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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether Texas House Bill 20's content-moderation restrictions comply with the First Amendment.

2. Whether Texas House Bill 20's individualized-explanation requirements comply with the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners were the plaintiffs-appellees in the court of appeals. They are NetChoice, LLC d/b/a NetChoice; and Computer & Communications Industry Association d/b/a CCIA.

Respondent was the defendant-appellant in the court of appeals. Respondent is Ken Paxton in his official capacity as Attorney General of Texas.

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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INTRODUCTION

Texas House Bill 20 ("HB20") is an extraordinary assertion of governmental power over expression that violates the First Amendment in multiple ways. HB20 singles out some of the Internet's most popular websites, including Facebook, Instagram, Pinterest, TikTok, Vimeo, X (formerly known as Twitter), and YouTube. Pet. App. 154a.[1] It forces those websites—but not comparable Internet websites with different perceived viewpoints—to disseminate third-party speech against their will and provide individualized explanations for billions of editorial decisions. Legislators and the Texas Governor were not shy about the motivation for this law: to promote "conservative" speech and combat perceived "Silicon Valley censorship." J. A. 21a, 25a.

HB20 is a flagrant violation of the First Amendment. This Court has repeatedly rejected governmental efforts to compel private parties to disseminate speech, in cases involving everything from parade organizers to newspapers to bookstores to cable-television operators to government-franchised monopolies to websites and more. *E.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 570, 575 (1995); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) ("*PG&E*") (plurality op.);[2] *Miami Herald*

[1] This brief will refer to HB20-regulated entities, which include social media services, websites, online applications, and other digital services, as "websites."

[2] All citations to *PG&E* are to the plurality opinion. *See Hurley*, 515 U.S. at 573, 575-76, 580 (treating *PG&E*'s plurality opinion as its holding).

Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974). And rightly so, as there is no American tradition of forcing private parties to disseminate viewpoints against their will. Benjamin Franklin "did not have to operate his newspaper as 'a stagecoach, with seats for everyone.'" *Halleck*, 139 S. Ct. at 1931 (quoting Frank Luther Mott, American Journalism - A History 1690-1960, at 55 (3d ed. 1962)). The same is true of a website that displays speech on the Internet.

The Fifth Circuit majority reached the opposite conclusion by trying to characterize a website's decision not to disseminate expressive "content" as "censorship." But only the government, with its coercive power, can engage in "censorship." When private parties refuse to publish speech, they are engaged in protected First Amendment activity, as numerous cases of this Court hold. The notion that the government may compel private speech in the name of quelling "censorship" turns the First Amendment on its head.

Yet that is precisely what HB20 seeks to do. Its prohibition on making editorial choices based on "viewpoint" would require covered websites to display tens of millions of posts per year containing myriad messages with which they may disagree, from antisemitic speech to terrorist propaganda. Pet. App. 173a. Viewers and advertisers will inevitably attribute this objectionable content to the websites. In fact, many have already waged several boycotts resulting in millions of dollars in lost revenue based on websites' perceived failures to address objectionable content. Pet. App. 184a; J. A. 97a-100a, 103a, 208a, 212a. Worse still, HB20 would force websites to provide individualized explanations each time they refuse to disseminate

speech—actions that covered websites take literally billions of times each year.

The First Amendment tolerates none of this. Accordingly, this Court should reverse the Fifth Circuit's judgment.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a-142a) is reported at 49 F.4th 439. The district court's opinion (Pet. App. 143a-85a) is reported at 573 F. Supp. 3d 1092.

JURISDICTION

The Fifth Circuit entered its judgment on September 16, 2022. Petitioners timely petitioned for certiorari on December 15, 2022. The Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment is reproduced at Pet. App. 186a. HB20 is reproduced at Pet. App. 187a-206a.

STATEMENT

A. Factual background

Petitioners NetChoice and CCIA are two leading Internet trade associations whose members operate a variety of popular websites on which users can share and interact with content, including Google (YouTube's owner), Meta (Facebook and Instagram's owner), Pinterest, TikTok, and X. Pet. App. 154a.[3] These websites "publish," *Reno v. ACLU*, 521 U.S. 844, 853 (1997), and "disseminate," *303 Creative LLC v. Elenis*, 600 U.S. 570, 594 (2023), speech by making text, audio, graphics, and video available to their users.

Petitioners' members edit and organize customized compilations ("feeds") of content that typically include a combination of their own speech, user-submitted speech, and advertisements. *E.g.*, J. A. 100a, 139a, 289a. Covered websites "organize and present" speech, in part, with "'recommendation' algorithms that automatically match advertisements and content with each user." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 480 (2023). Website operators design these algorithms to implement editorial policies likewise crafted by humans. Pet. App. 164a; J. A. 113a, 118a-21a. Every user's feed is an "original, customized creation," "tailored" "for each" user and intended to "communicate ideas." *303 Creative*, 600 U.S. at 582, 587, 594 (internal quotation marks omitted); J. A. 139a ("unique to each user"). That expression is "displayed on" proprietary

[3] Respondent engaged in nearly a month of discovery during the preliminary-injunction proceedings below, including depositions and document production from Petitioners' seven declarants, plus two sets of interrogatories. J. A. 164a-65a.

"graphic and website design" alongside "the name of the company," such that "[v]iewers will know" the website is responsible for the expression on it. *303 Creative*, 600 U.S. at 579, 582.

A website's organization of content conveys "ideas" about what it considers relevant or interesting to individual viewers, "deserving of expression, consideration, and adherence," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994), or "worthy of presentation and quite possibly of support as well," *Hurley*, 515 U.S. at 575. Thus, every piece of expression in a feed "affects the message conveyed by" the website. *Id.* at 572.

NetChoice and CCIA members do not disseminate or present all user-created expression equally. Everything viewers see is arranged according to websites' editorial policies, which reflect the community each website seeks to foster and each website's value judgments about what expression is worthy of presentation. J. A. 77a-78a, 109a-110a. Some websites have cultivated communities around specific topics, like Pinterest's emphasis on recipes, design, fashion, and inspiration. J. A. 77a. Others, like YouTube, "foster[] self-expression on an array of topics as diverse as [their] user base[s]." J. A. 108a. And every covered website prohibits speech it considers dangerous, such as speech praising terrorism or inciting violence. J. A. 405a-479a.

Covered websites use a variety of means to enforce their policies and curate the expression they display. J. A. 66a-78a. Users must agree to terms of service, which uniformly make clear some content is off-limits and require compliance with the website's editorial policies. J. A. 84a-85a, 112a, 140a. All expression on the websites is

subject to review for such compliance. J. A. 84a-85a, 112a-13a.

These websites must exercise editorial discretion to prioritize some speech by selecting the order in which material is displayed to viewers. J. A. 77a-79a, 100a. Whether in search results, comments, or in feeds, websites necessarily must choose what gets displayed first. J. A. 78a. Websites also recommend content to users—even if just chronologically. J. A. 113a-15a. Some websites allow viewers to help determine the content they see, allowing viewer preferences to inform how they display expression in customized ways. J. A. 143a, 349a-50a. Finally, websites also provide context about content, offering warnings and other information they consider useful or appropriate. *E.g.*, J. A. 76a.

Stripping away this editorial oversight would fundamentally change the character of these websites. They would be overrun with objectionable expression that would drive away users and advertisers—and contradict the websites' own principles. The scale of objectionable content is vast: In a six-month period in 2018, "Facebook, Google, and Twitter took action on over 5 billion accounts or user submissions—including 3 billion cases of spam, 57 million cases of pornography, 17 million cases of content regarding child safety, and 12 million cases of extremism, hate speech, and terrorist speech." Pet. App. 173a; J. A. 102a. And "in a three-month period in 2021, YouTube removed 1.16 billion comments." Pet. App. 173a; J. A. 133a.

Undisputed evidence shows that both viewers and advertisers have boycotted websites for perceived failures to remove offensive expression. Pet. App. 184a; J. A. 79a,

87a-88a, 97a-100a, 103a. YouTube in 2017 "lost millions of dollars in advertising revenue after" advertisers "took down their ads after seeing them distributed next to videos containing extremist content and hate speech." J. A. 103a. Meta in 2020 "saw a nearly identical response" generated by advertiser concerns about "hate speech and misinformation." *Id.* These websites devote tens of millions of dollars annually to refining their editorial policies and enforcement mechanisms to keep objectionable content off their sites. *E.g.*, J. A. 241a.

B. Texas House Bill 20

HB20 seeks to upend the way certain State-disfavored websites disseminate speech, imposing the State's views and editorial directives on private entities. In Texas's view, certain websites do not do enough to promote "conservative" speech. Texas therefore decided to compel them to do more. As the Governor proclaimed in his official signing statement (and elsewhere): "It is now law that conservative viewpoints in Texas cannot be banned on social media." J. A. 25a; *see* J. A. 22a-23a. Key legislators echoed that sentiment. Pet. App. 144a-45a, 165a-66a, 182a; J. A. 22a-23a.

