No. 22-555

In the Supreme Court of the United States

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

v.

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

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

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For nearly 50 years, this Court has stated that "statutory or common law may . . . extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994). Texas's House Bill 20 does just that: recognizing that a small number of modern communications platforms effectively control access to the modern, digital public square, HB 20 provides a remedy to individuals who are denied equal access to that square because those platforms disagree with their point of view. HB 20 also requires those platforms to share purely factual and uncontroversial information with consumers about how the platforms moderate their spaces. The questions presented are:

1. Whether States may, consistent with the First Amendment, forbid dominant communications companies from denying users equal, non-discriminatory access to the media in which modern communication often occurs.

2. Whether States may, consistent with the First Amendment, require dominant social-media platforms to provide truthful, factual information to users about various aspects of their services.

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INTRODUCTION

Although they take starkly different views of the merits of two laws that are similar in goal but different in design, everyone in this litigation as well as that in *Moody v. Netchoice*, No. 22-277 (U.S. Sept. 21, 2022), 22-393 (U.S. Oct. 24, 2022), agrees the cases present fundamentally important questions: whether those who gatekeep Americans' ability to communicate in the "modern public square," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017), can be required to provide equal access to the public regardless of viewpoint; and whether they can be required to provide purely factual information to users about how they manage that square. Even members of this Court have recognized the cases raise "issues of great importance that . . . plainly merit this Court's review." *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting). As a result, the primary question before the Court is not whether to grant review in either *Moody* or *Paxton*, but whether to grant review in both. Respondent respectfully suggests this Court should grant both petitions.

Petitioners here (respondents in *Moody*) contend that social-media platforms that dominate this modern public square have an absolute First Amendment right to exclude—or, at minimum, deny undifferentiated access to—anyone they want for any reason they want without explanation.[1] Moreover, they ask (at 2) the Court

[1] Petitioners are two trade associations, NetChoice, LLC, and the Computer and Communications Industry Association. Petitioners represented below that only Facebook, YouTube, and Twitter (the Platforms) are likely affected by the Texas law at issue here. Record on Appeal (ROA) 1306. Respondent thus refers to petitioners interchangeably as "petitioners" or "the Platforms."

to address that issue in *Moody* and hold this case pending that decision—only alternatively suggesting to grant both petitions.

Respondent disagrees on both points. In the absence of federal legislation, this Court's caselaw permits a State to step in to (1) guard its citizens' rights to equal access to modern means of communication, *e.g.*, *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994); and (2) require companies doing business in the State to provide "purely factual and uncontroversial information" about their services, *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985). That is precisely what Texas's House Bill 20 does.

Moreover, respondent respectfully suggests that though HB 20 and the Florida law at issue in *Moody* share important similarities, there are enough differences that resolution of *Moody* is not likely to resolve this case. Most notably, whereas HB 20 prohibits viewpoint discrimination across the board, Florida's law creates a special right of access for politicians and journalists. *See* Fla. Stat. §§ 106.072(2), 501.2041(2)(h), (2)(j). That difference, among many others, is of constitutional significance under this Court's First Amendment jurisprudence. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Although it is entirely possible that the Court will find *both* Florida's and Texas's laws are constitutional, it cannot be assumed that either State will zealously advocate for the other. Thus, it would be advisable to hear both at the same time to allow the Court to fully explore the important First Amendment issues presented by each distinct law.

STATEMENT

I. Factual Background

This Court has recognized, and Texas agrees, that the Platforms have made themselves the gatekeepers of a digital, "modern public square." *Packingham*, 137 S. Ct. at 1737. Although they are not themselves news outlets, they have "enormous influence over the distribution of news." *Tah v. Glob. Witness Publ'g*, 991 F.3d 231, 255 (D.C. Cir. 2021) (Silberman, J., dissenting). And they "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham*, 137 S. Ct. at 1737.

