No. 21-51178

In the United States Court of Appeals for the Fifth Circuit

NETCHOICE, L.L.C., A 501(C)(6) DISTRICT OF COLUMBIA ORGANIZATION DOING BUSINESS AS NETCHOICE; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, A 501(C)(6) NON-STOCK VIRGINIA CORPORATION DOING BUSINESS AS CCIA,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
Civil Action No. 1:21-cv-00840-RP

APPELLEES' RESPONSE IN OPPOSITION TO APPELLANT'S MOTION TO STAY PRELIMINARY INJUNCTION

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No. 21-51178

NetChoice, L.L.C., a 501(c)(6) District of Columbia organization doing business as NetChoice; and Computer & Communications Industry Association, a 501(c)(6) non-stock Virginia Corporation doing business as CCIA,
Plaintiffs-Appellees,

v.

Ken Paxton, in his official capacity as Attorney General of Texas,
Defendant-Appellant.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. Plaintiffs-Appellees CCIA and NetChoice have no parent corporations and no publicly held corporation owns 10% or more of their respective stock. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTRODUCTION

The district court's preliminary injunction of Texas House Bill 20's Sections 2 and 7 ("HB20") rightly preserved the "status quo"—an Internet free of government-compelled and chilled speech eviscerating websites' editorial discretion. *E.T. v. Paxton*, 2021 WL 5629045, at *7 (5th Cir. Dec. 1, 2021) (agreeing with Texas Attorney General that "the maintenance of the status quo is an important consideration" for stay motions) (cleaned up).

The district court relied on fundamental First Amendment principles that have "repeatedly been recognized by courts":

> *Tornillo*, *Hurley*, and *PG&E*, stand for the general proposition that private companies that use editorial judgment to choose whether to publish content—and, if they do publish content, use editorial judgment to choose what they want to publish—cannot be compelled by the government to publish other content.

ROA.2584 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 581 (1995); *PG&E v. PUC of California*, 475 U.S. 1, 12 (1986) (plurality op.);[1] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). Likewise, the district court joined a chorus of cases holding that government cannot infringe companies' editorial discretion and compel their speech through burdensome disclosure and operational requirements. ROA.2592 (citing *NIFLA v. Becerra*, 138 S. Ct. 2361, 2372 (2018); *Washington Post v. McManus*, 944 F.3d 506, 514 (4th Cir. 2019) (Wilkinson, J.)).

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[1] All citations to *PG&E* are to the plurality.

HB20 is a content-, viewpoint-, and speaker-based law that would eviscerate editorial discretion, impermissibly compel and chill speech, and impose onerous disclosures on a select few disfavored Internet social-media platforms.[2] The district court correctly preliminarily enjoined HB20's enforcement—just as Florida's similar law has been preliminarily enjoined. *NetChoice, LLC v. Moody*, 2021 WL 2690876, *12 (N.D. Fla. June 30, 2021), *appeal pending*, 11th Cir. No. 21-12355.

HB20's Section 7 prohibits platforms from deleting or deprioritizing speech based on "viewpoint." ROA.2572. HB20 therefore unconstitutionally compels platforms to disseminate (and present on equal terms) all sorts of objectionable speech—including pro-Nazi speech, terrorist propaganda, Holocaust denial, and misinformation. *Robinson v. Hunt Cnty.*, 921 F.3d 440, 447 (5th Cir. 2019) ("subjective judgment that the content of protected speech is offensive or inappropriate" is based on "viewpoint").

HB20's Section 2 also imposes unconstitutional operational and disclosure requirements. For example, it requires platforms to provide notice *every time* they delete speech—and provide a complaint-and-appeal process subject to short deadlines. This is onerous: In just three months earlier this year, YouTube removed 9.1 million videos and *1.16 billion comments*. ROA.2591. Over a similar period, Facebook removed over 40 million pieces of bullying, harassing, and hateful content alone. *Id.* Section 2 also requires platforms to

[2] All references to "platforms" refer to HB20-covered companies.

publish voluminous—and potentially impossible-to-compile—details in a "biannual transparency report." ROA.2573. And it mandates that platforms "publicly disclose" their "content management, data management, and business practices"—broad categories piercing First-Amendment-protected editorial discretion and trade secrets. *Id.*

Defendant's motion wholly ignores the Supreme Court's seminal *Reno v. ACLU* decision. *Reno* recognized that disseminating speech on the Internet is inherently "expressive," and there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to" the "Internet." 521 U.S. 844, 870 (1997).

Worse yet, Defendant's main argument is a limitless assertion of government power—which the Supreme Court has already rejected. Defendant contends the First Amendment only protects entities that "have an overt editorial hand in *developing*" speech—that is, the actual "*creation* of the underlying speech." Mot.2 (emphases added); Mot.9 ("creates or develops"). Defendant thus asserts that disseminating speech generated by a "third party," Mot.1, 13-17, is non-protected "conduct" that government can regulate however it sees fit, Mot.1, 11-13. *Hurley* already *squarely* rejected this argument: The First Amendment does not "require a speaker to generate, as an original matter, each item featured in the communication." 515 U.S. at 570. Fundamentally, Defendant's argument would give government untold power over entities vital to disseminating others' speech—bookstores, book publishers, essay-compilation editors, theaters, cable television operators, art shows,

community bulletin boards, and comedy clubs, just to name a few. According to Defendant, government could compel them to disseminate (or block them from disseminating) speech authored by others. Case after case rejects this unlawful assertion of government power. *Infra* p.11.