1. Regulated "social media platforms"

HB20's definition of "social media platforms" is a content- and speaker-based provision targeting only a handful of websites for onerous regulation.

HB20 regulates "social media platforms," defined as any "website or application" (1) "that is open to the public"; (2) "allows a user to create an account"; and (3) "enables users to communicate with other users for the primary purpose of posting information, comments,

messages, or images." Tex. Bus. & Com. Code § 120.001(1); Tex. Civ. Prac. & Rem. Code § 143A.001(4).

But HB20 applies only to "platforms" with "more than 50 million active users in the United States in a calendar month." Tex. Bus. & Com. Code § 120.002(b). This arbitrary threshold excludes websites with a different perceived ideological perspective like "Parler and Gab." Pet. App. 175a (cleaned up). Today, newer websites like Truth Social would also be excluded for the same reason. HB20 also excludes certain websites "that consist[] primarily of news, sports, entertainment, or other information or content that is not user generated." Tex. Bus. & Com. Code § 120.001(1)(C)(i).

2. HB20 Section 7's content-moderation restrictions

This lawsuit challenges two sections of HB20. HB20 Section 7 compels covered websites to disseminate speech by prohibiting them from making editorial choices based on the "viewpoint" of the expression or user. Tex. Civ. Prac. & Rem. Code §§ 143A.001(1), 143A.002(a).

Section 7 bans covered websites from "censor[ing] a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state." *Id.* § 143A.002.[4] Because this

[4] This prohibition does not apply if the website "is specifically authorized to censor by federal law." Tex. Civ. Prac. & Rem. Code § 143A.006(a)(1). Respondent has never asserted that websites' current policies would satisfy that exception.

provision applies to both submitting and "receiv[ing]" expression, HB20 regulates websites' editorial choices worldwide. *Id.* § 143A.002(a).

The statute defines "censor" to include editorial actions that websites make countless times a day—including decisions about what advertisements to run and how. Specifically, websites cannot "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." *Id.* § 143A.001(1).

Section 7 contains additional content-based exceptions for expression that (1) "is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment"; or (2) "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of" a limited subset of protected characteristics. *Id.* §143A.006(a)(2)-(3).

HB20 also requires websites to do business in Texas, as it makes it unlawful to "deny equal access or visibility to" expression "based on . . . a user's geographic location in this state." *Id.* §§ 143A.001(1), 143A.002.

3. HB20 Section 2's individualized-explanation requirements

HB20 Section 2 compels covered websites to create individualized explanations for billions of their editorial decisions.

a. Section 2 requires onerous notice, complaint, and appeals processes for users to challenge each of the millions of times websites refuse to disseminate speech. Tex. Bus. & Com. Code §§ 120.101-120.104.

Notices. When websites remove content for any reason, Section 2 compels them to "notify the user who provided the content of the removal and explain the reason the content was removed." *Id.* § 120.103(a)(1).

Complaints. Users also must be able to "submit" and "track" complaints about "a decision made by the social media platform to remove content posted by the user" or "illegal content or activity" that is not removed. *Id.* § 120.101. For complaints about the latter, websites must respond "within 48 hours of receiving the notice." *Id.* § 120.102.

Appeals. Websites must "allow the user to appeal the decision to remove . . . content." *Id.* §§ 120.103(a)(2), 120.104. Websites must "review" such complaints, "determine" their validity, and respond to them within 14 business days. *Id.* § 120.104. A website's response must explain (1) "the determination" of "whether the content adheres to the" website's "acceptable use policy"; and (2) if the website reverses its decision, "the reason for the reversal." *Id.* §§ 120.103(a)(3), 120.104.

b. HB20 Section 2 separately compels websites to provide broad disclosures and individualized explanations of content-moderation decisions in two sets of public reporting.

As part of Section 2's "biannual transparency report," websites must disclose "a description of *each* tool, practice, *action*, or technique used in enforcing the acceptable use policy." *Id.* § 120.053(a)(7) (emphases added). Respondent has not disputed that this would require websites to describe every single editorial action they take during the reporting period. As the record reflects, websites take "action" "per individual per piece of content."

J. A. 291a. Thus, this provision would require websites to track and describe billions of actions each year.

Similarly, Section 2 requires broad disclosures about websites' "content management, data management, and business practices"—which covers virtually everything they do. Tex. Bus. & Com. Code § 120.051(a). These disclosures mandate "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; [and] (4) uses search, ranking, or other algorithms or procedures that determine results on the platform." *Id.* As with the disclosure of each "action," each of these decisions are determined by countless dynamic variables. *E.g.*, J. A. 291a.

The record reflects that all these disclosures risk providing malicious actors with information helping them evade moderation. *E.g.*, J. A. 134a. That is why websites' content-moderation algorithms are proprietary and closely held. Pet. App. 173a; J. A. 134a, 147a.[5]

4. HB20 enforcement

All provisions of HB20 Sections 2 and 7 are enforceable by the Texas Attorney General, who can recover attorney's fees and investigative costs. Tex. Bus. & Com. Code § 120.151; Tex. Civ. Prac. & Rem. Code § 143A.008. Section 7 is also enforceable via private right of action. Tex. Civ. Prac. & Rem. Code § 143A.007. HB20 permits

[5] Section 2 also requires covered websites to publish an "acceptable use policy." Tex. Bus. & Com. Code. § 120.052.

courts to impose "daily penalties sufficient to secure immediate compliance" with Section 7. *Id.* § 143A.007(c).

C. Procedural history

Soon after Texas passed HB20, NetChoice and CCIA challenged the law in federal court. After nearly a month of discovery, the district court enjoined Respondent from enforcing HB20 Sections 2 and 7, concluding they violate the First Amendment. Pet. App. 185a. Respondent asked the Fifth Circuit to stay the injunction, and, two days after oral argument on the merits, a divided panel granted the motion. NetChoice and CCIA promptly sought relief from this Court, which vacated the Fifth Circuit's stay order. *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022).

Months later, the Fifth Circuit released its opinion. Pet. App. 1a-142a. Over Judge Southwick's dissent, the majority concluded that HB20 Section 7 does not violate the First Amendment. Pet. App. 20a-55a, 80a-91a. Notwithstanding that covered websites are private entities, the majority repeatedly characterized websites' decisions not to disseminate speech as "censorship." Pet. App. 3a, 7a-9a, 15a-20a, 23a-25a, 38a-40a, 42a-48a, 53a-55a, 80a-83a, 85-86a, 90a-91a, 99a-100a, 108a-110a, 113a. And the majority denied that the First Amendment protects websites' rights to choose what speech to disseminate. Pet. App. 43a. The panel unanimously concluded that HB20 Section 2 does not violate the First Amendment based on an expansive understanding of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). Pet. App. 91a- 99a.

SUMMARY OF ARGUMENT

I. The First Amendment protects the right of private parties to choose whether and how to disseminate speech.

A. As this Court has recognized time and again, the First Amendment protects private parties' editorial rights to choose whether and how to disseminate speech—including speech generated by others. *E.g.*, *Halleck*, 139 S. Ct. at 1930; *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998); *Hurley*, 515 U.S. at 570; *Turner*, 512 U.S. at 661; *PG&E*, 475 U.S. at 11; *Tornillo*, 418 U.S. at 258. Our constitutional tradition has long protected private entities' rights to decide what speech they find worth presenting, what speech is not, and how best to use the latest technology to promote speech.

The Fifth Circuit majority's contrary analysis suffered from multiple flaws. Primarily, it erroneously treated the constitutionally protected decisions of private actors not to disseminate speech as the "conduct" of "censorship." Pet. App. 9a (emphases omitted). That central error led the majority to ignore the First Amendment's well-established protections for editorial discretion, impose unwarranted limitations on the right to exercise it, artificially limit this Court's precedent rejecting compelled speech, and give undue weight to inapposite precedent that does not involve parties making editorial choices about whether and how to disseminate speech.

B. These First Amendment protections apply fully to speech on the Internet. Decades ago, *Reno v. ACLU* held that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to speech on the "Internet." 521 U.S. at 870. This Court reaffirmed that principle just last Term. *303 Creative*, 600 U.S. at 587.

Governments therefore "may not . . . tell Twitter or YouTube what videos to post; or tell Facebook or Google what content to favor." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) ("*USTA*") (Kavanaugh, J., dissenting from denial of reh'g en banc); *accord id.* at 392 (Srinivasan, J., concurring in denial of reh'g en banc) (similar).

The Fifth Circuit majority's justifications for limiting websites' First Amendment rights are unpersuasive. Websites like Facebook and YouTube are not common carriers, and governments cannot compel private parties that have exercised editorial discretion in ways the government disfavors to become common carriers of third-party speech. Nor are Petitioners' members "public forums"—a concept limited to government property. And Congress's protections for Internet websites in 47 U.S.C. § 230 have no bearing on the First Amendment questions presented, beyond underscoring that Congress affirmatively protected websites' editorial discretion.