The Platforms are open to the public and provide a means for users worldwide to communicate with one another. ROA.163, 184, 194, 345-46, 591. The Platforms allow users to share videos with one another, have conversations, and integrate social lives. "For the first decade or so, online intermediaries" including the Platforms "were avowedly laissez faire about user-generated content." Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759, 769 (2021). For example, Twitter promised for years it would remove user content only in "limited circumstances" to "comply with legal requirements."[2] The Platforms also disclaimed any interest in editing or otherwise taking responsibility for the content that others posted to their spaces. As Facebook said in 2014: "We try to explicitly view ourselves as not

[2] *See* Internet Archive Wayback Machine, Twitter, The Twitter Rules (Jan. 18, 2009), https://bit.ly/31UlaJx (archived version of Twitter rules); *see also, e.g.*, Brian Stelter, *Twitter's Jack Dorsey: 'We Are Not' Discriminating Against Any Political Viewpoint*, CNN, (Aug. 20, 2018), https://tinyurl.com/fe8jw9e8 (insisting its policies "look at behavior," not speech).

editors . . . . We don't want to have editorial judgment over the content that's in your feed. You've made your friends, you've connected to the pages that you want to connect to[,] and you're the best decider for the things that you care about."[3]

Once these businesses became "dominant digital platforms," *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring), they began to deny access to their services based on their customers' viewpoints. Representative examples abound. For example, Facebook censored Americans who suggested that the COVID-19 pandemic originated in China's Wuhan laboratory for over a year.[4] Meanwhile, the Platforms allowed Chinese Communist Party officials to claim that *America* started the virus.[5] Iran's Ayatollah Khamenei was allowed to advocate genocide against Israel on the Platforms, while U.S. politicians have been denied service for demonstrably less incendiary commentary. When asked to answer for this discrepancy, Twitter rationalized that Khamenei's advocacy for genocide was mere "foreign policy saber rattling" and

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[3] Ravi Somaiya, *How Facebook Is Changing the Way Its Users Consume Journalism*, N.Y. TIMES (Oct. 27, 2014), https://nyti.ms/3ommZXb.

[4] *See, e.g.*, Thomas Barrabi, *Facebook Ends Ban on Posts Claiming COVID-19 is Man-made*, FOX BUSINESS (May 26, 2021), https://fxn.ws/3y0L8qD. The Platforms have never disputed the veracity of the examples in this response. *Cf.* Appellant's Opening Br. at 5-10 (Fifth Cir. Mar. 2, 2022).

[5] *See, e.g.*, Marisa Fernandez, *Twitter Fact-Checks Chinese Official's Claims that Coronavirus Originated in U.S.*, AXIOS (May 28, 2020), https://bit.ly/3lFWfjM.

acceptable "commentary on political issues of the day."[6] When asked at oral argument whether, in their view, the Platforms would be able to remove pro-LGBTQ speech based on viewpoint, petitioners' counsel candidly said "yes." Oral Argument at 22:39–22:52, *NetChoice v. Paxton*, No. 21-51178 (5th Cir. May 9, 2022).

The public has now learned the Platforms have begun partnering with federal officials to exclude certain users those officials deem undesirable. The White House, for example, admitted in July 2021 that it is "in regular touch with these social media platforms" and that it "flag[s] problematic posts for" them to censor. White House, *Press Briefing by Press Secretary Jen Psaki and Surgeon General Dr. Vivek H. Murthy* (July 15, 2021); *see also* Joint Statement on Discovery Disputes Ex. 3 at 2 *Missouri v. Biden*, No. 3:22-cv-01213-TAD-KDM (W.D. La.), ECF No. 71-3.

Even before learning of the Platforms' collusion with the Executive to deny free speech to Americans, legislatures at both the federal and state levels began to look for ways to rein in the Platforms' discriminatory conduct. Congress repeatedly held hearings on this phenomenon to discuss its concerns.[7] And many States are also

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[6] *See* Raphael Ahren, *Twitter to MKs: Unlike Trump Tweets, Khamanei's 'Eliminate Israel' Posts Are OK*, THE TIMES OF ISRAEL (July 30, 2020), https://bit.ly/336th6V; John Hendel, *Twitter CEO: Iranian Leader's 'Saber Rattling' Doesn't Violate Our Policies*, Politico (Oct. 28, 2020), https://politi.co/3GzTdpG.

[7] For just two examples of many, see House Comm. on Energy & Commerce, *Facebook, Google and Twitter: Examining the Content Filtering Practices of Social Media Giants*, 115th Cong. (2018); U.S. Senate Comm. on the Judiciary, Subcomm. on the Constitution, *Stifling Free Speech: Technological Censorship and the Public Discourse*, 115th Cong. (2019).

considering their own responsive legislation. *See* Rebecca Kern, *Push to Rein in Social Media Sweeps the States*, Politico (July 1, 2022), https://www.politico.com/news/2022/07/01/social-media-sweeps-the-states-00043229.