Government "may not . . . tell Twitter or YouTube what videos to post; or tell Facebook or Google what content to favor." *USTA v. FCC*, 855 F.3d 381, 392 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc). This Court should deny Defendant's motion and maintain the "status quo." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (rejecting stay of preliminary injunction of new state law).

BACKGROUND

The district court's order accurately summarizes the background. ROA.2571-76.

A. Platforms disseminate speech by arranging, recommending, and presenting expression to users. In doing so, platforms express the message that the disseminated speech is "worthy of presentation." *Hurley*, 515 U.S. at 575.

As the district court found, platforms "curate both users and content to convey a message about the type of community the platform seeks to foster and," accordingly, they "exercise editorial discretion over their platform's content." ROA.2586.[3] They use editorial judgment both to determine from

[3] Defendant selectively quotes a 2013 Facebook brief for the idea that Facebook is a passive "conduit" for speech. Mot.9. But that brief clearly states

whom they disseminate speech and what speech they disseminate. *Id.* For example, platforms have hate-speech policies. ROA.1769-1826 (collecting policies). Platforms require each *eligible* user to abide by platforms' policies regarding acceptable expression. ROA.359 n.1; ROA.383 ¶11; ROA.1664-1721. Platforms have always had such policies, updating them to respond to new conditions. ROA.363 ¶22; ROA.383 ¶10. Exercising editorial judgment "is an important way that online services express themselves and effectuate their community standards," ROA.2599, allowing each platform to provide a distinctive experience. ROA.2586.

Defendant is therefore right that platforms have "shown an overwhelming tendency" (Mot.18) to remove spam, criminal speech, child sexual abuse material, hate speech, misinformation, and other expression they deem objectionable. ROA.2591-92. Without curation, platforms "would soon become unacceptable—and indeed useless—to most users." *NetChoice*, 2021 WL 2690876, at *7.

Platforms also make "context-specific decisions about how to arrange and display content, how best to recommend content to users based on their interests, and how easy it should be to access certain kinds of content." ROA.328 ¶14. And platforms append warning labels, disclaimers, links to

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Facebook exercises a traditional editorial function: "Whether and when to remove or exclude content posted by a third-party user falls at the very core of a publisher's traditional editorial function." 2013 WL 5371995, at *18. Thus, there is no "dramatic reversal" in this case. Mot.10.

sources, and other kinds of commentary to user-submitted expression. ROA.2588-89.

B. HB20 is content-, speaker-, and viewpoint-based. For example, HB20 excludes websites that "consist[] primarily of news, sports, [or] entertainment." ROA.2572-73. And HB20 singles out a few social-media platforms with more than 50 million monthly active U.S. users. ROA.2572. According to the Governor's official signing statement, HB20 protects "conservative viewpoints": "It is now law that conservative viewpoints in Texas cannot be banned on social media." ROA.278; ROA.2572-73, 2587-88, 2599 (lawmaker statements).

HB20's Section 7 directly prohibits editorial judgment based on "viewpoint." Tex. Civ. Prac. & Rem. Code § 143A.001. This bans, for instance, hate-speech policies, ROA.2589, which are plainly "viewpoint"-based. *Supra* p.2; *accord R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (hate-speech policy "viewpoint"-based). So a platform violates Section 7 if it deletes or deprioritizes hate speech, like pro-Nazi speech.

And HB20's Section 2 compels platforms to provide intrusive disclosures. ROA.2573-74.

Both sets of provisions are enforceable by the Texas Attorney General, who may sue—including for "potential violation[s]" of Section 7—and is entitled to fee-shifting and "reasonable investigative costs." ROA.2574, 2592.

ARGUMENT

Defendant meets none of the stay factors. *Barber*, 833 F.3d at 511. "'A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Id.* (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). "[T]he maintenance of the status quo is an important consideration" for stay motions, *id.*—as Defendant recognized in *E.T. v. Paxton*, 2021 WL 5629045, at *7.

I. Plaintiffs are likely to succeed on their First Amendment claims.

A. HB20 abridges platforms' protected editorial discretion.

1. Websites' editorial discretion is fully protected by the First Amendment.

a. The Supreme Court recognized a generation ago that the inherently "expressive" "content on the Internet is as diverse as human thought," and fully protected by the First Amendment. *Reno*, 521 U.S. at 870.

Speech "publishing" and "dissemination" on the Internet is "speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) ("distributing" protected); *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("disclosing" and "publishing" protected).[4] Websites' "decisions relating to the

[4] Defendant suggests that platforms' for-profit status undercuts their rights, Mot.2, 25-26, a position this Court has rejected. *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 561 (5th Cir. 1997).

monitoring, screening, and deletion of content" are "actions quintessentially related to a publisher's role." *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008); *Landry's, Inc. v. Ins. Co. of the State of Pa.*, 4 F.4th 366, 369 (5th Cir. 2021) (collecting "publish" and "publication" definitions).