II. A. HB20 Section 7's prohibition on editorial choices based on "viewpoint" triggers strict scrutiny in multiple ways.

First, Section 7 would compel covered websites to disseminate speech and infringe their editorial discretion. *Tornillo* and its progeny make crystal clear that refusing to carry third-party speech because of its viewpoint is a core First Amendment right. Nonetheless, under HB20, covered websites would have to abandon many aspects of their editorial policies, including their prohibitions on pro-terrorist speech. Unrebutted evidence confirms that governmental interference with editorial discretion is costly as well as unconstitutional, as users and advertisers will

leave the websites if they are required to display objectionable speech, costing websites millions of dollars. *E.g.*, J. A. 97a-100a.

Second, HB20's "social media platforms" definition is both content- and speaker-based. It excludes websites that (1) have fewer than 50 million monthly U.S. users, or (2) consist primarily of news, sports, or entertainment.

Third, Section 7's prohibition on "viewpoint"-based editorial discretion is unavoidably a viewpoint-based infringement of First Amendment rights. Worse yet, Section 7 contains additional content-based exceptions. And Texas officials candidly acknowledged HB20 was designed to promote "conservative" viewpoints.

B. HB20 Section 7 fails strict scrutiny. This Court has repeatedly held that governments cannot compel private actors to disseminate speech in hopes of achieving balance in—or maximizing—speech. *E.g.*, *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 749-50 (2011); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam); *Tornillo*, 418 U.S. at 258.

The Fifth Circuit majority invoked *Turner* to claim a governmental interest "in protecting the widespread dissemination of information." Pet. App. 91a. But *Turner* involved very different circumstances: a content-neutral law regulating government-franchised cable-television operators, which had a "physical connection" providing a "bottleneck" that could be used to "obstruct readers' access to other competing publications." 512 U.S. at 646, 656. No covered website controls the content available on the Internet or can impede access to competing websites, and this Court has never extended *Turner* beyond its unique facts. *Hurley*, 515 U.S. at 577 (discussing *Turner*).

HB20 Section 7 would not be properly tailored even if its true goal were maximizing speech. It covers only a few State-disfavored websites. Furthermore, websites purportedly may refuse to display large categories of speech to avoid the obligation to disseminate objectionable viewpoints—which would reduce the speech they display.

III. A. HB20 Section 2's onerous individualized-explanation requirements and broad disclosures of individual editorial actions likewise trigger strict scrutiny in multiple ways. Section 2 relies on the same flawed content- and speaker-based coverage definition of "social media platforms," which applies to a limited number of websites and excludes news, sports, and entertainment websites.

Further, Section 2 compels covered websites to create speech in their own name and imposes onerous requirements whenever they exercise editorial control over their websites. Specifically, websites must provide notice, complaint, and appeals procedures for users to challenge each of the millions of times covered websites refuse to disseminate user-created expression. These procedures require websites to respond quickly and create explanations for granular editorial decisions. Websites must also publicly report an even broader range of editorial decisions. Among the ways to alleviate the massive burdens this entails would be to engage in less editorial discretion.

The Fifth Circuit erred by evaluating Section 2's requirements under the test for compelling certain commercial disclosures in *Zauderer*. This Court has never applied *Zauderer* outside the context of correcting misleading advertising. Individualized explanations for a publication's editorial choices have nothing to do with advertising, let alone misleading advertising. They are instead akin to

requiring a newspaper to explain every decision not to publish any one of a million letters to the editor.

B. Section 2's individualized-explanation requirements fail any First Amendment scrutiny.

These provisions do not serve any purported interest in "preventing deception of consumers." Pet. App. 92a. That interest is nowhere to be found in HB20 itself or legislators' public statements. The decision below did not explain what "deception" these provisions might address. Nor could it have when websites already state publicly that they moderate content and make their editorial policies publicly available. Besides, Texas has a separate deceptive trade practices law. The State lacks a sufficient governmental interest to "subject[] the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest." *Herbert v. Lando*, 441 U.S. 153, 174 (1979).

In all events, Section 2 cannot pass even *Zauderer*'s "unduly burdensome" test, let alone satisfy strict scrutiny. HB20 imposes enormously burdensome requirements designed to prevent websites from moderating content. The record demonstrates covered websites would need to radically expand their notice-and-appeals processes, divert editorial resources, and disclose countless editorial decisions to comply. For example, YouTube would need to "expand" its current appeal "systems' capacity by over 100X—from a volume handling millions of removals to that of over a billion removals." J. A. 133a. That is the very definition of an undue burden on disseminating speech.

ARGUMENT

I. The First Amendment protects the right of private parties to make editorial choices in the selection and presentation of speech.

A. This Court's First Amendment precedent and the Nation's history and tradition protect private parties' editorial discretion.

1. The First Amendment protects the right of private parties both to decide what messages to disseminate and to choose whether and how to disseminate others' speech. Each of those protections is critical to expression in a free society.

This Court has faithfully applied those principles to all kinds of speakers throughout the Nation's history. From the Founding onward, one basic rule has persisted: The First Amendment prevents governmental efforts to compel people to disseminate others' speech. And when private parties decline to do so, they are exercising their constitutional right to editorial discretion, not engaging in "censorship." Indeed, "censorship" is the exclusive province of the government. The notion that the government may compel private speech in the name of quelling "censorship" turns the First Amendment on its head.

a. The First Amendment has steadfastly protected the publication and dissemination of speech. It protects more than simply creating speech. It protects "publish[ing]," *Reno*, 521 U.S. at 853; "dissemin[ating]," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); "circulating," *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 768 (1988) (citation omitted); "transmit[ting]," *Turner*, 512 U.S. at 636; "distributing," *Brown v. Ent. Merchs. Ass'n*,

564 U.S. 786, 792 n.1 (2011); and "disclosing" speech, *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). And these protections are "enjoyed by" all private actors, *Hurley*, 515 U.S. at 574, including those who "employ[] the corporate form to disseminate their speech," *303 Creative*, 600 U.S. at 594.

b. The freedom to disseminate speech necessarily includes the right to choose *whether* and *how* to do so. Any governmental "compulsion to publish that which 'reason tells them should not be published' is unconstitutional." *Tornillo*, 418 U.S. at 256.

Editorial discretion is itself protected by the First Amendment. When a private entity "exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity." *Forbes*, 523 U.S. at 674. Put another way, "the editorial function itself is an aspect of 'speech.'" *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996) (plurality op.) (citation omitted). "[E]ditorial control" includes the "choice of material," "decisions made as to limitations on the size and content," and "treatment of public issues and public officials." *Tornillo*, 418 U.S. at 258. This "right to tailor" speech applies "equally" to "expressions of value, opinion, or endorsement" as to "statements of fact." *Hurley*, 515 U.S. at 573 (citation omitted).

The right of editorial discretion necessarily includes the right *not* to disseminate speech. Presenting speech "inherently involves choices of what to say and what to leave unsaid." *Id.* at 573 (quoting *PG&E*, 475 U.S. at 11); *see 303 Creative*, 600 U.S. at 585-86; *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Relatedly, private actors

may "eschew association for expressive purposes." *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018); *see 303 Creative*, 600 U.S. at 586.

c. First Amendment protections for editorial discretion apply fully when private entities disseminate speech *created by others*. Private actors do not "'forfeit constitutional protection simply by combining multifarious voices' in a single communication." *303 Creative*, 600 U.S. at 588 (quoting *Hurley*, 515 U.S. at 569). Indeed, "the presentation of an edited compilation of speech generated by other persons is a staple" of our Nation's history. *Hurley*, 515 U.S. at 570. This includes many compilations and compilers protected by this Court's decisions: parade organizers, *id.*; newspapers' op-ed pages, *Tornillo*, 418 U.S. at 258; bookstores, *Smith v. California*, 361 U.S. 147, 150 (1959); "book publishers," *303 Creative*, 600 U.S. at 594; "community bulletin boards," *Halleck*, 139 S. Ct. at 1930; "[c]omedy clubs" hosting "open mic nights," *id.*; cable operators, *Denver*, 518 U.S. at 737-38 (plurality op.); "editor[s] of a collection of essays," *id.* at 816 (Thomas, J., concurring in part and dissenting in part); "newsstands," *Turner*, 512 U.S. at 681 (O'Connor, J., concurring in part and dissenting in part); "movie theaters," *id.*; and more.