II. HB 20

A. Texas passed HB 20 after it concluded the Platforms' selective refusals to deal with disfavored consumers rose to the level that it implicated the State's "fundamental interest in protecting the free exchange of ideas and information" within its borders. Act of Sept. 2, 2021, 87th Leg., 2d C.S., ch. 3, § 1(1). HB 20 is designed to ensure the Platforms provide undifferentiated service to the public without discriminating based on viewpoint, and forthrightly disclose their content-moderation practices.

HB 20 narrowly applies to only the largest social-media platforms: "social media platform[s]" with 50 million monthly users in the United States, Tex. Bus. & Com. Code § 120.002; Tex. Civ. Prac. & Rem. Code § 143A.004(c), which HB 20 deems common carriers, Act of Sept. 2, 2021, 87th Leg., 2d C.S., ch. 3, § 1(3). Analogous to established communications common carriers, a "social media platform" is an Internet website or application that is "open to the public" and primarily facilitates users sharing information with each other. Tex. Bus. & Com. Code § 120.001. Although petitioners now argue (at 6) that HB 20 also affects Instagram, TikTok, Vimeo, and Pinterest, the evidence in the record

indicates that HB 20 covers only Facebook, YouTube, and Twitter, ROA.1306.[8]

B. The Platforms facially challenge two of HB 20's provisions. *First*, the Platforms challenge Section 7, which prohibits the Platforms from denying service to a consumer based on his viewpoint (whether expressed on, or off, the platforms) or location in Texas. Tex. Civ. Prac. & Rem. Code § 143A.002(a)-(b). To prevent less overt forms of service denial, Section 7 also forbids the Platforms from "deny[ing] equal access" to users or "otherwise discriminat[ing]" against users on either of those bases. *Id.* § 143A.001(1). Users and the Attorney General can enforce Section 7 but cannot seek damages. *Id.* §§ 143A.007(a), 143A.008.

Section 7 is subject, however, to significant limitations. Perhaps most importantly, Section 7 does not apply to any of the Platforms' own speech, such as when they recommend specific content to a user, or when they warn users against specific content. Section 7 also does not apply to content neither shared nor received within Texas. *Id.* § 143A.004(b).

Moreover, Section 7 does not prohibit the Platforms from removing entire categories of content—including many categories highlighted in the Petition. For example, the Platforms can eliminate pornography, spam—which, according to the Platforms, currently constitutes 60% of the content they remove—and "bullying." *Contra*

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[8] Although the district court suggested HB 20 also covers Instagram, Pinterest, TikTok, and Vimeo, Pet. App. 145, the record pages it cited do not even *mention* these entities. ROA.322-23; ROA.346-37. And, unlike YouTube and Facebook, none of these entities submitted a declaration describing whether HB 20 would affect them. *Cf.* ROA.192 (YouTube declaration); ROA.218 (Facebook declaration).

Pet. 4-5. They merely must do so in a viewpoint-neutral way.

And Section 7 expressly allows the Platforms to remove content falling within any number of statutory exclusions. For example, the Platforms can ban content that incites violence. Tex. Civ. Prac. & Rem. Code § 143A.006(a)(3). They may remove any content when "specifically authorized" by federal law, content that is unlawful or tortious, content concerning the sexual exploitation of children or the harassment of sexual-abuse survivors, or content inciting criminal activity. *Id.* §§ 143A.001(5), 143A.006(a).

The Platforms may even direct content to users that are specific to users' preferences, even if doing so could be seen as resulting in viewpoint discrimination. *Id.* § 143A.006(b). The Platforms may therefore moderate what a user sees so long as that user has assented.

Second, in addition to their challenge to Section 7, the Platforms challenge HB 20's disclosure and operational requirements ("Section 2"). Under Section 2, the Platforms must: (a) describe how they manage data and their spaces in a way "sufficient to enable users to make an informed choice regarding . . . use of" the platform, Tex. Bus. & Com. Code § 120.051; (b) publish an "acceptable use policy" informing users what content is permitted and why content is removed, *id.* § 120.052; (c) publish a biannual transparency report documenting certain facts about how the platform managed content during the preceding time period, *id.* § 120.053; and (d) maintain a complaint-and-appeal system regarding illegal content and content users challenge as wrongfully removed, *id.* §§ 120.101-104. Unlike Section 7, only the Attorney General can enforce these requirements, and he cannot seek damages. *Id.* § 120.151.