This "editorial function itself is an aspect of 'speech.'" *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996) (plurality op.). The First Amendment applies equally to the publication and "presentation of an edited compilation of speech generated by other persons." *Hurley*, 515 U.S. at 570 (citation omitted); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) ("exercis[ing] editorial discretion in the selection and presentation" of content is protected "speech activity").

Accordingly, platforms have a constitutional right to delete, arrange, and otherwise moderate user-submitted content. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019) (recognizing "private entities' rights to exercise editorial control over speech and speakers on their properties or platforms"). Even private entities "who open their property for speech" retain "the ability to exercise what they deem to be appropriate editorial discretion within that open forum." *Id.* at 1930-31.

The Supreme Court has upheld these protections irrespective of the underlying facts of its cases.

Tornillo confirmed that the First Amendment protects the editorial discretion of speech disseminators. 418 U.S. at 258. *Tornillo* invalidated a "right-of-reply" law because "the choice of material to go into a newspaper, and

the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the [protected] exercise of editorial control and judgment." *Id.* The law in *Tornillo* was indistinguishable from a law "forbidding [an entity] to publish specified matter," which violated "the First Amendment because of its intrusion into the function of editors." *Id.* at 256, 258.

Hurley held that government may not use anti-discrimination laws to "declar[e] . . . speech itself to be [a] public accommodation" and "alter the expressive content" of private expression. 515 U.S. at 572-73. Specifically, government could not compel a private parade to include a float featuring a message with which the parade operators disagreed. *Id. Hurley* reiterated: "a speaker has the autonomy to choose the content of his own message," and this principle "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.* at 573.

Hurley expanded on *Tornillo*, making clear that disseminating "third-party" speech receives the same constitutional protection as a newspaper's publication. Speech disseminators do not need to present a "particularized message" or generate, adopt as their own, or even agree with expression: "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech," *even if* it is "rather lenient in admitting participants." *Id.* at 569-70.

Accordingly, the Constitution protects platforms from disseminating user-submitted content they do not wish to distribute. HB20's "[c]ompelled access . . . both penalizes the expression of particular points of view"—like platforms' hate-speech policies—"and forces speakers to alter their speech to conform with an agenda they do not set." *PG&E*, 475 U.S. at 9. "[T]he choice to speak includes within it the choice of what not to say," so "compelling a private corporation to provide a forum for views other than its own may infringe the corporation's freedom of speech." *Id.* at 9, 16. And it poses the "inherent risk" that the state seeks to "manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). "[A]ny such compulsion to publish that which 'reason tells them should not be published' is unconstitutional." *Tornillo*, 418 U.S. at 256.

Thus, the district court's decision is consistent with myriad authority upholding Internet platforms' First Amendment rights. *E.g.*, *NetChoice*, 2021 WL 2690876, at *7; *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017); *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014).

b. Defendant responds that these protections do not apply if government can assert platforms merely engage in the "conduct" of "hosting" others' speech. Mot.1-2, 12-15.

As explained above, this is a remarkable assertion of government power. That is why the Supreme Court has squarely rejected it: *Tornillo*, *PG&E*, and *Hurley* all protected the rights of private companies (a newspaper, an energy monopoly, and parade organizers) not to disseminate speech generated by others (candidates, customers, and parade participants). The Court could have described the Miami Herald in *Tornillo* as "hosting" candidate replies—or the parade organizers in *Hurley* as merely "hosting" participants. It did not. Instead, the Court held that the First Amendment protected editorial discretion—just as it has done for various other entities disseminating speech generated by others. *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 702-03 (1992) (O'Connor, J., concurring) ("right to distribute" expressive content "lies at the heart of the liberties guaranteed by the Speech and Press Clauses of the First Amendment"); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963) ("the circulation of books"); *Smith v. California*, 361 U.S. 147, 150 (1959) ("free publication and dissemination of books and other forms of the printed word");[5] *Muir v. Ala. Educ. Television Comm'n*, 656 F.2d 1012, 1016 (5th Cir. 1981) ("speaking, book publishing, theatre presentations, pamphleteering"); *Bayou Landing, Ltd. v. Watts*, 563 F.2d 1172, 1175 (5th Cir. 1978) ("magazines" and "films").

[5] Defendant cites *Cubby, Inc. v. CompuServe, Inc.* Mot.9. *Cubby* cited *Smith* in recognizing that private parties have "deeply rooted" First Amendment rights over "distributing" expression created by others. 776 F. Supp. 135, 139 (S.D.N.Y. 1991).

More generally, even when speech dissemination "can be reduced to [its] constituent acts, and thus described as conduct," the expressive "end product" cannot be "disconnect[ed] . . . from the act of creation." *Turner v. Driver*, 848 F.3d 678, 689 (5th Cir. 2017). Whatever "conduct" platforms engage in is inextricably intertwined with protected editorial discretion. For instance, the "creation of custom wedding cakes is expressive"—notwithstanding the "conduct" of purchasing and combining ingredients, baking, and decorating—because the result is expressive. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1743 (2018) (Thomas, J., concurring).

c. Ignoring the bedrock principles established by *Tornillo*, *PG&E*, and *Hurley*, Defendant feebly attempts to limit these cases to their facts. Mot.14-17. That effort fails.

