No. 21A720

In the Supreme Court of the United States

NETCHOICE, LLC D/B/A NETCHOICE; AND
COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION D/B/A CCIA,
Applicants,

V.

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

TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT
ON APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION
ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR IMMEDIATE ADMINISTRATIVE RELIEF AND TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Paul D. Clement
K. Winn Allen
Kasdin M. Mitchell
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004

Kyle D. Hawkins
Matthew H. Frederick
Todd Disher
LEHOTSKY KELLER LLP
919 Congress Ave.
Austin, TX 78701

Scott A. Keller
Counsel of Record
Steven P. Lehotsky
Gabriela Gonzalez-Araiza
Jeremy Evan Maltz
LEHOTSKY KELLER LLP
200 Massachusetts Ave., NW
Washington, DC 20001
(512) 693-8350
scott@lehotskykeller.com

Katherine C. Yarger
LEHOTSKY KELLER LLP
700 Colorado Blvd., #407
Denver, CO 80206

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INTRODUCTION

Respondent's 56-page response brief never once explains why this Court should not restore the ordinary appellate process. To the contrary, its extensive focus on merits arguments that have yet to be embraced by any Article III judge in a reasoned decision underscores the importance of preserving the status quo. The response does not seriously defend the panel majority's abrupt and unreasoned decision to suddenly disrupt an orderly process of multiple circuits reviewing two district court preliminary-injunction orders supported by extensive reasoning—five months after Respondent asked for a stay pending appeal. And Respondent points to no exigency necessitating the immediate imposition of Texas's effort to upend the *worldwide* operations of some of the Internet's largest websites. Wholly apart from the hotly debated question whether the First Amendment permits Texas's novel experiment, the Fifth Circuit's unreasoned deviation from the normal order has nothing to recommend it, and restoration of the status quo and the orderly appellate process has everything to recommend it.

The disruptive—indeed, avulsive—nature of what the panel majority has done cannot be overstated. Respondent cites no decision ruling that government can dictate editorial choices for private websites that disseminate speech. And Respondent gives no reason why this Court should brush past the Applicants' significant arguments and let the Texas Attorney General single-handedly inflict ruinous liability and potential daily penalties on Internet websites—all before the Fifth and Eleventh Circuits, let alone this Court, have had the chance to offer so much as a word of analysis.

Through an orderly appellate process, there will be plenty of time for multiple courts to consider the various merits arguments, some of which were raised for the first time, throughout Respondent's 56-page response. But in the meantime, this Court should vacate the Fifth Circuit's stay order to maintain the status quo while the courts below grapple with HB20's serious First Amendment problems. While the Judiciary cautiously reviews these momentous issues, platforms should not be compelled by government to disseminate the vilest speech imaginable—such as white supremacist manifestos, Nazi screeds, Russian-state propaganda, Holocaust denial, and terrorist-organization recruitment.

At the same time, the Texas Attorney General's enforcement of HB20 would put platforms to an impossible choice: Either immediately start spending unrecoverable "billions" of dollars to bring their worldwide operations into compliance, App.350a, or face the threat of, at minimum, "daily penalties"—which are wholly within a state trial court's discretion to "secure immediate compliance" with injunctions requiring broad programmatic changes to platforms' editorial discretion. Tex. Civ. Prac. & Rem. Code § 143A.007(c); *accord* Opp.13 n.7. While platforms may be sued for any one of their countless daily decisions, the Attorney General can also launch invasive investigations into "potential violations" of platforms' editorial-discretion policies and failures to meet Section 2's broad, open-ended operational and disclosure requirements. This is quintessential irreparable injury, as HB20 will chill platforms' editorial discretion and make platforms less hospitable for users the world over.

If the Fifth Circuit wishes to permit such a dramatic overhaul of some the Internet's largest websites, it should do so only after providing a careful explanation,

subject to the ordinary rules regarding appellate mandates, rehearing, and this Court's certiorari process. To preserve that orderly process and the status quo, this Court should immediately grant this Application.

I. This Court should maintain the status quo to establish an orderly appellate process that allows for cautious deliberation.

As the Application explains (at 1-4), vacatur will ensure an orderly appellate process preserving the Internet's "status quo" as it has existed for a generation, where private websites can make their own judgments about what speech to disseminate and how to exercise their editorial discretion free from compelled-speech burdens and discrimination based on viewpoint, content, and speaker. *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978) (Rehnquist, J., in chambers). Until the Fifth Circuit's order created irreparable injury for Applicants' members and the broader marketplace, *see* Cox Br.15, and this emergency in this Court, the status quo was preserved by two preliminary injunctions supported by two lengthy written decisions that detailed serious First Amendment problems with these novel state efforts to regulate a global phenomenon. Each decision was the result of extensive briefing and (in this case) discovery.[1] Those injunctions guaranteed that platforms could continue to engage in the editorial discretion that makes their communities hospitable and useful to consumers and attractive to advertisers. Those reasoned decisions set the stage for

[1] Respondent incorrectly contends that the District Court "sharply limit[ed] discovery" in this case. Opp.14. To the contrary, the District Court gave Respondent plenty of opportunities to engage in reasonable discovery over the course of four weeks, yet Respondent has insisted that it was entitled to, effectively, "millions" of documents from platforms about all their editorial choices. ECF 36 at 1-2.

an orderly appellate process that proceeded through the regular order until last week. Florida did not even seek a stay pending appeal, and the status quo had prevailed in Texas. Then, like a thunderbolt, the Fifth Circuit's unreasoned order has needlessly destroyed the status quo without a word of explanation to contradict the extensive analysis of the only two Article III Judges who have shown their work on these important issues. That result cannot be squared with the principles governing stays that this Court set out in *Nken v. Holder*, 556 U.S. 418, 427 (2009).