Time after time, this Court has held that editorial decisions underlying the "compilation of the speech of third parties" are themselves "communicative acts." *Forbes*, 523 U.S. at 674. It does not matter if private entities "fail to edit . . . themes to isolate an exact message." *Hurley*, 515 U.S. at 569. Whenever laws "requir[e]" private entities "to include voices they wished to exclude," governments "impermissibly require them to 'alter the expressive content of their'" compilations. *303 Creative*, 600 U.S.

at 585 (quoting *Hurley*, 515 U.S. at 572-73). That is so even if the government allows private entities to "expressly disavow [or] distance themselves from" the compelled speech by "add[ing] addenda or disclaimers." Pet. App. 41a. Otherwise, the ability to disclaim would "justify any law compelling speech." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring in part).

In short, private entities that "provide[] a forum for [third-party] speech" are entitled to "exercise editorial discretion over the speech and speakers." *Halleck*, 139 S. Ct. at 1930. That is why governments cannot "declar[e] . . . speech itself to be [a] public accommodation." *Hurley*, 515 U.S. at 573; *see 303 Creative*, 600 U.S. at 592. Otherwise, private entities that "open their property for speech . . . would lose the ability to exercise what they deem to be appropriate editorial discretion." *Halleck*, 139 S. Ct. at 1930-31. The First Amendment precludes putting private entities to the unconstitutional "choice of allowing all comers or closing . . . altogether." *Id.* at 1931.

2. Rather than focus on this Court's precedent and the clear rule it compels, the Fifth Circuit majority spent much of its opinion engaging in its own examination of what it deemed to be "the original public meaning of the First Amendment." Pet. App. 24a. The majority even went so far as to chide Petitioners for "focus[ing] their attention on Supreme Court doctrine" rather than "mount[ing] any challenge under the original public meaning of the First Amendment." *Id.* But Respondent never argued below that the First Amendment's original meaning diverges from "Supreme Court doctrine." *Id.*

Regardless, lower courts cannot use originalism as an excuse to ignore this Court's binding precedent.

The majority posited a false dichotomy at any rate. Petitioners have consistently focused on this Court's precedent because this Court has already determined the First Amendment's original meaning when it comes to private parties' editorial discretion. The principle that editorial discretion is itself protected speech, not prohibited "censorship," has been well understood since the time of Benjamin Franklin. There simply is no American tradition of governments compelling speech by directing the editorial choices of private parties—which is precisely why this Court has repeatedly rejected such efforts as prohibited by the First Amendment.

a. As far back as our Nation's 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." *USTA*, 855 F.3d at 427 (Kavanaugh, J., dissenting from denial of reh'g en banc). So Benjamin Franklin's newspaper was not "'a stagecoach, with seats for everyone,'" *Halleck*, 139 S. Ct. at 1931 (quoting Mott at 55), "in which anyone who would pay had a right to a place," Benjamin Franklin, Autobiography of Benjamin Franklin 94 (1901 ed.). He explained why he exercised editorial discretion to omit things like "personal abuse": "having contracted with [his] subscribers to furnish them with what might be either useful or entertaining, [he] could not fill their papers with private altercation . . . without doing them manifest injustice." *Id.*

As other Founding-era materials confirm, printers were widely understood to have the right to exercise

editorial discretion. "A Printer ought not to publish every Thing that is offered to him, but what is conducive of general Utility," stated future Constitutional Convention delegate William Livingston. On the Use, Abuse, and Liberty of the Press, with a Little Salutary Advice 37, New Eng. Mag. Knowledge & Pleasure (Aug. 1, 1758). Even those who took the narrowest view of First Amendment freedoms recognized that printers should not be compelled to publish others' speech. In defending the Alien and Sedition Acts, the Report of the Minority on the Virginia Resolutions (often attributed to John Marshall) explained that the press has "liberty to publish . . . any thing and every thing *at the discretion of the printer only*." Report of the Minority on the Virginia Resolutions (Jan. 22, 1799) (emphasis added).

Nor is there support for the Fifth Circuit majority's implicit conclusion that the right to "express[] . . . good-faith opinions on matters of public concern" does not include the right to editorial discretion. Pet. App. 24a. As explained above (at pp.5, 19-20), private parties' decisions about what speech to disseminate are themselves a form of expression, as they reflect private parties' views about what speech they believe is "worthy of presentation." *Hurley*, 515 U.S. at 575. The majority's contrary view would permit governments to tell "all manner of artists, speechwriters, and others whose services involve speech" what speech they must disseminate. *303 Creative*, 600 U.S. at 589-90.

Finally, to the extent the majority suggested that the First Amendment protects against only "prior restraints," Pet. App. 23a, that is both irrelevant and egregiously wrong in light of this Court's precedent

invalidating other abridgments of speech. HB20 *is* a prior restraint: Laws that "forbid speech activities" when "issued in advance of the time that such communications are to occur" are "classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993). That is precisely what HB20 does. The majority posited otherwise only because it refused to accept that editorial discretion is a protected form of expression.

In any case, this Court has held time and again that "[t]he protection of the First Amendment . . . is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 n.3 (1942); *e.g.*, James Madison, The Report of 1800 (Jan. 7, 1800) ("the freedom of the press" ensures "an exemption . . . from the subsequent penalty of laws"); Thomas Cooley, A Treatise on Constitutional Limitations Which Rests Upon the Legislative Power of the States of the American Union 421 (1871) ("the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions"). The majority made no effort to justify its seeming desire to upend more than a century of this Court's precedent.

b. When the Fifth Circuit majority addressed this Court's precedent, its analysis was equally flawed. The majority posited that this Court has not recognized editorial discretion as "a freestanding category of First-Amendment-protected expression." Pet. App. 45a. Even worse, it directly contradicted this Court's precedent by holding that if "a firm's core business is disseminating others' speech, then that should weaken, not strengthen, the [business's] argument that it has a First Amendment

right" not to disseminate speech. Pet. App. 106a. This Court has repeatedly held that the First Amendment protects the right of private parties to exercise "editorial discretion in the selection and presentation" of speech. *Forbes*, 523 U.S. at 674; *see supra* pp.19-20. As the Court has explained, since "all speech inherently involves choices of what to say and what to leave unsaid," it is axiomatic that "one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (citation omitted). That remains equally true whether one publishes his own speech, the speech of others, or both. *See id.*; *PG&E*, 475 U.S. at 11; *Tornillo*, 418 U.S. at 258.

The Fifth Circuit majority tried to evade that conclusion by insisting that HB20 regulates "conduct," specifically "censorship." Pet. App. 9a (emphases omitted). That gets matters backward. Censorship occurs when *the government* tells private parties what they cannot say, not when private parties decline to disseminate messages with which they disagree. If labeling a private party's editorial choices "censorship" sufficed to deprive those choices of First Amendment protection, *Tornillo*, *PG&E*, and *Hurley* (among others) would have come out the other way. And governments could justify virtually any law compelling private parties to display third-party speech. By the majority's logic, the New York Times engages in unprotected "censorship" when it refuses to publish an op-ed. Fox News engages in unprotected "censorship" when it refuses to air an interview. The parade organizer in *Hurley* engaged in unprotected "censorship" when it excluded GLIB. But when governments declare "that a private party . . . is a 'censor,'" governments themselves are the real censors, as they "interfere with" the "freedom

to speak as an editor." *Denver*, 518 U.S. at 737-38 (plurality op.).

The majority fared no better with its suggestion that First Amendment protection is contingent on a private party accepting responsibility for the content subject to its editorial discretion. Pet. App. 45a-46a. That requirement has no basis in law. Plus, covered websites *do* take reputational responsibility for the speech on their services—as they can lose users and advertisers by disseminating objectionable speech and can be criticized by States for their perceived liberal viewpoints or for supposedly insufficiently removing or restricting content. And to the extent websites do not have legal responsibility for third-party content, that is owing principally to Congress's decision affording them protection against certain types of lawsuits to foster their editorial control. *See* 47 U.S.C. § 230(c). Private speech does not lose First Amendment protection because the federal government chooses to protect the speaker against some forms of liability.

To the extent the majority suggested some constitutional distinction between pre-publication and post-publication editorial discretion, Pet. App. 46a-47a, that too is factually and legally unsustainable. Both forms of editorial discretion implement judgments about what speech is worthy of presentation. Factually, covered websites constantly engage in pre-publication editorial discretion, promulgating policies about acceptable expression and "screen[ing] *all content* for" some kinds of "unacceptable material." *Moody v. NetChoice, LLC*, U.S. No. 22-277, Pet. App. 85a (emphasis added). For instance, around 90% of Facebook's removals "[f]or many categories" of prohibited expression take place before "anyone reports it."

J. A. 141a. Similarly, YouTube removes the majority of policy-violating videos before they receive many, if any, views. J. A. 120a. Nor do these websites lose First Amendment protection by using human-programmed "algorithms" in addition to human review, because those algorithms implement human judgments about how to organize content according to their websites' (human-authored) policies. *Cf.* Pet. App. 35a & n.8, 45a, 108a. As the district court found, "algorithms do some of the work that a newspaper publisher previously did," like "exercis[ing] editorial discretion." Pet. App. 164a.