Defendant argues *Tornillo* was just a case about "newspapers." Mot.14-15. But under *Tornillo*, any "intrusion into the function of editors" is unconstitutional. 418 U.S. at 258. The Supreme Court has since extended *Tornillo* beyond "newspapers." *PG&E*, 475 U.S. at 11-12; *Hurley*, 515 U.S. at 570, 575. Defendant's alleged distinctions do not matter, and (if true) would revolutionize First Amendment doctrine.

First, Defendant suggests that *Tornillo*'s right-of-reply law would have been constitutional if it applied more broadly. Mot.14. But expanding the law would only have exacerbated the problem by "requir[ing] the newspaper to disseminate" *more* "message[s] with which the newspaper disagreed." *PG&E*, 475 U.S. at 18.

Second, Defendant argues that *Tornillo*'s holding relied on newspapers' limited space. Mot.14. So according to Defendant, newspapers today could be forced to publish replies on their websites because websites allegedly have "infinite space to disseminate limitless speech." Mot.14-15. The Supreme Court has rejected the idea that technological advances dilute First-Amendment protections, particularly on the "Internet." *Reno*, 521 U.S. at 870.

Third, Defendant argues that platforms' expression is different from a newspaper's expression. Mot.15. This is irrelevant as *Hurley* subsequently held—and numerous courts hold that Internet platforms possess constitutional rights of editorial discretion. *Supra* pp.9-10.

Fourth, Defendant asserts that platforms disclaim responsibility for user-submitted content. Mot.15. But newspapers, likewise, could disclaim that an op-ed reflects the views of the author alone, and government cannot compel them to publish the op-ed with a disclaimer. *Tornillo*, 418 U.S. at 258.

Fifth, Defendant contends that platforms avoid being associated with content on their platforms. Mot.15. But, as unrebutted record evidence demonstrates, platforms recognize that users and advertisers hold platforms responsible for the expression platforms disseminate. ROA.291-92, 315.

Finally, Defendant asserts that newspapers "screen" content before publication and platforms do not. Government cannot compel *continued dissemination* any more than it can compel initial dissemination. The choice of *when* to exercise editorial discretion—no less than *how*—is protected by the First Amendment. *Horton v. City of Houston*, 179 F.3d 188, 189-90 (5th Cir. 1999)

(recognizing "First Amendment rights" for organizations that "do not pre-screen submitted programs"). "[M]onitoring, screening, *and deletion*" are all "quintessentially related to a publisher's role." *Doe*, 528 F.3d at 420 (emphasis added). And many other entities like "community bulletin boards" and "[c]omedy club[]" open-mic nights do not pre-screen content, yet they undisputedly have First Amendment rights. *Manhattan*, 139 S. Ct. at 1930.[6]

Moreover, Platforms *do* pre-screen expression in deciding how content is presented to users in the first place, and they moderate certain policy-violating content before users see it. ROA.360-71 ¶¶ 16, 24, 40; ROA.382-85 ¶¶ 5, 14; NetChoice, *By the Numbers* 5-6, https://bit.ly/3Gn54Hj.

PG&E, according to Defendant, merely addressed third-party speech that a public utility was forced to mail to its customers "as its own." Mot.16. But *PG&E* recognized that *Tornillo*'s principles extend beyond newspapers because "[c]ompelled access . . . both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *PG&E*, 475 U.S. at 9. *PG&E* held that a private company could not be forced to disseminate third-party speech, especially when that company would feel compelled to disclaim any agreement with that speech. *Id.* at 16, 20-21.

[6] For similar reasons, and contrary to Defendant's suggestion (Mot.4), the First Amendment does not require platforms to have *always* exercised editorial discretion for their *current* efforts to be protected.

Defendant's argument that *Hurley* "extended *Tornillo* to a parade" (Mot.16) only proves that *Tornillo*'s principles transcend its facts. As addressed above (p.9), *Hurley* extended *Tornillo* based on generally applicable free-speech principles that control here, too.

2. Publication of Internet speech is inherently expressive, unlike the physical access laws at issue in *FAIR* and *PruneYard*.

Defendant also argues that HB20 deserves no First Amendment scrutiny under *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Mot.12-14.[7] Defendant asserts these cases stand for the proposition that private entities can be forced to "host" speech—and that websites should be treated no differently than *FAIR*'s law school and *PruneYard*'s mall.

This argument fails. *NetChoice*, 2021 WL 2690876, at *9. As explained above, (1) websites are inherently "expressive" disseminators of speech, *Reno*, 521 U.S. at 870; and (2) disseminators of speech generated by others receive full First Amendment protection. In contrast, *FAIR* and *PruneYard* involved laws requiring physical access to certain physical property—*not*

[7] The dissenting opinion Defendant cited (Mot.12) recognized that *Hurley* protected a private entity—notwithstanding that it "combined multifarious voices of disparate groups without bothering to isolate an exact message." *USAID v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2097-98 (2020) (Breyer, J., dissenting) (cleaned up).

intrusions on editorial judgment over a private company's own expressive product.