Respondent shows virtually no interest in defending the Fifth Circuit panel's unreasoned, divided one-sentence effort to let Texas upend some of the largest Internet websites overnight. In 56 pages of briefing, Respondent never once claims that the Fifth Circuit issued the "meaningful decision" *Nken* requires. *Id.*; *see* Application.15-16. He does not dispute that the Texas Legislature determined that the platforms should be given three months to comply with HB20—a timeframe two judges of the Fifth Circuit compressed to one day. And he does not acknowledge that his counterpart in Florida opted not to seek a stay pending appeal, undoubtedly in recognition that First Amendment injuries from state action are classic irreparable injury and to avoid the exact chaos the Fifth Circuit has now unleashed. And while he pays lip service to the staggering consequences that would result from HB20 going into effect, he does not meaningfully explain how a platform could determine when user speech crosses the line from expressing a "viewpoint" to inciting violence.[2]

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[2] The cases that Respondent cites to justify this unusual posture are unavailing. *Moore v. Brown* (Opp.15-16) allowed a preliminary injunction to remain in effect

Instead, Respondent attempts to use its own merits arguments as a substitute for a reasoned decision from the Fifth Circuit. *See* Opp.49 (admitting that the Fifth Circuit's unorthodox process means "it is impossible to know precisely how the Fifth Circuit analyzed the remaining *Nken* factors"). As demonstrated below, Respondent's merits arguments violate core First Amendment principles, but they are largely beside the point at this juncture. Of course, the parties can reproduce their merits briefs below, but that is no substitute for a reasoned decision from the Fifth Circuit that would be subject to the normal rules governing appellate review. *Nken* did not envision parties having to predict what appellate courts might have been thinking. *See* 556 U.S. at 427. To allow such a disruptive law to take effect overnight, with neither warning nor explanation, undermines both the proper functioning of judicial review and confidence in the judicial process. The purpose of a stay is to preserve the status quo during the period necessary to resolve an appeal. But this order massively disrupts the status quo, imposing billions of dollars in compliance costs and ending editorial practices that have governed the internet since its inception.

Respondent's silence verifies that there is no justification for the Fifth Circuit's departure from settled appellate practice. There is plainly no exigency justifying the

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precisely to "preserv[e] the status quo," not destroy it. 448 U.S. 1335, 1338 (1980) (Powell, J., in chambers) (citation omitted). The Fifth Circuit there denied a stay of that preliminary injunction, as did Justice Powell by exercising "caution." *Id.* at 1338, 1341.

Doe v. Gonzales (Opp.4, 16) was a terrorism national security case, challenging a phone-record disclosure provision of the Patriot Act, that has no bearing on Texas's attempt to overhaul the international business operations of platforms. 546 U.S. 1301, 1303, 1307 (2005) (Ginsburg, J., in chambers). As in *Doe*, this Court should ensure process allowing for "cautious review." *Id.* at 1309.

Fifth Circuit's order here, and the fact that the Fifth Circuit waited five months to grant Respondent's request for a stay pending appeal only confirms as much.

It is hard to fathom that this Court will allow either Texas or Florida to fundamentally reshape some of the largest Internet websites' worldwide operations without considering the merits of these laws itself. It is also hard to fathom that this Court will uphold laws that transgress virtually every First Amendment limit on state action, from compelled speech, to overriding editorial discretion, to discrimination on the basis of viewpoint, content, and speaker. But even putting all of that aside, the case for this Court's intervention at this juncture is crystal clear. Fifty-six pages of impassioned briefing from the Attorney General is itself a testament that these important issues should be decided through the regular, orderly appellate process, not via a single sentence from a divided panel that overrides pages of detailed reasoning from the only Article III judges who have explained their judgments.

II. A ruling upholding HB20 would eminently satisfy this Court's criteria for certiorari review.

Respondent does not dispute that this Court routinely reviews important First Amendment rulings, even if there is not a square circuit split or the case is in an "interlocutory" posture. Opp.17. After all, "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Stephen M. Shapiro et al., Supreme Court Practice § 4.18, at p.4-57 (11th ed. 2019) (collecting cases including *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018)). That is the case here: if this Court holds, consistent

with longstanding precedent, that HB20 violates the First Amendment, such a ruling effectively obviates the need for further merits analysis in this lawsuit.

This Court has recognized time and again that the deprivation of First Amendment rights is a serious irreparable harm that counsels immediate judicial intervention. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam). In the past two years, this Court has intervened in numerous emergency matters in non-final postures implicating important First Amendment concerns. *E.g.*, *Roman Catholic Diocese*, 141 S. Ct. at 67; *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *Robinson v. Murphy*, 141 S. Ct. 972, 972 (2020) (per curiam); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527, 527 (2020) (per curiam). And it has done so on plenary review in countless other cases. Application.18. Simply put, if Rule 10 is broad enough to permit splitless review (and vindication) of the Westboro Baptist Church's right to yell "God Hates F[***]" at military funerals (*Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011)), or overturn a conviction for showing dogfighting videos (*United States v. Stevens*, 559 U.S. 460, 468 (2010)), then it surely allows prompt review of Texas's attempts to substitute its editorial preferences for those of private parties and drastically limit the ability of leading online services to protect themselves, their users, and advertisers from all manner of vile and incendiary expression.

Review of a decision upholding HB20 would be particularly warranted given that platforms face an immediate and irreversible Hobson's choice. Under the Fifth Circuit's sudden order, those platforms must either change the core nature of their business or face ruinous liability backed by daily penalties. It is no answer at all to tell

the platforms to create a new Facebook.com, Twitter.com, and YouTube.com—at a cost of billions of dollars—in the hopes that one day their First Amendment rights might finally be vindicated, and then they can go back—again, at enormous cost—to the way things were.

Respondent's suggestion (Opp.26) that he needs even more time and discovery "to develop many factual questions" including "market power" gets things exactly backwards. Respondent apparently believes that a full-blown antitrust trial is necessary before anyone can determine whether the First Amendment permits Texas to force websites to publish odious views they disdain. The better course is to let this Court consider the Fifth and Eleventh Circuits' explanations about the contours of the First Amendment's protections before barreling into unnecessary, costly discovery that chills editorial discretion.