Legally, it does not matter *when* websites exercise editorial discretion, as governments cannot compel *continued* dissemination of speech any more than they can compel its dissemination in the first place. Private parties routinely engage in post-publication editorial discretion in mediums such as "community bulletin boards," "[c]omedy clubs" hosting "open mic nights," *Halleck*, 139 S. Ct. at 1930, bookstores, and live call-in shows. A broadcaster does not lose First Amendment protection if it excises material from a rebroadcast that the five-second delay let through. The result should be no different when it comes to the Internet.

c. Rather than seriously grapple with the reasoning in the long line of cases protecting editorial discretion, the majority tried to limit *Tornillo*, *PG&E*, and *Hurley* to their facts. Its efforts are unavailing.

The majority first tried to limit *Tornillo* and *PG&E* to "newspaper[s] and newsletter[s] with significant space constraints." Pet. App. 40a. But *Tornillo* itself rejected that rationale, reiterating that the First Amendment protects against compelled publication even when it would

not impose "additional costs" or require publishers to "forgo publication" of other speech due to "finite" space. 418 U.S. at 257-58. And this Court has squarely rejected the notion that such protection is limited to the "press"; *Tornillo* repeatedly "has been applied to cases involving expression generally." *Riley v. Nat'l Fed. of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 797 (1988). This Court likewise held that the near-infinite space on the Internet does not justify "qualifying" First Amendment protections for online speech. *Reno*, 521 U.S. at 870.

The majority next tried to limit *Tornillo* and *PG&E* to laws where the obligation to display speech is "triggered by a particular category of . . . speech and" access is "awarded only to those who disagreed with the [publisher's] views." Pet. App. 42a (quoting *PG&E*, 475 U.S. at 13). That post-hoc gerrymander does not work either. As illustrated by *Hurley*, whenever governments compel private entities to disseminate speech and change the content of their compilations, 515 U.S. at 573, governments impose a "content-based penalty" on those entities, Pet. App. 42a. Neither *Tornillo* nor *PG&E* would have come out differently had the governments required those private entities to distribute *all* viewpoints, instead of just certain ones. HB20 compels websites to disseminate speech of "those who disagree[] with [the websites'] views" that the speech is not worthy of presentation. *PG&E*, 475 U.S. at 13.

The majority also tried to distinguish *Hurley* on the ground that the parade organizer was "'intimately connected' to" the message of the parade. Pet. App. 32a (quoting *Hurley*, 515 U.S. at 576). But *Hurley* recognized that private entities *are* "intimately connected" to

the speech they compile and present—even when they "fail" to "isolate an exact message." *Hurley*, 515 U.S. at 569-70. And whatever "intimate connection" means, it does not require a risk that the speech may be misperceived as having been created by the disseminator. The compelled speech in *Wooley* was unconstitutional even though every Granite State resident understood that the State's slogan was mandatory and not "intimately connected" to the driver. 430 U.S. at 713-15. No reasonable observer would have thought the political candidate's reply to the Miami Herald in *Tornillo* was the newspaper's own message. And there was zero risk of misattribution in *PG&E* because the State commission specifically ordered the third party "to state that its messages are not those of" the company. 475 U.S. at 7. Ordering private entities to carry these messages violated the First Amendment just the same.

d. Conversely, the Fifth Circuit majority placed outsized reliance on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Pet. App. 25a-26a, 30a-33a, 37a-41a, 44a. Neither *FAIR* nor *PruneYard* involved private parties making editorial choices about what speech to publish. *See FAIR*, 547 U.S. at 64; *PruneYard*, 447 U.S. at 88. Both cases instead addressed in-person access to physical property. *See FAIR*, 547 U.S. at 64-65 (military recruiters seeking on-campus interview rooms); *PruneYard*, 447 U.S. at 77 (petition seekers accessing shopping mall). The *PruneYard* shopping mall "owner did not even allege that he objected to the content of the [speech]." *PG&E*, 475 U.S. at 12 (discussing *PruneYard*).

None of the majority's cited authorities supports a general governmental power to require private entities to "host" others' speech. *E.g.*, Pet. App. 24a-28a, 32a-34a, 41a. This Court emphatically rejected such a governmental power grab: "[T]he constitutional issue in [*PG&E* and *Hurley*] arose because the State forced one speaker to *host* another speaker's speech." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2088 (2020) (emphasis added). *FAIR* itself distinguished the "conduct" of employment recruitment assistance from a "number of instances" where the Court "limited the government's ability to force one speaker to *host or accommodate* another speaker's message." 547 U.S. at 62-63 (emphasis added) (citing *Hurley*, *PG&E*, and *Tornillo*). Thus, nothing in *FAIR* would require schools to publish military-preferred messages in their law reviews or invite military speakers to lecture students.

B. The First Amendment's protections for private editorial discretion fully apply to websites.

1. The First Amendment fully applies to the Internet. Presenting text, graphics, audio, and video on websites qualifies as "publish[ing]" and "disseminat[ing]" speech protected by the First Amendment. *303 Creative*, 600 U.S. at 594; *Reno*, 521 U.S. 853; *see Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (the "press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion").

There is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to the "Internet." *Reno*, 521 U.S. at 853, 870; *accord 303 Creative*, 600 U.S. at 587 (collecting cases). This Court's precedent rejecting compelled speech dissemination therefore

applies equally to websites. *See 303 Creative*, 600 U.S. at 586 (discussing *Hurley*, 515 U.S. at 574; *Tornillo*, 418 U.S. at 256). When "governments in this country have sought to test these foundational principles," this Court has rebuffed them. *Id.* at 585.

2. Websites like Facebook and YouTube are not common carriers that must display all user-submitted speech, and governments violate the First Amendment by treating them as such.[6]

a. Covered websites under HB20 are not common carriers. They do not "hold themselves out as affording neutral, indiscriminate access to their platform without any editorial filtering." *USTA*, 855 F.3d at 392 (Srinivasan, J., concurring in denial of reh'g en banc). To the contrary, they constantly engage in editorial filtering, providing curated experiences and limiting how their customers and advertisers may use their websites, pursuant to policies they publish and enforce. J. A. 84a-85a, 111a-15a, 139a, 141a.

For all these reasons, "Facebook, Google, Twitter, and YouTube . . . are not considered common carriers." *USTA*, 855 F.3d at 392 (Srinivasan, J., concurring in denial of reh'g en banc). The distinctive feature of a common carrier is that it "does not make individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (cleaned up). Texas enacted HB20 precisely because these websites do *not* open themselves up to all third-party speech, but rather make individualized determinations about which speech to disseminate and how. That readily

[6] The common-carrier portions of the opinion below were joined only by Judge Oldham. Pet. App. 55a-80a, 110a-112a.

distinguishes them from services that merely facilitate individual-to-individual communication, like "phone companies" or "communications firms," Pet. App. 106a-107a—and makes them far different from "banks," Pet. App. 2a, and "shipping services," Pet. App. 25a, 106a, which do not publish speech at all. Federal law confirms as much. When Congress protected websites' rights to exclude speech in 47 U.S.C. § 230(c), it disclaimed any intent to treat such websites "as common carriers," *id.* § 223(e)(6). Congress wanted to confirm these websites' discretion to "filter, screen, . . . disallow[,] pick, [and] choose . . . content," *id.* § 230(f)(4), they "consider[]" "objectionable" without fear of liability, *id.* § 230(c)(2)(A).

b. Texas cannot deprive websites of First Amendment protections by forcing them to *become* common carriers. *E.g.*, *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 379 (1984) ("transform[ing] broadcasters into common carriers . . . would intrude unnecessarily upon . . . editorial discretion"). "[I]mpos[ing] a form of common carrier obligation" is just another way to describe a law countermanding editorial discretion and thus cannot justify a law that "burdens the constitutionally protected speech rights" of private parties. *Denver*, 518 U.S. at 825-26 (Thomas, J., concurring in part and dissenting in part). Accordingly, labeling HB20 "a common carrier scheme has no real First Amendment consequences." *Id.* at 825.

Even true common carriers and government-franchised monopolies retain the "right to be free from state regulation that burdens" their decisions about which speech to disseminate. *PG&E*, 475 U.S. at 17-18 (energy monopoly); *e.g.*, *Denver*, 518 U.S. at 738 (plurality op.) (cable operators).

3. Contrary to the majority's passing suggestion, covered websites are not public forums, and governments cannot transform private entities into "public square[s]." Pet. App. 2a, 23a, 35a, 69a-70a, 84a. The First Amendment's public-forum doctrine is limited to its "historic confines," *Forbes*, 523 U.S. at 678—that is, when "*government* seeks to place [restrictions] on the use of *its* property," *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (emphases added); *see Halleck*, 139 S. Ct. at 1930. So a newspaper, for instance, cannot "permissibly be made to serve as a public forum." *Denver*, 518 U.S. at 813 (Thomas, J., concurring in part and dissenting in part) (discussing *Tornillo*, 418 U.S. at 258). Nothing in *PruneYard* suggests otherwise; again, the shopping mall owner there "did not even allege that he objected to the content of the [speech]." *PG&E*, 475 U.S. at 12 (discussing *PruneYard*).