FAIR's "equal access" law required schools to grant military employment recruiters the same "recruiting assistance" as other employment recruiters, which "is not inherently expressive." 547 U.S. at 64-65. Because the law school was not publishing expression when it "host[ed] interviews and recruiting receptions" on its physical campus, "accommodating the military's message [did] not affect the law schools' speech." *Id.* at 63-64.[8] "A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper"—referring to *Hurley*, *PG&E*, and *Tornillo*. *Id.* at 64. As the district court correctly concluded, *FAIR* "has no bearing [here] because it did not involve government restrictions on editorial functions." ROA.2589.

Because HB20 "dictate[s] the content of" curated expression, it imposes far more than the permissible "incidental" burden on platforms' expression. *FAIR*, 547 U.S. at 62. Here, the "compelled-speech violation . . . result[s] from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63.

[8] To be sure, *FAIR* did say that military recruiters could have access to any school "e-mails" or "bulletin boards" that schools allowed other employers to use for employment recruitment, because such "compelled speech" was only "incidental." 547 U.S. at 61-62. But that depended on *FAIR*'s holding that employment "recruitment assistance" is not expressive. *Id.* at 61.

Similarly, *PruneYard* involved no "intrusion into the function of editors," because the shopping mall's operations lacked an editorial function over an expressive product. 447 U.S. at 88. The law there required a mall—which never engaged in expression—to grant physical access to people collecting petition signatures. As the district court emphasized, citing *PG&E*, "the [mall] owner did not even allege that he objected to the content of the [speech]; nor was the access right content based." ROA.2589 (quoting *PG&E*, 475 U.S. at 12). So requiring the mall to "host" others' physical presence while they engaged in expression had no impact on the mall's (nonexistent) expression. *PruneYard*, 447 U.S. at 88.

PruneYard would have come out differently if the mall had created a bulletin board—either physically or on the Internet—over which it exercised editorial control about acceptable posts, as is the case here. Indeed, "*PruneYard* [] does not undercut the proposition that forced associations that burden protected speech are impermissible." *PG&E*, 475 U.S. at 12. HB20 will eviscerate platforms' right to "eschew association for expressive purposes." *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018).

At bottom, HB20 "compel[s] the platforms to change their own speech in other respects, including, for example, by dictating how the platforms may arrange speech on their sites. This is a far greater burden on the platforms' own speech than was involved in *FAIR* or *PruneYard*." *NetChoice*, 2021 WL 2690876, at *9.

3. Platforms are not common carriers and common-carrier status makes no First Amendment difference.

In the district court, Defendant described his "common carrier" argument as "essential," ROA.2585, but now devotes only two pages to it. Mot.17-19. Platforms are not common carriers, and common-carrier status does not alter the First Amendment analysis.

a. The district court correctly recognized "that social media platforms are not common carriers" because they are not indiscriminate as to both users and content. ROA.2585-87; *accord USTA*, 855 F.3d at 392 (Srinivasan & Tatel, JJ., concurring in the denial of reh'g en banc) ("Facebook, Google, Twitter, and YouTube . . . are not considered common carriers"); ROA.303 n.6 (collecting similar cases).

b. Even if platforms were common carriers, HB20's statutory label as "a common carrier scheme has no real First Amendment consequences." *Denver*, 518 U.S. at 825 (Thomas, J., concurring in judgment in part). And "impos[ing] a form of common carrier obligation" cannot justify a law that "burdens the constitutionally protected speech rights" of platforms "to expand the speaking opportunities" of others. *Id.* at 825-26.

PG&E and *Denver* vindicated the First Amendment rights of common carriers. *PG&E* held that a public utility monopoly retained editorial discretion and could not be compelled to disseminate others' speech. 475 U.S. at 17-18 n.14. *Denver* recognized that cable operators generally retain editorial discretion over the "freedom to pick and to choose programming" and that

common carriers more generally retain First Amendment rights. 518 U.S. at 738 (plurality op.) (collecting cases).

Contrary to Defendant's arguments, *Turner* does support HB20. Mot.2, 14-15, 17-18.

First, *Reno* held that *Turner*'s broadcast-television-specific analysis has no place in evaluating First Amendment rights on the "Internet." 521 U.S. at 870.

Turner hinged on "the unique physical characteristics of cable [television] transmission"—physical cable lines running into houses—which provided cable companies a physical "bottleneck, or gatekeeper, control over most (if not all) of the television programming" available to consumers. 512 U.S. at 639, 656; *accord Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 640 (5th Cir. 2012) ("*TWC*") ("the cable medium [in *Turner*] uniquely allowed for the bottleneck control"). Because of that unique physical bottleneck, there would have been a complete "elimination of broadcast television"—that is, "access to free television programming for the 40 percent of Americans without cable"—if cable companies nationwide had not been required to carry the broadcast television channels the federal government had spent decades cultivating. *Turner*, 512 U.S. at 646; *accord Horton*, 179 F.3d at 192, 194 (*Turner*'s law "assur[ed] free TV access to citizens who lack cable connections"). In fact, this broadcast-television governmental interest required cable operators to carry just a "certain minimum number of broadcast

stations"—nothing close to common carriage of all channels irrespective of content. *Turner*, 512 U.S. at 643-44, 662.