Respondent also bemoans the lack of a "square circuit split," Opp.18-19, callously ignoring the immediacy of the damage that the Fifth Circuit's divided order has wrought to the appellate process. The Fifth Circuit's preemptive strike has upended the normal appellate process that might well produce a split between the Eleventh and Fifth Circuits and has created a de facto split in the two courts' divergent paths. Florida's effort to transform the Internet's largest websites and counteract the perceived bias of "Big Tech" remains on hold, while Texas's partially overlapping effort takes effect overnight. Respondent posits that the Fifth Circuit panel majority's unexplained order has precluded this Court's involvement, because there is "*no* circuit decision." Opp.18. But that is exactly the problem. The appellate process cannot function with integrity if panels can thwart this Court's involvement by refusing to

explain their dramatic departure from settled First Amendment law and the ordinary procedures *Nken* prescribes.

Respondent greatly understates the extent to which the Fifth Circuit's unexplained order deviates from the overwhelming consensus among lower courts. Respondent cites no other court decision, until the Fifth Circuit's order, that has allowed the government to compel Internet websites to publish speech contrary to their editorial discretion. Applicants' brief includes a string cite of examples that run contrary to the Fifth Circuit's order. Application.18-19 & n.6. Respondent ignores them.

III. HB20 is plainly unconstitutional, and this Court is likely to review and reverse any decision to the contrary.

With an orderly appellate process, there could be sufficient, careful consideration of the weighty First Amendment principles at stake. This is all the more important here, as Respondent's merits arguments largely try to evade, rather than satisfy, First Amendment scrutiny.[3]

[3] Applicants have properly brought a facial challenge because, in every case in which HB20 applies, it unconstitutionally infringes editorial discretion, compels speech, or imposes unjustified onerous operational and disclosure burdens. Application.31 n.11. It does not matter (Opp.31-32) that HB20 permits editorial discretion over the "few limited areas" where "well-defined and narrowly limited classes of speech" receive no constitutional protections. *Stevens*, 559 U.S. at 468-69 (citations omitted). HB20 is incredibly overbroad, as it prohibits platforms' programmatic efforts to limit other vile speech that is constitutionally protected like hate speech. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

A. HB20's Section 7 impermissibly infringes platforms' right to engage in editorial discretion over the speech they publish and disseminate, contrary to binding precedent and the lower courts' uniform consensus.

Time and again, this Court has "reaffirm[ed] unequivocally the protection afforded to editorial judgment," and the axiom that the First Amendment does not "authorize any restriction whatever, whether of content or layout, on stories or commentary originated by [a publisher], its columnists, or its contributors." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 391 (1973); *see* Application.19-21 (collecting examples). Respondent's arguments ignore the core First Amendment principles established by this line of cases.

Respondent also never grapples with this Court's First Amendment precedents that broadly protect not just editorial discretion itself, but all forms of "dissemination" of speech. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *see* Application.20-21 (collecting cases). And the "liberty of the press . . . comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); *id.* ("Liberty of circulating is as essential to that freedom as liberty of publishing.") (citation omitted). And while Respondent insists that platforms are nothing like newspapers (Opp.39), he simultaneously admits their "enormous influence over the distribution of news." Opp.4. Throughout its brief, Respondent steadfastly ignores that platforms—as publishers and disseminators of speech on the Internet—enjoy these First Amendment protections in full. *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Respondent's arguments misunderstand the First Amendment at every turn.

1. Editorial discretion. HB20's core premise is that platforms have used their editorial discretion in a manner that Texas does not like. That is the reason the law was enacted, as leading state officials have made clear, as discussed below at p.26. Now, however, Respondent attempts to argue that platforms nevertheless do not engage in editorial discretion at all. Opp.35. There are many problems with this.

First, almost all of Respondent's arguments flow from a fundamentally incorrect premise: that platforms are just individual-to-individual "communications" services like the "mail." Opp.25, 33, 39.[4] As Applicants explained, platforms offer a curated collection of expression published and presented according to the platforms' own judgments about what communities they wish to foster and what they believe their users (and advertisers) want to see. Application.5-9. Platforms create a series of tailored digests of all manner of expression (including user-submitted expression, advertisements, and platform-authored expression), which distinguishes them from mediums that exist solely to deliver interpersonal communications. Even more importantly here, these services maintain, apply, and enforce detailed, value-laden rules about what material they do not allow and do not wish to have their services associated with. And it is exactly those content- and viewpoint-based policy judgments that Texas now seeks to override. HB20's broad definition of covered actions it defines as "censor[ship]" provides several examples of the curation choices available to

[4] HB20's definition of "Social media platforms" expressly excludes actual communication services like "(1) an Internet service providers; [and] (2) electronic mail." Tex. Bus. & Com. Code § 120.001(1)(A)-(B).

platforms, *e.g.*, "demonetize, de-boost, restrict, deny equal access or visibility to." Tex. Civ. Prac. & Rem. Code §§ 143A.001(1), .002.

Second, contrary to Respondent's argument (Opp.35), digital services *are* associated with the content on their platforms, and they do face claims of responsibility—including intense public and advertiser-driven pressures—for what they allow to be disseminated on their websites. Application.3.[5] Much like the parade organizers in *Hurley*, platforms are judged by what they disseminate and what they decide to exclude. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 575 (1995). Conversely, it is widely understood that decisions to remove or restrict content express the views and values of the platforms about what is acceptable or worthy of dissemination of their services. *Id.* The basic purpose of HB20 is to punish platforms for making such choices that the State does not like. So, although pro-terrorist-organization content should not be attributed to platforms with policies against such content, *see* Opp.42 (citing example of platforms' motions to dismiss), advertisers and others have attributed other hateful content to the platforms and have removed their advertisements a result. App.139a-40a. Similarly, platforms have billions of

[5] Regardless, nothing in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 674 (1998), conditions First Amendment protection on requiring users to "associate" expression with an editor or what that "association" would entail. If anything, that case reaffirms that constitutionally protected "programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts." *Id.* There is no reason to think that readers would "associate" a reply that a newspaper was compelled to publish with the newspaper, yet *Tornillo* still held the right-of-reply law invalid. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). The same goes for cable operators. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996).

pieces of content and sometimes will make mistakes that do not accord with their policies. *See* App.158a.[6] But making editorial mistakes does not strip platforms of their First Amendment rights. And the fact that we know platforms inadvertently deviated from their editorial policies is what distinguishes platforms from simple communications services that lack such policies. *See* Chamber of Progress Br.6, 15.