4. The Fifth Circuit majority further erred in holding that 47 U.S.C. § 230's protections for Internet websites somehow diminish their First Amendment rights. Pet. App. 51a. It is axiomatic that Acts of Congress cannot override the Constitution. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). In any event, Section 230 only underscores websites' editorial discretion and First Amendment rights, as Congress enacted Section 230 to *protect* their editorial discretion. *See* 47 U.S.C. § 230(c)("Protection[s] for 'Good Samaritan' blocking and screening of offensive material"); *id.* § 230(f)(4) (protecting websites that "filter, screen, . . . disallow[,] pick, choose, . . . organize, [or] reorganize . . . content").

The majority also incorrectly concluded that Section 230 "reflects Congress's factual determination that the

Platforms are not 'publishers.'" Pet. App. 51a. To the contrary, Congress enacted Section 230 precisely because some courts had held that websites qualified as "publishers" under the common law's definition when they "ma[de] decisions as to content" because "such decisions constitute editorial control." *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995) (discussing *Tornillo*). Thus, far from providing a basis to limit the First Amendment rights of websites, Section 230 confirms their existence.

In all events, whether covered websites qualify as "publishers" is beside the point, as this Court has not cabined the First Amendment's protections against the compelled publication of third-party speech to any strict conception of "publishers." *See supra* p.18-20 Thus, while websites satisfy any definition of "publisher," they enjoy First Amendment protection when it comes to deciding which speech to disseminate and how.

II. HB20 Section 7's restrictions on viewpoint-based editorial discretion violate the First Amendment.

HB20 Section 7's strangling of websites' editorial discretion violates the First Amendment. Section 7 not only interferes with constitutionally protected editorial discretion, it does so based on content, speaker, and viewpoint—triggering strict scrutiny multiple times over. Section 7 cannot survive any form of heightened scrutiny, let alone strict scrutiny.[7]

A. HB20 Section 7 triggers strict scrutiny by compelling speech dissemination based on viewpoint, content, and speaker.

HB20 Section 7 triggers strict scrutiny in multiple ways, and the Fifth Circuit majority erred by concluding otherwise.

1. The "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown*, 564 U.S. at 790-91. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they

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[7] The Fifth Circuit majority incorrectly claimed that Petitioners brought only an "overbreadth" challenge. Pet. App. 9a, 15a. Petitioners argued that the challenged provisions "are facially unconstitutional *in all applications*," raising overbreadth "[i]n the alternative." ECF 12 at 36, *NetChoice, LLC v. Paxton*, W.D. Tex. No. 1:21-cv-00840 (emphasis added). Similarly, Petitioners argued on appeal that "whenever HB20 applies, it unconstitutionally abridges editorial judgment and compels speech." CA5 Appellees' Br., 2022 WL 1046833, at *44 n.17. Petitioners also prevail under the overbreadth doctrine. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) ("*AFP*").

are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citations omitted). And laws that compel speakers to "alter the content of their speech" are necessarily "content based." *Nat'l Inst. of Family Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*") (cleaned up); *see, e.g.*, *Hurley*, 515 U.S. at 573; *Riley*, 487 U.S. at 795; *PG&E*, 475 U.S. at 9.

Section 7 is plainly content based, as it requires covered websites to alter the content of their speech. When Facebook, YouTube, or X present speech to their users, they convey a message about the type of speech the websites find acceptable and the communities they hope to foster. "Since every participating unit affects the message conveyed," requiring a website to include speech it does not want to include, or present speech in ways it would rather not, necessarily alters the content of its message. *Hurley*, 515 U.S. at 572-73. For example, by ordering websites not to "ban," "block," or "remove" speech on the basis of viewpoint, HB20 compels publication of pro-terrorist speech, like celebrations of ISIS's terrorist attacks. Tex. Civ. Prac. & Rem. Code § 143A.001(1). If HB20 is upheld, covered websites could not do anything to "discriminate" against speech on the ground that it celebrates terrorism or terrorists—including "de-boost[ing], restrict[ing], or deny[ing] equal access or visibility." *Id.* Nor could they prioritize authoritative news reports of terrorist attacks relative to celebrations of those atrocities, or deny revenue sharing ("monetization") because the expression contains a pro-terrorist "viewpoint." *Id.*

That alone is enough to render Section 7 a content-based requirement, yet HB20 draws other content-based

distinctions too. HB20 excludes some content from its prohibition: (1) content that "is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment"; or (2) content that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge." *Id.* § 143A.006(a)(2)-(3). The district court correctly concluded there is "no legitimate reason to allow the platforms to enforce their policies over threats based only on favored criteria but not other criteria like sexual orientation, military service, or union membership." Pet. App. 175a (cleaned up).

What is more, the definition of "social media platform" exempts certain websites "that consist[] primarily of news, sports, entertainment, or other information or content that is not user generated." Tex. Bus. & Com. Code § 120.001(1)(c)(i). While the Fifth Circuit majority insisted that HB20's definition of "social media platform" draws distinctions based on "medium" rather than content, Pet. App. 82a, that ignores that "medium[s]" are subject to the statute's onerous requirements only because of the content of the speech they disseminate.

2. Regardless, characterizing HB20's definition of "social media platform" as a medium-based distinction does not solve the State's problem. The practical effect of HB20's "news, sports, entertainment" carveout and its 50 million monthly U.S. user requirement is to single out a few websites for disfavored treatment. This Court is deeply skeptical of laws that "distinguish[] among

different speakers," as "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). "Speaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own.'" *NIFLA*, 138 S. Ct. at 2378 (citation omitted). Here, the Governor and legislators connected the dots by explaining that the law would promote "conservative" viewpoints. J. A. 22a- 25a.

Skepticism about speaker-based discrimination has special force when a law singles out for disfavored treatment some but not all of those in the business of disseminating speech. *See Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582-83 (1983); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250-51 (1936). Laws that "discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns," because they create very real "dangers of suppression and manipulation" of the medium and risk "distort[ing] the market for ideas." *Turner*, 512 U.S. at 559-61 (citation omitted).

HB20's speaker distinctions trigger strict scrutiny. On its face, HB20 singles out just a subset of websites, saddling them—and only them—with a slew of onerous burdens. The law's size and revenue requirements are carefully gerrymandered to target "Silicon Valley," while exempting smaller companies with a different perceived ideological bent. Worse still, HB20's news, sports, and entertainment carveout means that "the basis on which [the government] differentiates between" media is "its content," which is "particularly repugnant to First

Amendment principles." *Ark. Writers' Project*, 481 U.S. at 229. No legitimate "special characteristic," *Turner*, 512 U.S. at 661, justifies the State's distinctions. State officials' declared purpose is to single out certain websites because of their perceived ideological bias.

The Fifth Circuit majority tried to distinguish *Arkansas Writers' Project*, *Minneapolis Star*, and *Grosjean* on the ground that "Section 7's focus on a particular subset of firms is not directed at *suppressing* particular ideas or viewpoints." Pet. App. 84a. But that is wrong both legally and factually. This Court applied strict scrutiny to speaker-based distinctions in *Minneapolis Star* and *Arkansas Writers' Project* despite the absence of evidence of "any impermissible or censorial motive on the part of the legislature." *Minneapolis Star*, 460 U.S. at 580, 582-83; *see Ark. Writers' Project*, 481 U.S. at 229-31 (same). That is because laws singling out disfavored speakers within a particular medium are *inherently* dangerous, as they tend to skew the marketplace of ideas. *See Turner*, 512 U.S. at 641. A law that singles out the Washington Post but not the New York Post may skew debate regardless of why that distinction was drawn. So too a law that burdens Facebook and YouTube but not Gab or Truth Social. *See* Pet. App. 175a. As *Minneapolis Star* explained, "*[w]hatever the motive of the legislature* . . . recognizing a power in the State not only to single out the press but also to tailor the [law] so that it singles out a few members of the press presents such a potential for abuse that no

interest suggested by Minnesota can justify the scheme." 460 U.S. at 591-92 (emphasis added).[8]

3. In addition, the Fifth Circuit majority was wrong to conclude that HB20 does not suppress "particular ideas or viewpoints." Pet. App. 84a. If anything, this is a far easier case than *Minneapolis Star* and *Arkansas Writers' Project*. Here, all signs point to the conclusion that HB20 "goes even beyond mere content discrimination, to actual viewpoint discrimination." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). That impermissible motivation was not even disguised, as HB20 was avowedly "designed" to "target" certain "speakers and their messages for disfavored treatment." *Sorrell*, 564 U.S. at 565. As the district court found, the "record in this case confirms that the Legislature intended to target large social media platforms perceived as being biased against conservative views and the State's disagreement with the social media platforms' editorial discretion over their platforms." Pet. App. 176a. The Governor and legislators repeatedly and officially denounced "Silicon Valley" and "West Coast Oligarchs" for supposedly "silenc[ing] conservative viewpoints and ideas," declaring that HB20 sought to level what they perceived as a tilted playing field. *See supra* p.7; J. A. 21a, 23a. Such avowed efforts to "level the playing field" in favor of the State's preferred viewpoints, however, are strictly forbidden under the First

[8] The majority also incorrectly dismissed *Minneapolis Star* and *Arkansas Writers' Project* as limited to different taxation among publishers. Pet. App. 83a-85a. This Court has applied the same principles to laws beyond tax statutes that burden First Amendment rights of other entities, *Citizens United*, 558 U.S. at 342, including entities that disseminate speech, *Turner*, 512 U.S. at 640-41.