Unlike the cable companies in *Turner* (and phone companies and railroads), websites have no natural monopoly over physical infrastructure. *Reno*, 521 U.S. at 870. And websites do not possess any bottleneck that would "destroy[]" an entire speech medium used by half of the country. *Hurley*, 515 U.S. at 577. Platforms lack "the physical power to silence anyone's voices." *Zhang*, 10 F. Supp. 3d at 437, 441.

Second, HB20 triggers strict scrutiny as a content-, viewpoint-, and speaker-based law—unlike the "content neutral" law in *Turner* that triggered only heightened scrutiny. 512 U.S. at 655-56.

Third, Defendant is wrong that the *Turner* dissenters would have upheld HB20. Mot.19. The dissenters recognized the First Amendment protects those who "[s]elect[] which speech to retransmit"—like "publishing houses, movie theaters, bookstores, and Reader's Digest"—because their activities are "no less communication than is creating the speech in the first place." *Id.* at 675 (O'Connor, J., dissenting in part). The same is true of platforms, so compelling speech dissemination "puts this case squarely within the rule of [*PG&E*]." *Id.* at 682.

c. In the district court (and in a passing citation, Mot.19), Defendant made a different common-carrier argument, invoking a certiorari-stage statement by Justice Thomas. A non-exhaustive, multi-factor test like that proposed by Defendant in the district court is inappropriate in the First

Amendment context, which "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.).

Defendant incorrectly asserts that "Justice Thomas . . . has agreed the Platforms can be regulated like common carriers." Mot.19. As Justice Thomas acknowledged, that case "afford[ed] [the Court] no opportunity to confront" this issue. *Biden v. Knight First Amendment Inst.*, 141 S. Ct. 1220, 1227 (2021) (vacating for mootness).

Importantly, the *Knight* statement did not address (1) Justice Thomas's prior observation in *Denver* that labeling a law "a common carrier scheme has no real First Amendment consequences," 518 U.S. at 825; or (2) *Hurley*'s holding that government cannot declare "speech itself to be the public accommodation," 515 U.S. at 573. The statement even acknowledged that asserting that platforms are "public forum[s] . . . has problems." *Knight*, 141 S. Ct. at 1225.[9]

B. HB20's disclosure and operational provisions violate platforms' First Amendment rights.

1. HB20 Section 2's requirements are content-, speaker-, and viewpoint-based because they rely on the same "social-media-platform" definition as Section 7. ROA.2572-73. Accordingly, Section 2 is subject to strict scrutiny on this independent basis. *NIFLA*, 138 S. Ct. at 2374 (collecting cases); *United*

[9] Plaintiffs responded to *Knight* in detail in the district court. ROA.1649-1655.

States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 812 (2000) ("content-based burdens must satisfy the same rigorous scrutiny as . . . content-based bans"); *Sorrell*, 564 U.S. at 565-66.[10]

2. Section 2 also unconstitutionally infringes on protected editorial control. *Herbert v. Lando*, 441 U.S. 153, 174 (1979) (First Amendment prohibits any "law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest"). Section 2's requirements are therefore unlike the commercial-speech disclosures that Defendant invokes. Mot.23, 25.[11]

HB20's requirements are like requiring (select) bookstores to publicly declare their book-selection processes, disclose which books they chose not to display, and provide a grievance procedure for writers whose books they decline to carry. This is unconstitutional.

As the district court noted, relying on a similar Fourth Circuit case, the First Amendment precludes HB20's effort to "'force[] [platforms] to speak when they otherwise would have refrained.'" ROA.2592 (quoting

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[10] At minimum, "exacting scrutiny"—used for campaign-finance disclosures—should apply. *AFP v. Bonta*, 141 S. Ct. 2373, 2383 (2021). Neither interest justifying such disclosures apply here. *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam).

[11] The "commercial speech" doctrine does not apply here, as Plaintiffs explained in the district court. ROA.1639-40; *Express Oil Change, L.L.C. v. Miss. Bd. of Licensure for Pro. Eng'rs & Surveyors*, 916 F.3d 483, 488 n.2 (5th Cir. 2019).

Washington Post, 944 F.3d at 518). Specifically, the Fourth Circuit held that disclosures regarding political advertisements on websites "intrud[ed] into the function of editors" and unconstitutionally compelled speech. *Washington Post*, 944 F.3d at 518. That law failed exacting scrutiny (let alone strict scrutiny). *Id.* at 520. Setting aside that Defendant's purported interest in enacting HB20 is constitutionally illegitimate (*infra* pp.27-29), Defendant's interest also lacks any substantial connection to the broad disclosure requirements imposed by HB20. These touch virtually every aspect of platforms' operations.

Defendant cannot justify HB20's imposition because certain platforms already engage in some voluntary transparency efforts. Mot.23-24. The Supreme Court has held that governmental attempts to address the "gap" between "voluntary" efforts and what government mandates "can hardly be a compelling state interest." *Brown*, 564 U.S. at 803. It does not matter that some platforms have chosen to use certain processes that are *similar* to some of HB20's requirements, like "acceptable use policies," different notice-and-appeal systems, and some transparency reports. Nor under HB20's open-ended and expansive requirements can platforms be sure that any part of their current efforts is already in compliance or will be in the future.[12]

[12] Contrary to his insinuation, Mot.23-24 n.19, Defendant has never stated platforms are in compliance or disavowed enforcement.