Third, publishers do not need to present a single "message" to receive constitutional protection. *See* Application.20. *Hurley* expressly rejected that idea. *Hurley*, 515 U.S. at 575. And cable operators and newspapers are yet again perfect examples. *Denver*, 518 U.S. at 737-38; *Tornillo*, 418 U.S. at 244.

The message platforms present is that the expression disseminated on their platforms is "worthy of presentation," and their arrangement of speech expresses the platforms' views about what is most informative and useful to the user. *Hurley*, 515 U.S. at 575; Application.8. The parade in *Hurley* did not convey a single message, nor could the parade organizers edit the parade floats. Moreover, the platforms present a clear message by what they choose to remove or restrict—which is the message that HB20 seeks to override. That is why, for example, YouTube, Facebook, and Twitter are very different from 4chan and Parler, even though the latter similarly exercise varying levels of editorial discretion over user-submitted expression.

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[6] Respondent exaggerates the extent of these mistakes. Opp.35. On platforms with billions of pieces of content, the raw number of policy-violating content could seem high, but the *rates* of such content reaching the public are low. On YouTube, for instance, 0.25% of views are of policy-violating content, when YouTube has 500 hours of video uploaded every minute. App.290a.

Fourth, Respondent asserts that the constitutional violation in *Tornillo* arose from the space constraints in the newspaper. Opp.43. But *Tornillo* itself rejected this, holding that the right-of-reply law in that case would have been unconstitutional "[e]ven if a newspaper would face no additional costs to comply . . . and would not be forced to forgo publication of news or opinion by the inclusion of a reply." 418 U.S. at 258; *see* Reporter's Br.A-9 (noting perverse consequences of contrary rule).

Fifth, Respondent asserts that HB20 in no way regulates the platforms' own speech. Opp.13. Leaving aside that editorial discretion is the platforms' speech, HB20's prohibition against covered platforms "otherwise discriminat[ing] against" user-submitted content restricts speech generated by the platforms. Tex. Civ. Prac. & Rem. Code § 143A.001(1). For instance, if a platform appends its own speech to certain user-submitted content—such as posts from state-sponsored media—Respondent might argue that the platform has "discriminate[d]" against that content if it does not append a disclaimer to other content. *Id.*

2. "Hosting" theory. Respondent misreads *PruneYard* and *FAIR*, as those precedents do not stand for the proposition that a private entity "hosting" speech generated by others is mere "conduct" unprotected by the First Amendment. Opp.21-24. In fact, *USAID* rejected this theory: "the 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. (USAID) v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2088 (2020) (emphasis added); Application.25-26.

Respondent's unsupported theory is akin to defending censorship as regulating the "conduct" of writing, publishing, or disseminating. Whatever "conduct" platforms

engage in is intertwined with editorial discretion and the expression embodied in such choices. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1743 (2018) (Thomas, J., concurring) ("creation of custom wedding cakes is expressive"—notwithstanding the "conduct" of purchasing ingredients, baking, and decorating—because the end result is expressive).

Respondent has no response to the fact that *PruneYard* and *FAIR* did not involve entities that publish or disseminate speech. *See* Application.26. And *PruneYard* and *FAIR* are distinguishable on other bases.

PruneYard is more of a property rights case than a First Amendment case and is readily distinguishable.[7] The state law there requiring the mall to "host" individuals engaged in expression had no impact on the mall's (nonexistent) expression. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980). The mall in *PruneYard* did not actually care about the petition gatherer's expression occurring on his property. *Id.* Rather, the owner wanted to exclude others from his property. Ultimately, "*PruneYard* [] does not undercut the proposition that forced associations that burden speech are impermissible." *PG&E v. PUC of Cal.*, 475 U.S. 1, 12 (1986).[8]

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[7] *Cedar Point Nursery v. Hassid* was not a First Amendment decision, and it emphasized *PruneYard*'s focus on "[l]imitations on how a business generally open to the public *may treat individuals on the premises*." 141 S. Ct. 2063, 2076-77 (2021) (emphasis added).

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

Respondent partially relies on Justice Powell's *PruneYard* concurrence (Opp.22), but this distinguished cases like *Tornillo* and *Wooley* as involving "[t]he *selection of material for publication*." *PruneYard*, 447 U.S. at 99 (Powell, J., concurring in part) (emphasis added). And Justice Powell noted that the mall owners "ha[d] not alleged

Likewise, *FAIR* involved arguably the least expressive aspect of a law school—its employment "recruiting assistance," which the Court held is "conduct" and "is not inherently expressive." *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006). If Texas sought to regulate only the platforms' job boards or this Court upheld compelled military messages in law-school classrooms, *FAIR* might have some relevance. In reality, *FAIR* upheld federal conditional-funding legislation requiring schools to grant military recruiters equal access to students that schools provided other employers. This Court began by emphasizing the "judicial deference" given to Congress' "broad and sweeping" power "to raise and support armies." *Id.* at 58 (citations omitted). And *FAIR* concluded that—unlike disseminators of speech, such as platforms—"schools are not speaking when they host interviews and recruiting receptions," so "assist[ing] their students in obtaining jobs" did not trigger First Amendment protection. *Id.* at 64. *FAIR* undoubtedly would have been decided differently if government had required professors to let military members present classroom rebuttals—or compelled print or online law reviews to publish articles generated by military members.[9] Here, by

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that they object to the ideas contained in the appellees' petitions." *Id.* at 101. Justice Powell's *PG&E* plurality opinion would later recognize this exact limitation on *Prune-Yard*. 475 U.S. at 12.