Amendment—and attaching supposed partisan labels to the side of the debate that would be leveled up only makes matters worse. *See Buckley*, 424 U.S. at 48-49.

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

Because strict scrutiny applies, Respondent bears the heavy burden of demonstrating that Section 7 is "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014); *see United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 827 (2000). Even under intermediate scrutiny, Texas would have to prove that HB20 is "narrowly tailored to serve a significant governmental interest." *Packingham v. North Carolina*, 582 U.S. 98, 105-06 (2017) (citation omitted); *see AFP*, 141 S. Ct. at 2383. Respondent cannot come close.

1. Respondent has not identified a significant, let alone compelling, justification for Texas's content, speaker, and viewpoint discrimination. To the extent Texas officials sought to justify Section 7 on the theory that it has an interest in ensuring that the public has access to "conservative" speech, J. A. 22a-25a, that does not work. As *Tornillo* explained, whatever interest the State may have had in "ensur[ing] that a wide variety of views reach the public," that interest cannot justify compelling private parties to disseminate content with which they disagree. 418 U.S. at 247-48, 258. Simply put, the "State may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell*, 564 U.S. at 578-79; *see Buckley*, 424 U.S. at 48-49.

In concluding otherwise, the Fifth Circuit majority relied on this Court's statement in *Turner* that ensuring "the widespread dissemination of information from a

multiplicity of sources" is "a governmental purpose of the highest order." 512 U.S. at 662-63; Pet. App. 86a. But the State lacks an interest in forcing private parties to speak or stay silent so that other messages are amplified. *E.g.*, *Tornillo*, 418 U.S. at 249, 251. *Turner* recognized a rare exception to that rule based on the application of a content-neutral law to the "special physical characteristics" of the cable medium. 512 U.S. at 640, 660-61. "When an individual subscribes to cable," the Court explained, "the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." *Id.* at 656. "A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch." *Id.* That is why this Court held that the government may, in those unique circumstances, force cable operators to carry some broadcast-television channels "to avoid the elimination of broadcast television." *Id.* at 646; *see Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189-90 (1997).

Turner's rationale—like the rationale justifying differential treatment for the broadcast medium, *e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969)—is "not applicable to other speakers" or media, including the "Internet." *Reno*, 521 U.S. at 868-69. When it comes to the Internet, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.* at 870. The Internet is "dynamic" and "multifaceted," allowing anyone to easily "publish" speech on all sorts of websites that increase in number by the day. *Id.* at 853, 870. Like newspapers, websites such as Facebook

and YouTube do "not possess the power to obstruct readers' access to other competing publications." *Turner*, 512 U.S. at 656. A user who cannot spread her views on Facebook may use X or Truth Social. A user who cannot spread his message on YouTube may try Rumble. While the "size and success" of some websites may make them "an enviable vehicle for the dissemination" of views, that alone cannot justify countermanding their private editorial judgments. *Hurley*, 515 U.S. at 577-78. After all, no one thinks the government has greater leeway to force Fox News or the New York Times to publish the government's preferred views simply because the publishers are popular.

2. Even if Respondent could articulate a compelling (or even significant) governmental interest, HB20 still fails heightened scrutiny. It is not even clear that Section 7's ban on viewpoint discrimination meaningfully advances the State's goal of disseminating a wide range of views. To the contrary, it will often have the perverse effect of incentivizing websites to remove entire categories of content, resulting in less speech, not more. After all, if displaying speech criticizing terrorists triggers an obligation to display speech praising them, the rational course is to remove all speech about terrorism. Advertisers and users will demand nothing less.

Section 7's ban on viewpoint discrimination not only fails to meaningfully advance the State's goals but is also both overinclusive and underinclusive. HB20 is overinclusive because the definition of "social media platforms" sweeps in all large websites regardless of whether they disseminate their users' viewpoints. Respondent has presented no evidence to justify painting with such a broad brush, as HB20 regulates the unique editorial policies of

websites as diverse as Facebook and Pinterest. The statute is also hopelessly underinclusive. Texas has no explanation for the arbitrary size requirements that essentially exempt social media sites with a different perceived ideological bent, like Parler and Gab. "Such underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *NIFLA*, 138 S. Ct. at 2376 (cleaned up). In short, HB20 burdens too much and furthers too little, and this one-sided tradeoff falls short of what the First Amendment requires.

The Fifth Circuit majority suggested that HB20-covered websites' "market dominance and network effects make them uniquely in need of regulation." Pet. App. 90a. But the First Amendment protects the editorial-discretion rights of private entities, even if they allegedly have a "monopoly of the means of communication." *Tornillo*, 418 U.S. at 250. *PG&E*, for instance, involved a government-sanctioned energy monopoly, which nonetheless retained First Amendment editorial discretion. 475 U.S. at 17-18. Nor are the websites here anything akin to monopolies. *Reno* recognized "the Internet can hardly be considered a 'scarce' expressive commodity." 521 U.S. at 870. There are countless avenues for speech online, and the mere fact that any one website is "unique" does not mean it is a monopoly. *303 Creative*, 600 U.S. at 592. Even "singular" and "notable" "outlet[s] for speech" do not justify governmental attempts to "deny speakers the right 'to choose the content of their own messages.'" *Id.* (cleaned up) (quoting *Hurley*, 515 U.S. at 573, 577-78). Nor does size and success "support[] a claim that [those entities] enjoy an abiding monopoly of access to spectators" or justify

compelled speech. *Hurley*, 515 U.S. at 577-78. Otherwise, the more successful the private entity, "the more easily his voice could be conscripted to disseminate" speech—"spell[ing]" the First Amendment's "demise." *303 Creative*, 600 U.S. at 592.[9]

Moreover, HB20 is not properly designed to maximize "the widespread dissemination of" *all* "information." Pet. App. 86a. HB20 excludes many Internet websites. And the law seeks to advantage viewpoints objectionable to websites over others that websites would prefer to disseminate. Either these websites must display viewpoints against their will, or cease displaying other viewpoints they consider useful to their communities. After all, Respondent has represented that covered websites can "remov[e] . . . entire *categories* of 'content.'" CA5 Appellant's Br., 2022 WL 1046833, at *1 (emphasis added). That assertion is hard to reconcile with the State's professed interest in maximizing speech. Nor would it alleviate the constitutional problem, as it infringes websites' rights to disseminate the precise speech they choose.

[9] The 50 million monthly U.S. user threshold also lacks any evidentiary basis in the legislative record. *See Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (requiring more than "mere speculation or conjecture"). There is nothing akin to the "unusually detailed" legislative findings that supported *Turner*'s must-carry law. 512 U.S. at 646. A website with, say, 49 million U.S. users obviously contributes to the "widespread dissemination" of information. Pet. App. 86a.

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

HB20 Section 2 singles out State-disfavored websites and compels them (and only them) to provide individual explanations for each of the millions of times they refuse to disseminate speech or take other content-moderation actions. These broad requirements impose a massive burden that will chill the right of covered websites to exercise editorial discretion. "What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77-78 (1990). So these "content-based burdens must satisfy the same rigorous scrutiny as . . . content-based bans." *Playboy*, 529 U.S. at 812.

A. HB20 Section 2 triggers strict scrutiny by compelling speech and encumbering the exercise of protected editorial discretion based on content and speaker.