3. This Court, therefore, need not reach *Zauderer*'s test for evaluating compelled speech—which applies only to "commercial advertising" that is not subject to higher scrutiny. *NIFLA*, 138 S. Ct. at 2372 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). But Section 2 fails even *Zauderer*'s test, as the district court concluded. ROA.2591-92. These provisions compel speech beyond "factual, noncontroversial information" and are "unjustified or unduly burdensome." *NIFLA*, 138 S. Ct. at 2372 (cleaned up). They far exceed the few lines of text that *NIFLA* concluded "drown[ed] out" speech in that case. *Id.* at 2378.

First, HB20's notice-and-appeal provisions are burdensome as they apply to billions of pieces of content—way beyond platforms' current efforts. They require (1) a complaint system requiring responses within 48 hours; (2) notice each time platforms remove content, with an explanation of "the reason the content was removed"; and (3) an appeal process for content removal requiring decisions within 14 days. Tex. Bus. & Com. Code §§ 120.101-4.

The district court noted the vast amounts of content to which these requirements would apply. ROA.2591-92. For instance, YouTube provides appeals for video deletions but not comment deletions; so "YouTube would have to expand these systems' capacity by over 100—from a volume handling millions of removals to that of over a billion removals." ROA.376 ¶ 56.

Second, HB20's non-exhaustive list of required "public disclosures" is intrusive. Tex. Bus. & Com. Code § 120.051. HB20 requires these disclosures to

"be sufficient to enable users to make an informed choice," but does not define this standard. *Id.* §120.051(b). The opacity is especially troublesome because the topics of disclosure—"content management, data management, and business practices," *id.* §120.051(a)—encompass everything platforms do. Defendant may investigate and sue both because a platform's disclosure on enumerated topics is "insufficient" and because a platform did not provide certain *un*enumerated information.

These disclosures will cause further harm. Unrebutted record evidence demonstrates that every incremental disclosure further enables predators to evade detection and prey on the vulnerable. ROA.1437 40:5-18. Furthermore, these disclosures, particularly with respect to "algorithms or procedures that determine results on the platform," may reveal trade secrets and other competitively sensitive information. Tex. Bus. & Com. Code §120.051(a)(4).

Third, the "acceptable use policy" that "reasonably inform[s]" and details all "steps" to enforce platform policies (*id.* §120.052) is vague. And it is impermissible under *Zauderer* because editorial policies are not "factual, noncontroversial information." *NIFLA*, 138 S. Ct. at 2372.

Finally, the "transparency report" requires publication of voluminous detail, far exceeding platforms' current data-reporting-and-collection efforts—and it may not be technically possible. Tex. Bus. & Com. Code §120.053. For example, it requires platforms to provide an accounting of every single "action" they take when exercising editorial discretion to, among other things, delete or "deprioritize[e]" "illegal" or "potentially

policy-violating" expression on their platforms. *Id.* §120.053(a)(2). And it requires platforms to track further information about that content and how it was reported. *Id.* §120.053(a)(3)-(b). As explained above (p.2), platforms do this tens of millions of times each month. Defendant therefore ignores the voluminous data collection and calculation necessary to produce the "top-line numbers" HB20 requires. Mot.24. Facebook and YouTube noted such a requirement would be incredibly burdensome, and Facebook's declarant expressed skepticism that compliance would even be possible. ROA.2592.

C. HB20 triggers strict scrutiny, because HB20 is content-, viewpoint-, and speaker-based.

The district court's order correctly explains how HB20 triggers strict scrutiny, even beyond its infringement of editorial discretion. ROA.2592-94.

First, the "social-media-platform" definition is (1) content-based because it excludes certain sites based on content like "sports, news, [or] entertainment," and (2) speaker-based because it arbitrarily singles out those platforms with more than 50 million monthly U.S. users. ROA.2595. As the district court concluded, "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." ROA.2594.

Second, Section 7's core prohibition on content moderation based on "viewpoint" is itself viewpoint- and content-based. HB20 commands platforms to disseminate speech based on the viewpoint expressed in the speech.

Finally, HB20's two content-based exceptions reveal that the statute "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (collecting cases); ROA.2592-93.

D. HB20 fails any level of heightened scrutiny.

Defendant does not argue that HB20 satisfies strict scrutiny. Nor does HB20 satisfy any other form of heightened scrutiny.

1. The district court correctly rejected Defendant's two interests asserted below (public forum common carrier and anti-discrimination). ROA.2597.[13] Defendant raises a new governmental interest on appeal—"protecting the free exchange of ideas and information." Mot.18.[14] But this interest is merely a reformulated version of the interest *Tornillo* (and others, including the Northern District of Florida) rejected. *NetChoice*, 2021 WL 2690876, at *7, *11.

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[13] The district court correctly concluded that platforms "are privately owned platforms, not public forums." ROA.2597; *accord Manhattan*, 139 S. Ct. at 1932. Dicta in *Packingham v. North Carolina* is not to the contrary (Mot.3) because *Packingham* considered whether *government* has the power to bar sex offenders from platforms—not whether *private platforms* have the right to exclude sex offenders. 137 S. Ct. 1730, 1732, 1735 (2017).