[9] As Respondent's amici highlight, Respondent's hosting theory would even provide the government with vast authority to do something profoundly un-American: compel private entities to publish expression from those the *State* deems "to have uniquely important contributions to the public square." Florida Amicus Br.2.

contrast, HB20 "dictate[s] the content" on platforms and thus imposes more than a permissible "incidental" burden on platforms' expression and publication. *Id.* at 62.[10]

3. Common carrier. Texas officials and Respondent deride the platforms as allegedly being too liberal and otherwise politically motivated in their editorial choices, *e.g.*, Opp.6-7, but simultaneously pretend that platforms are common carriers open to "all comers on equal terms" irrespective of viewpoint. Opp.26.

Respondent does not respond to the myriad arguments Applicants made explaining why these websites are *not* common carriers and that common-carrier designation does not strip private entities of their First Amendment rights. Application.26-28.[11] For example, Respondent offers no response to the fact that labeling a law "a common carrier scheme has no real First Amendment consequences." *Denver*, 518 U.S. at 825 (Thomas, J., concurring in the judgment in part and dissenting in part). A state cannot by fiat convert the platforms into such conduits. *See* Application.27 (citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 379 (1984)). And Respondent misleadingly cites the D.C. Circuit's *USTA* decision (Opp.25) in which all three panel

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[10] HB20 is not some narrowly targeted compelled hosting law (though even that would not save it): In addition to compelling speech publication, HB20 "dictat[es] how the platforms may arrange speech on their sites." *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1093 (N.D. Fla. 2021). HB20's sweeping definition of "censor" means "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." Tex. Civ. Prac. & Rem. Code §143A.001(1). This is a "far greater burden on the platforms' own speech than was involved in *FAIR* or *PruneYard*." *NetChoice*, 546 F. Supp. 3d at 1093

[11] Respondent cites a purported "expert report" it submitted to the District Court, which Plaintiffs moved to strike. Opp.26. But the District Court did not consider this "report," and this Court also should not consider it. Application.10a-11a. In any event, the report's legal arguments are incorrect for all the reasons expressed in the Application and this Reply.

Judges concluded that social media platforms are not common carriers. *See* Application.26-27.

Platforms are not "open to the public" or "open to all comers" in any constitutionally relevant sense. Opp.26, 41. The undisputed record evidence is that platforms are only open to those that agree to abide by the platforms' terms and conditions regarding acceptable content. Platforms are not mere conduits for private messages among others. And government may not regulate platforms as common carriers just because platforms generally apply their acceptable-use policies to the subset of the public that agree to those policies. That argument is wholly circular: It uses the existence of the platforms' editorial policies as justification for overriding them.[12] That platforms have detailed rules about what speech is and is not acceptable on their private websites does not give the State license to sweep those rules aside in favor of ones it prefers.

Nor does market power matter, as Respondent himself stated in the court below, *see* Def's Reply in Supp. of Motion to Stay at 7 (5th Cir. Dec. 30, 2021) ("nothing approaching monopoly is required to justify common carriage regulation"), and this Court made clear in *Tornillo* and *PG&E* that market power does not strip private companies of First Amendment rights. *See* Application.10, 21-22.

4. *Turner.* *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636-37 (1994), does not justify the State's novel effort to strip platforms of all First

[12] HB20 compels platforms to publish versions of these policies, as addressed below at p.24.

Amendment protections. Opp.27-29; see App.22-23 n.7.[13] Respondent concedes that cable providers have a First Amendment right to engage in editorial control over the expression they disseminate to their users. Opp.27. This forecloses any argument that platforms lack protected editorial discretion, or that Texas can make the First Amendment problem disappear by claiming that what is being regulated is merely conduct rather than speech. And Respondent concedes that *Reno* held this Court's "broadcast" television jurisprudence does not apply to the Internet. Opp.29.

Respondent otherwise elides *Turner*'s core limitation. This Court only upheld that content-neutral intrusion on editorial discretion—which compelled cable operators to carry only a "certain minimum number of broadcast stations"—because of cable operators' "bottleneck, or gatekeeper, control over most (if not all) of the television programming" in the country. *Turner*, 512 U.S. at 644. Here, HB20 is not designed to address any *physical* bottleneck problems because there are none. *See* Reporter's Br.A-21 to A-22.[14] Indeed, the absence of a bottleneck is underscored by the existence of countless smaller preferred platforms Texas leaves entirely unregulated,

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[13] The language that Respondent cites from *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931 n.2 (2019), refers only to *Turner*, which is distinguished in the Application (22-23 n.7) and below.

[14] Respondent wrongly speculates that the *Turner* dissenters would have upheld HB20. Opp.28-29. To begin, they dissented because they concluded the statute was *content-based*—as is HB20. *Turner*, 512 U.S. at 680 (O'Connor, J., dissenting in part). Furthermore, the dissenters recognized the Constitution 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. The same is true of platforms, which "puts this case squarely within the rule of [*PG&E*]" forbidding the compelled publication of speech. *Id.* at 682.

notwithstanding that they, too, engage in undisputed editorial discretion as to user-submitted expression on their private websites. Put differently, Texas's blatant speaker-based discrimination is not only an independent First Amendment foul, but it renders *Turner* entirely inapposite.

This lack of exclusive control is why *Turner*'s analysis has "no application to the Internet." Opp.29. Website users are free to use different websites when one ceases to provide the kind of environment they want. Moreover, contrary to Respondent's assertion (Opp.28), HB20 requires platforms to change their worldwide operations because it requires that users in Texas be able to "receive" any other user's expression without geographic limitation. *See* Application.12. Even cable operators cannot be converted into common carriers: The must-carry law in *Turner* still permitted cable operators to maintain editorial discretion over most of their channels, 512 U.S. at 643-44, 662—as *Denver* later confirmed, 518 U.S. at 737-38.

5. 47 U.S.C. § 230. This appeal concerns the First Amendment, yet Respondent wants to inject into this lawsuit his policy disagreement with Congress' protections for all websites in 47 U.S.C. § 230(c). Opp.36-38. Congressional statutes, of course, cannot override constitutional rights.

