation to clarify what this provision requires—Respondent still refuses to take a position on whether websites' current publicly posted editorial policies comply with the requirement to publish an "acceptable use policy" that "reasonably inform[s] users." Tex. Bus. & Com. Code § 120.052(a), (b)(1).

b. Respondent also incorrectly argues that operational and financial burdens are not cognizable under *Zauderer*. Resp.31. Under Respondent's view, debilitating implementation costs would be irrelevant under *Zauderer*.

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[11] Respondent wrongly claims that the district court "sharply limited discovery." Resp.20 n.13. To the contrary, the district court extended preliminary-injunction briefing deadlines expressly to allow over a month of discovery, including interrogatories, document production, and seven depositions. R.965. The district court denied, as "overbroad," some of Respondent's "document requests" that sought "*millions of documents*." R.964 (emphasis added).

Nor do Respondent's comparisons to other reporting obligations justify HB20. Resp.30-33. Many securities disclosures are far less burdensome, are technically feasible (unlike some here), and apply equally to all publicly-traded companies. *SEC v. McGoff*, 647 F.2d 185, 190 (D.C. Cir. 1981). Moreover, securities disclosures do not require divulging information about editorial discretion. *Id.* at 191 (investigation unlawful as applied to "editorial policy"). Even then, the First Amendment still imposes important limits on the SEC's disclosure power. *E.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 527, 530 (D.C. Cir. 2015) (First Amendment prohibited requirement to disclose use of "conflict minerals").

CONCLUSION

The Court should hold this Petition pending resolution of the *Moody* petitions, or alternatively grant this Petition.

Respectfully submitted.

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