And the district court correctly rejected the anti-discrimination interest because, "forbidding acts of discrimination" among expressive viewpoints is "a decidedly fatal objective" for the First Amendment's "free speech commands." *Hurley*, 515 U.S. at 578-79.

[14] Defendant forfeited this argument by not raising it in the district court. *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021).

The state cannot mandate such "enforced access"—even in the name of "enhanc[ing]" speech, promoting "fairness," or addressing "vast accumulations of unreviewable power in the modern media empires." *Tornillo*, 418 U.S. at 245, 250-51. *Tornillo* established that even a "noncompetitive and enormously powerful" company with a "monopoly" on the "marketplace of ideas" retains First Amendment protections, *id.* at 249, 250-51,[15] and Plaintiffs' members are all fierce competitors in a highly competitive digital marketplace. Likewise, the "enviable" "size and success" of platforms does not "support[] a claim that [platforms] enjoy an abiding monopoly of access to spectators." *Hurley*, 515 U.S. at 577-78.

The "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49; *accord Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 749-50 (2011) ("leveling" not legitimate interest); *Sorrell*, 564 U.S. at 578-79 (government cannot "tilt public debate in a preferred direction."); *PG&E*, 475 U.S. at 20 (government "cannot advance some points of view by burdening the expression of others").

Defendant invokes *Red Lion*'s "fairness doctrine" (Mot.26), which was cabined to the "unique physical limitations of the broadcast medium."

[15] The Legislature made no market-power findings, and Defendant's "bare assertions" are too "conclusory to plausibly establish market power in any context." *FTC v. Facebook, Inc.*, 2021 WL 2643627, at *12 (D.D.C. June 28, 2021).

Turner, 512 U.S. at 637. Plus, many have questioned *Red Lion*'s "deep intrusion" into "First Amendment rights." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 531 (2009) (Thomas, J., concurring).

2. HB20 is also far from the "least restrictive" means of furthering any governmental interest. *AFP*, 141 S. Ct. at 2383; ROA.2596.

HB20's 50-million-monthly-user line does not apply "evenhandedly" to "smalltime" and "giant" speakers. *Fla. Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989). "Laws singling out a small number of speakers for onerous treatment are inherently suspect." *TWC*, 667 F.3d at 638. HB20's arbitrary line is unsupported by legislative findings. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). This 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); ROA.2593-94.

Defendant argues HB20 is properly tailored because "the biggest platforms is . . . where the problem is most salient." Mot.20. But this does not accord with Defendant's newly stated interest on appeal in the "free exchange of ideas and information," Mot.18—which ostensibly would apply Internet-wide. And it violates Supreme Court precedents (*supra* p.28).

Furthermore, there is an obvious, less-restrictive means that does not require burdening private entities' First Amendment rights: Texas could have created its own social-media platform to disseminate speech regardless of viewpoint. In fact, the Texas Legislature rejected that proposal while instead

choosing to commandeer private businesses to publish speech. Tex. H.R. Journal (87th Leg., 2d Spec. Sess.) at 232, https://bit.ly/2Y2YGEp.

E. Nothing in HB20 is severable.

HB20's coverage definition fails "strict scrutiny," which means the law is "facially invalid," regardless of its severability provision. *Veterans of Foreign Wars v. Tex. Lottery Comm'n*, 760 F.3d 427, 441 (5th Cir. 2014); ROA.2598-99. Additionally, in all circumstances in which HB20 applies, it unconstitutionally abridges editorial judgment and compels speech. *City of L.A. v. Patel*, 576 U.S. 409, 418 (2015). The Supreme Court has long held that an overbroad statute cannot be saved through severability. *AFP*, 141 S. Ct. at 2387; *Reno*, 521 U.S. at 884-85 n.49.

II. Plaintiffs also prevail on other grounds.

47 U.S.C. §230 preempts HB20's Section 7 because "Section 230 'specifically proscribes liability'" for a website's "'decisions relating to the monitoring, screening, and deletion of content from its network.'" *Doe*, 528 F.3d at 420; ROA.1655-58 (district court briefing).

And HB20 violates the Commerce Clause because it, among other things, (1) requires platforms to do business in Texas; and (2) extraterritorially regulates platforms' worldwide operations. ROA.310-14, 1658-60 (district court briefing).

III. The remaining factors all favor Plaintiffs.

A stay will prejudice Plaintiffs because the "loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (cleaned up). As the district court concluded, compliance with HB20 will also be incredibly burdensome, if it is possible at all. ROA.2599. HB20 (1) will require platforms to completely change their operations; (2) prohibits platforms from using tools that "make their platforms safe, useful, and enjoyable for users"; and (3) will result in lost users and revenue. *Id.* As Facebook's declarant testified, "[W]e would not be able to change systems in that nature. . . . I don't see a way that we would actually be able to go forward with compliance in a meaningful way." ROA.2592.

"[I]njunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (cleaned up). Defendant suffers no injury as a result of this unconstitutional law being enjoined. *Id.*

Finally, denying Defendant's motion maintains the status quo (*supra* p.1).

CONCLUSION

This Court should deny Defendant's motion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 23, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses. No paper copies were filed in accordance with the COVID-19 changes ordered in General Docket No. 2020-3.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 6995 words, excluding the parts of the brief exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

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