Regardless, § 230 is a resounding federal judgment that platforms are not common carriers and that Congress wanted to facilitate their efforts to exercise editorial discretion. *See* 47 U.S.C. § 230(c); *id.* § 223(e)(6) (disclaiming intent to treat websites as "common carriers"). There is no tension between the First Amendment and § 230, which has "further[ed] First Amendment . . . interests on the Internet." *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003); *accord Google, Inc. v. Hood*, 822 F.3d 212,

220 (5th Cir. 2016) (similar); *see* Cox Br.6.[15] Section 230 reinforces—and effectively codifies—websites' pre-existing First Amendment right to make editorial choices about what content to disseminate. Respondent's arguments are precisely backward when he suggests this statutory protection somehow—silently and without anyone realizing it until HB20—eliminated the underlying First Amendment rights that otherwise would have protected platforms' editorial choices.[16]

Congress "has not imposed . . . nondiscrimination" among expressive viewpoints—or *any other* limitation on platforms' editorial discretion—as a condition of § 230 protection. *Biden v. Knight 1st Am. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (statement of Thomas, J.). So § 230 does not put the platforms to any

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[15] No matter whether a website is considered a "publisher" (*Stratton Oakmont*) or "distributor" (*Cubby*), the First Amendment covers its "dissemination" of speech. *See Sorrell*, 564 U.S. at 570; *see Reno*, 521 U.S. at 853, 870.

[16] Respondent in passing mentions (Opp.12) HB20 Section 7's purported exception for expression that a platform "is specifically authorized to censor by federal law." Tex. Civ. Prac. & Rem. Code § 143A.006(a)(1). For multiple reasons, this exception will not stop the Texas Attorney General from attempting to enforce HB20 against platforms, and Respondent does not argue otherwise. This provision does not apply at all to HB20's Section 2. HB20 does not define "specifically authorize," and the parties obviously dispute whether "federal law" like the First Amendment permits Section 7. Regardless, the First Amendment does not allow government to enact restrictions with a sweeping coverage definition and force parties to litigate whether statutory exceptions apply. *See, e.g.*, *Reno*, 521 U.S. at 884 n.49; *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576-77 (1987). And a purported saving clause cannot insulate a law from judicial review, as Respondent has recognized. May 4, 2021, Plfs. Memo. in Opp. to Mtn. to Transfer Venue, *Louisiana v. Biden*, No. 2:21-cv-00778, 2021 WL 2644609 (W.D. La.).

"choice" between either exercising editorial discretion or invoking their statutory § 230 protections. Opp.37.[17]

Platforms have not "disclaimed that they possess any editorial discretion" when invoking § 230 in prior cases. Opp.36. To the contrary, lower courts have held that § 230's protections apply precisely when platforms take actions "quintessentially related to the publisher's role," such as editorial "decisions relating to the monitoring, screening, and deletion of content." *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (citation omitted). That is why platforms' prior briefs argued for § 230 protection by recognizing that they do exercise editorial control over their platforms.[18]

B. HB20 Section 2's burdensome operational and disclosure requirements violate the First Amendment.

HB20 Section 2's onerous operational and disclosure requirements provide the Texas Attorney General sweeping authority to investigate and sue disfavored platforms. *See* Goldman Br.8-10. Respondent's arguments miss the mark in several ways.

First, Respondent does not contest that Section 2 compels speech by requiring descriptions of platforms' editorial choices that occur *millions* of times each day across

[17] Thus § 230 is unlike the tax benefits (Opp.36) that organizations may *willingly accept* in exchange for narrow and clear delimitations on *some* of their constitutionally protected speech. *E.g.*, 26 U.S.C. §501(c) (explicitly delineating the tradeoff).

[18] *E.g.*, Sept. 25, 2013 Br. for Appellees at *18, *Klayman v. Zuckerberg*, No. 13-7017, 2013 WL 5371995 (D.C. Cir.) ("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.").

billions of pieces of online content.[19] *See* Application.9, 12-13, 36-38. Every time platforms present one post, they necessarily demote some other post. Application.38-39.

Second, Respondent does not dispute that "content-based burdens must satisfy the same rigorous scrutiny as . . . content-based bans." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000).

Third, Respondent has little to say in defense of the notice-complaint-appeal provisions (Opp.49), which impose short deadlines for platforms' responses whenever platforms remove speech—which happens *millions* of times each day. Tex. Bus. & Com. Code §120.053; *see* Application.8-9. These editorial-discretion chilling requirements are far more than having a "customer-service department"—as the unrebutted record evidence reflects. *See* Application.36-37. And it is imposing internal appellate processes—not regulating speech about the "the *terms under which* [*the platforms'*] *services will be available*." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (emphasis added).[20]

Fourth, Respondent does not dispute that the general disclosure provision compels platforms to disclose every facet of their business operations—including trade

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[19] Respondent also does not dispute that the Fifth Circuit's stay order is contrary to the Fourth Circuit's on-point decision in *Washington Post v. McManus*, 944 F.3d 506, 513-14 (4th Cir. 2019), enjoining the operation of Maryland's law compelling disclosure of political advertising run by online websites. *See* Application.35 n.13.