HB20 Section 2's requirements trigger strict scrutiny for multiple reasons. First, they again rely on the content- and speaker-based definition of "social media platforms." *See supra* pp.7-8, 37-40. Second, they compel covered websites to alter the content of their speech both by compelling them to speak when they would rather not and by burdening their exercise of editorial discretion. *Riley*, 487 U.S. at 795. Section 2's requirements are akin to requiring the New York Times or Wall Street Journal to explain why it rejected each letter to the editor and placed particular articles on specific pages. And HB20 amplifies that problem here by requiring websites to explain *billions* of

editorial decisions. Thus, much like the right-of-reply statute burdened editorial discretion in *Tornillo* by imposing special burdens on newspapers that chose to criticize a political candidate, *see* 418 U.S. at 256-57, Section 2 imposes onerous burdens on websites that deprioritize or decline to disseminate third-party speech. "Faced with the penalties that would accrue" should such a decision be deemed unjustified, a website "might well conclude that the safe[r] course is to avoid controversy" by not exercising editorial discretion at all. *Id.* at 257. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 564 U.S. at 566.

Those significant burdens on all types of speech make this the very last context in which relaxed scrutiny under *Zauderer* should apply. This Court has emphasized that laws compelling disclosures are generally treated no differently from any other law compelling speech. *E.g.*, *NIFLA*, 138 S. Ct. at 2377. *Zauderer* provides a narrow exception to that rule, permitting compelled disclosures in the commercial advertising context—*i.e.*, to "speech which does no more than propose a commercial transaction." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (cleaned up). But this Court has never applied *Zauderer* to uphold a speech mandate outside the context of correcting misleading advertising.

In fact, this Court has consistently described *Zauderer* as limited to efforts to "combat the problem of inherently misleading commercial advertisements" by mandating "only an accurate statement." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 416

(2001) (declining to apply *Zauderer* where compelled subsidy was not "necessary to make voluntary advertisements nonmisleading for consumers"); *Hurley*, 515 U.S. at 573 (describing *Zauderer* as permitting the government only to "requir[e] the dissemination of 'purely factual and uncontroversial information'" in the context of "commercial advertising"); *In re R.M.J.*, 455 U.S. 191, 205 (1982) (invalidating commercial-speech mandate where advertising "ha[d] not been shown to be misleading").

Zauderer thus has no application here. Section 2's requirements have nothing to do with advertising, let alone with preventing misleading advertising. They are just designed to make it easier for the Texas Attorney General to investigate and sue covered websites for perceived inconsistencies in how they exercise their editorial discretion. Under *Zauderer*, governments may have relatively broader latitude to require a commercial entity that voluntarily advertises its services to include information that makes that advertisement non-misleading. Because the government can *ban* misleading advertisements without running afoul of the First Amendment, *see R.M.J.*, 455 U.S. at 203, it may preclude misleading commercial advertisements by requiring disclosures to ensure accuracy. *See Zauderer*, 471 U.S. at 651. *Zauderer* cannot possibly apply to compelled speech burdening a website's editorial discretion. That is particularly true when the entity has not engaged in any advertising at all. Thus, HB20 Section 2 falls far outside *Zauderer*'s heartland.

B. HB20 Section 2 fails strict scrutiny and any form of First Amendment scrutiny.

HB20 Section 2 fails strict scrutiny because it is not "the least restrictive means of achieving a compelling state interest." *AFP*, 141 S. Ct. at 2383 (citation omitted). Regardless, it would fail any form of First Amendment scrutiny, including *Zauderer*'s test.

1. Neither the Fifth Circuit nor Respondent has identified a sufficient governmental interest in requiring websites to provide individualized explanations of editorial decisions.

The opinion below concluded that HB20 Section 2's requirements further the State's interest in "preventing deception of consumers." Pet. App. 92a. In HB20, the Legislature made no such findings, and instead enacted HB20 to infringe private exercises of editorial discretion perceived to disadvantage conservative viewpoints. Pet. App. 187a (legislative findings). Legislators and the Governor admitted as much by declaring that HB20 promotes "conservative" speech. J. A. 22a-25a. Perhaps that is why the Fifth Circuit could not explain what purported deception HB20 addresses. If that were truly Texas's concern, it already has laws preventing deceptive trade practices. *See* Tex. Bus. & Com. Code § 17.46. So Section 2's requirements serve as a "prophylaxis-upon-prophylaxis approach," which this Court's precedent rejects. *FEC v. Cruz*, 596 U.S. 289, 306 (2022).

The record shows that covered websites' editorial decisions are not deceptive. The websites (1) tell users that they remove and restrict some content, J. A. 111a, 141a-42a; (2) publish their policies, J. A. 112a, 141a, 405a-479a; and (3) engage in voluntary efforts to provide

explanations of some editorial decisions, J. A. 123a, 143a, 147a-48a. To be sure, covered websites' existing transparency efforts may not provide all individualized details for all their countless editorial decisions. J. A. 123a, 133a-35a, 147a-49a. But it "can hardly be a compelling state interest" for governments to address a "gap" in "voluntary" efforts. *Brown*, 564 U.S. at 803.

Texas lacks a sufficient interest in "subject[ing] the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest." *Lando*, 441 U.S. at 174. As Respondent has argued elsewhere, "'it is plainly not enough for the Government to say simply that it has a substantial interest in giving consumers information.' This justification is insufficient because it 'would be true of any and all disclosure requirements.'" States' Letter to Vanessa Countryman, Secretary, SEC 11 (Aug. 16, 2022), https://perma.cc/D5VT-8B4E (quoting *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment)).

2. Even if the State had a sufficient governmental interest, HB20 Section 2 would not be sufficiently tailored to furthering that interest.

Under Section 2, every time a covered website declines to disseminate content, it must "explain the reason the content was removed" to the user. Tex. Bus. & Com. Code § 120.103(a)(1). After providing notice, it must both provide a complaint process, *id.* § 120.102, and "allow the user to appeal the decision to remove the content," *id.* §§ 120.103(a)(2), 120.104. Once a user appeals, websites have 14 business days, *id.* § 120.104, to provide their determination and explanation to the user,

id. §§ 120.103(a)(3), 120.104. Websites must also disclose "a description of *each* tool, practice, *action*, or technique used in enforcing the acceptable use policy." *Id.* § 120.053(a)(7) (emphases added). And Section 2 requires broad disclosures into websites' "content management"—including, for example, "specific information regarding the manner in which the social media platform . . . curates and targets content to users"—which describes the countless editorial decisions covered websites make every day. *Id.* § 120.051(a).

Unrebutted evidence demonstrates that these would be massive undertakings. In three months in 2021, YouTube removed 9.5 million videos and over 1.16 billion comments. J. A. 133a. YouTube provides appeals for *video* deletions but not deletions for the far more numerous comments, so it "would have to expand these [appeal] systems' capacity by over 100X." *Id.* And describing each time a website, for instance, deprioritizes a piece of content relative to other content would be practically impossible: As Meta's declarant testified, "I don't even know or understand the math that you would need to go through to be able to calculate" deprioritization decisions—let alone explain them all. J. A. 291a.

These requirements are far broader than necessary to accomplish any interest beyond simply discouraging the exercise of protected editorial discretion. They would require transformational changes to websites' exercise of editorial discretion. If the government forces websites to create granular explanations for each of their billions of editorial choices, they will have no choice but to display speech against their will to avoid incurring massive costs. Assuming it were even technologically feasible to track

and report every instance of deprioritization, for example, maintaining the infrastructure necessary to do so would be incredibly costly. This reality suggests that these provisions are not designed to prevent consumer deception, but rather to chill the exercise of editorial discretion by State-disfavored websites and force them to disseminate speech against their will—as the Legislature expressly intended.

3. HB20 Section 2's requirements are so burdensome that they cannot pass even *Zauderer*. As this Court recently reiterated, the *State* has the burden to prove that disclosure requirements are "neither unjustified nor unduly burdensome." *NIFLA*, 138 S. Ct. at 2377. Yet the Fifth Circuit barely even tried to explain how HB20's disclosure requirements are "reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. Respondent has pointed to nothing suggesting that consumers do not know that websites exercise editorial discretion or have been misled by how they do so.

Respondent likewise did not even try to demonstrate that its onerous disclosure rules are not unduly burdensome when balanced against any legitimate interests they purport to serve—a concern that should have been front and center given the sheer volume of mandated disclosures. Nor could he. As the district court explained, "Section 2's disclosure and operational provisions are inordinately burdensome given the unfathomably large numbers of posts on these sites and apps." Pet. App. 172a-73a. They would effectively paralyze covered websites, underscoring that the State's real goal is not to protect

consumers from deception, but to punish disfavored exercises of editorial discretion.

* * *

The First Amendment stands as a bulwark against governmental control of the private marketplace of ideas. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette*, 319 U.S. at 642. Through HB20, Texas has declared that *all* viewpoints are to be equally orthodox on a targeted group of websites, which must detail billions of their editorial decisions—or refrain from such decisions altogether. In so doing, the State seeks to make itself the arbiter of what speech private publishers must disseminate and to replace their editorial choices with the State's own. That is unconstitutional. There is no basis under this Court's First Amendment precedent or America's history and tradition to create a social-media-website exception to the freedoms of speech or the press.

CONCLUSION

The Court should reverse the Fifth Circuit's judgment.

Respectfully submitted.

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