[20] And the notice-complaint-appeal provisions are unlike the Fair Credit Reporting Act (FCRA), which has nothing to do with requiring disclosures from disseminators of speech protected by the First Amendment. Opp.49. The FCRA is distinguishable on other bases, as it imposes a lower burden on regulated companies who have longer to respond to complaints and are subject to fewer potential complaints—and contains an exception for "frivolous or irrelevant" disputes. 15 U.S.C. § 1681i(a)(3).

secrets. Application.37. And the acceptable-use policy requires platforms to disclose their editorial policies under penalty of law. *Id.* at 37-38. Given yet another opportunity, Respondent refuses to confirm that platforms are in compliance with Section 2's general disclosure and acceptable-use policy provision.[21] *See* Opp.47 & n.19. That is undoubtedly because Respondent would use HB20 to investigate platforms. The discovery requests that Respondent has attempted in this case already demonstrate the intrusive civil investigative demands that would follow if the preliminary injunction dissipates. For instance, Respondent requested "All documents and communications, including recordings, minutes, and documents reflecting team meetings, related to [each covered platform's] content moderation policies and practices." ECF 34 at 4. That request covers almost everything the platforms do—so these documents would have ranged in the millions for each platform. *Id.*

Fifth, the biannual transparency report is likewise more serious than Respondent admits. It requires, among other things, platforms to *calculate* "the number of instances in which the social media platform took action" on violative expression and provide a "*description of each tool, practice, action, or technique* used in enforcing the acceptable use policy." Tex. Bus. & Com. Code § 120.053(7) (emphasis added). This is much more than providing some "top-line" numbers. Opp.48. Even putting aside the millions of descriptions required, Application.38, to produce any top-line numbers

[21] Respondent cannot justify HB20 on the basis that certain platforms already engage in some voluntary transparency efforts. Opp.47 & n.19. Governmental attempts to address the "gap" between "voluntary" efforts and what government mandates "can hardly be a compelling state interest." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 803 (2011).

platforms must describe, track, and calculate countless instances of editorial discretion. The burden is not only in the reporting, it is in the work needed to make the reporting.[22] Application.38-39.

Sixth, the disclosure of tools and techniques would serve the interests of bad actors, including hostile foreign adversaries and child predators, who seek to reverse-engineer Applicants' members' processes for malicious ends (like child sex abuse material). Application.37, App.167a, 180a, 194a, 379a. Respondent merely dismisses these facts and the undisputed record evidence. Opp.48.

C. HB20 impermissibly discriminates based on speaker, content, and viewpoint, and Respondent cannot satisfy even intermediate scrutiny.

1. HB20 is speaker-, content-, and viewpoint-based. Respondent readily admits that HB20 targets only a select few websites—the largest social media platforms with 50 million or more monthly U.S. users. That is a speaker-based distinction triggering strict scrutiny, which is fatal (under even *Turner*). Application.29-30. HB20's prohibition on viewpoint-based editorial discretion also requires examining the

[22] HB20's required disclosures are different both in degree and kind from other disclosures like SEC disclosures and nutritional disclosures. *See* Goldman Br.6-8; Reporter's Br.A-16 to A-17. SEC and FDA disclosures are far less burdensome, are technically feasible (unlike here), and apply equally to all publicly traded companies and packaged food producers, respectively (unlike the speaker-based distinctions here), *SEC v. McGoff*, 647 F.2d 185, 190 (D.C. Cir. 1981); 21 U.S.C. § 343(q); do not require disclosures into the exercise of editorial discretion (unlike here); and are not limitless, *see Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (requirement to disclose "conflict minerals" unconstitutional). In fact, the D.C. Circuit has held SEC investigations unlawful as applied to "editorial policy" and newsgathering. *McGoff*, 647 F.2d at 191.

viewpoint of speech. *Id.*[23]And HB20 plainly targets platforms for perceived political biases and viewpoint-based editorial decisions, as Respondent's brief shows. *See* Opp.5-7.

Confirming HB20's viewpoint-based purpose, the "history of [HB20's] passage" demonstrates that HB20's arbitrary user threshold is a proxy for targeting platforms some perceive as disfavoring "conservative" viewpoints. *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). In the First Amendment context, this Court has permitted inquiries into the purpose of even a content-neutral law as expressed by lawmakers: "[S]trict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based." *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015).[24] Here, the Governor's *official* signing statement and HB20's key legislative proponents stated throughout the legislative process that HB20 was needed to stop platforms from "silencing conservative views." App.73a-75a.

2. No cognizable interest. Respondent asserts an interest in the "free exchange of ideas and information," Opp.32, so that government can compel the "widest possible dissemination of information," Opp.28. If recognized as cognizable, these interests would give governments complete control over all private entities publishing or

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[23] Furthermore, HB20's definition of "Social media platform" remains inherently content-based by excluding certain websites entirely based their content. Tex. Bus. & Com. Code §120.001(1)(C)(i) (excluding websites "consist[ing] primarily of news, sports, or entertainment"); *see* Application.10, 29. Even if covered platforms disseminate some amount of such content, that does not negate that HB20's coverage formula draws content-based distinction among websites. *Cf.* Opp.30.

[24] This Court's discussion in *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021), has no impact on the analysis in this First Amendment case. Opp.31.

disseminating speech. And if these interests were cognizable, then *Tornillo*, *PG&E*, *Hurley*, and other compelled-dissemination cases would have come out differently. Fundamentally, this level-the-playing-field approach has been rejected repeatedly by this Court. *See* Application.32-33; Reporter's Br.A-3 to A-6 & n.3, A-12 to A-13.

Likewise, Respondent contends that HB20 is necessary to prevent "discrimination." *E.g.*, Opp.2, 11, 12, 18, 20, 21, 24, 30, 31. But *Hurley* held that "forbidding acts of discrimination" *among expressive viewpoints* is "a decidedly fatal objective" for the First Amendment's "free speech commands." 515 U.S. at 578-79. Government may not use anti-discrimination laws to "declar[e] . . . speech itself to be [a] public accommodation." *Id.* at 573.

Respondent also indirectly quotes this Court's *Red Lion* decision again to support HB20's 21st-century version of the defunct Fairness Doctrine. Opp.50 (quoting *League of Women Voters*, 468 U.S. at 377, in turn quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969)). As this Court's jurisprudence has come to recognize, "First Amendment distinctions between media" were "dubious from their infancy." *Denver*, 518 U.S. at 813 (Thomas, J., concurring); *see* Application.32-33. *Reno* already held they do not apply to the Internet. 521 U.S. at 870.

3. No proper tailoring. Respondent has also failed to "*prove*[] that" HB20 is "narrowly tailored." *Reed*, 576 U.S. at 163 (emphasis added). Most glaringly, Respondent cannot justify why HB20's 50-million monthly U.S. user threshold furthers Texas's interest in the "free exchange of ideas and information." Opp.32. HB20's legislative record contains no explanation why (of all the thresholds it considered) the Legislature settled on 50 million users—except that it expressly rejected an

amendment to lower the threshold to include other Texas-favored purportedly conservative-leaning websites that otherwise similarly moderate user-submitted content. Application.30. Respondent claims it seeks the "widest possible dissemination of information," Opp.28, yet HB20 excludes entire platforms with 49 million or 20 million monthly users—allowing those favored platforms to retain full editorial discretion.[25]

HB20 also cannot be narrowly tailored when it forces platforms to choose whether to ban or allow *entire content categories* of deep public interest from discussion on its platforms.[26] For instance, as Respondent admits (Opp.11-12), if platforms do not want to disseminate Russian-state propaganda supporting its invasion of Ukraine, HB20 forces them to ban all "foreign government speech," Opp.12. That would be a fundamental change in their worldwide operations, but this shows that HB20 is not properly tailored to Respondent's asserted governmental interests in the

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[25] Respondent cannot simply refer to this subset of websites as the "public square" to avoid his obligation to demonstrate proper tailoring. Respondent has no answer to Applicants' point that private entities are not subject to public-forum analysis because they are not government property (or government actors). *See* Application.25 & n.8; *accord, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985) (public-forum analysis limited to "Government property"); *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983) ("public property").

The Application (at 25 n.8) already addressed *Packingham*, which recognized courts must "exercise extreme caution" before overriding First Amendment rights regarding the Internet. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

[26] Moreover, HB20's exceptions permitting limited viewpoint-based moderation also confirm a lack of tailoring to the asserted governmental interest. Platforms can remove any viewpoint, as long as that expression "is the subject of a referral or request" from a limited class of organizations. Tex. Civ. Prac. & Rem. Code §143A.006(a)(2). Rather than further the "free flow of information and ideas," HB20 furthers the flow of information and ideas the State prefers.

"widest possible dissemination of information."

IV. The balance of harm and the equities all favor vacatur.

Citing unrebutted record evidence, Applicants have demonstrated the irreparable constitutional, financial, and operational harms that the Fifth Circuit's order imposes. Application.39-41. Respondent's four principal arguments are unavailing.

First, Respondent suggests that because Section 7 may be enforced also by private individuals, the District Court's injunction does not prevent all possible types of irreparable harm Applicants might suffer. Opp.54. This argument fails for multiple reasons. Although it is true that Section 7 may be enforced by private individuals, Section 2 and its onerous operational and disclosure burdens may be enforced only by the Texas Attorney General. Tex. Bus. & Com. Code §120.151. Further, as a practical matter, enjoining state enforcement of HB20 prevents any quixotic private efforts to enforce the statute. In the five months since the District Court enjoined the Texas Attorney General from enforcing HB20, no private individual has successfully pursued an action under Section 7 against any platform. The only plaintiff who tried to do so was dismissed for filing in an improper forum; he has not refiled. *See Prather v. Meta Platforms, Inc.*, No. 352-332141-22 (Tarrant Cnty., Tex.). Finally, it bears emphasis that the private enforcement provisions of HB20 exacerbate the First Amendment problems with the law. *E.g.*, Feb. 28, 2003 Br. of United States as Amicus Curiae 7-8, *Nike, Inc. v. Kasky*, No. 02-575, 2003 WL 899100 (U.S.). Thus, it gets matters backwards to argue that those same provisions insulate a law from effective First Amendment challenge.

Second, Respondent suggests (Opp.52) that any injury is overstated because HB20 will not require the platforms to host vile speech because the platforms can "remove content . . . on a viewpoint-neutral basis." According to Respondent, the platforms can get rid of odious speech by banning certain topics—but Respondent admits that once a platform puts a topic in play, it must allow posts on both sides. Opp.52. That only underscores the core problem: recognizing the dangers created by its law, Texas now is effectively telling platforms that they should ban entire categories of discussion. On the State's telling, the only way Facebook or YouTube can avoid being forced to disseminate pro-Nazi speech is to prohibit all discussion of the Holocaust. This only underscores the profound constitutional and practical problems with HB20 and the serious injuries it threatens for platforms and their users.

Third, Respondent next attempts (Opp.52-56) to parse sworn and unrebutted deposition testimony and other record evidence to question whether the harms the platforms face are truly catastrophic and well supported. At Respondent's request, the District Court allowed a weeks-long discovery period when Respondent could have proffered evidence. Instead, the unrebutted record establishes that compliance with HB20 is a "practical impossibility" that will cost "millions of dollars"—or even "billions"—several times over. Application.40 (citing deposition transcripts). The record further includes voluminous evidence that platforms have suffered costly boycotts in the past by advertisers who do not want their ads next to vile, objectionable expression. *See id.* This is not speculative—it is a matter of historical record. Application.3; App.139a-40a, 168a, 325a-27a, 359a.

Finally, Respondent accuses Applicants of "conflat[ing] their merits arguments with their proposed irreparable and serious injuries." Opp.56. That argument is foreclosed by *Roman Catholic Diocese*, which expressly recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 141 S. Ct. at 67 (per curiam) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). Just like the victorious petitioners in that case, Applicants come to this Court seeking immediate relief from the unjustified abridgment of the core protections the First Amendment guarantees them.

CONCLUSION

This Court should grant the Application.

Dated: May 19, 2022

Paul D. Clement
K. Winn Allen
Kasdin M. Mitchell
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004

Kyle D. Hawkins
Matthew H. Frederick
Todd Disher
LEHOTSKY KELLER LLP
919 Congress Ave.
Austin, TX 78701

Respectfully submitted,
/s/ Scott A. Keller
Scott A. Keller
Counsel of Record
Steven P. Lehotsky
Gabriela Gonzalez-Araiza
Jeremy Evan Maltz
LEHOTSKY KELLER LLP
200 Massachusetts Ave., NW
Washington, DC 20001
(512) 693-8350
scott@lehotskykeller.com

Katherine C. Yarger
LEHOTSKY KELLER LLP
700 Colorado Blvd., #407
Denver, CO 80206