III. Procedural Background

HB 20 was scheduled to go into effect on December 2, 2021. On September 22, 2021, the Platforms sued the Texas Attorney General, respondent here, to enjoin HB 20's enforcement, which they insisted limits their "editorial discretion" over user content in violation of the First Amendment on a facially unconstitutional basis. Pet. App. 7a. On December 1, after sharply limiting discovery, the district court preliminarily enjoined respondent from enforcing Sections 2 and 7 on First Amendment grounds. Pet. App. 7a-8a.

The Attorney General then moved the Fifth Circuit to stay the preliminary injunction pending appeal, Pet. App. 8a, which was granted but only after full merits briefing and oral argument. 2022 WL 1537249. The Platforms sought emergency vacatur of the stay from this Court, arguing in large measure that the Fifth Circuit's stay order was "unexplained" and therefore "deprive[d]" the Platforms of the "careful review and a meaningful decision to which they are entitled." Appl. at 1 (alterations omitted). This Court vacated that stay without expressing a view on what should happen after the Fifth Circuit issued its merits opinion. *Paxton*, 142 S. Ct. 1715. Four justices of this Court would have denied the application. *Id.* at 1716.[9]

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[9] At the time, respondent opposed vacating the stay on the ground that review was unlikely because no court had yet ruled on the legality of either HB 20 or Florida's parallel law. Resp. to Appl. at 18. That circumstance has obviously changed, which is why respondent did *not* oppose the Platforms' request to stay the Fifth Circuit's mandate filed on September 29, 2022. An issue of this importance should be litigated in an orderly manner—not in rushed briefing on emergency applications.

On September 16, 2022, a divided Fifth Circuit reversed the district court, concluding that the Platforms' facial First Amendment challenge to Sections 2 and 7 failed. The majority concluded the Platforms are "not entitled to pre-enforcement facial relief against Section 7" because Section 7 "does not chill speech; if anything, it chills censorship." Pet. App. 9a. The majority also concluded that Section 7 is constitutional because "Section 7 does not regulate the Platforms' speech at all," it regulates their "*conduct*." *Id.*[10] In the alternative, the majority concluded that Section 7 would survive constitutional scrutiny because it was a tailored response to a demonstrably important problem. *Id.* The court unanimously concluded that the Platforms' challenge to Section 2 failed because a law requiring only "disclosures that consist of 'purely factual and uncontroversial information' about the Platforms' services" is not constitutionally suspect. Pet. App. 91a (quoting *Zauderer*, 471 U.S. at 651).

ARGUMENT

I. The Legality of HB 20 Presents Questions of Extraordinary Importance.

Respondent agrees with petitioners and members of this Court that the petition raises "issues of great importance that . . . plainly merit this Court's review." *Paxton*, 142 S. Ct. at 1716 (Alito, J., dissenting); Pet. 8. After all, the Platforms are the dominant communications providers of the modern age. As a result, their viewpoint-based discrimination implicates a government interest "of the highest order": the preservation of a "multiplicity of information sources" in the community. *Turner*, 512

[10] The majority also noted that its conclusion was "reinforced by 47 U.S.C. § 230." Pet. App. 9a. And Judge Oldham would have upheld HB 20 under the "common carrier doctrine." *Id.*

U.S. at 663. That is true for independent reasons for Section 7 and Section 2

A. There are at least four reasons why resolution of Section 7 presents issues of enormous magnitude—many of them the same reasons that justify Texas's decision to pass HB 20 in the first place. *See infra* at 19-20.

First, the "biggest platforms"—and the only social-media platforms to which HB 20 applies, *supra* at 6-7—"effectively own and operate digital public squares." Dep't of Justice, *Section 230 – Nurturing Innovation or Fostering Unaccountability? Key Takeaways & Recommendations* at 21 (June 2020); *accord Packingham*, 137 S. Ct. at 1737. As a result, the Platforms "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham*, 137 S. Ct. at 1737. Whether and how States may regulate such powerful entities is a question that this Court has recognized to be of constitutional significance. *Turner*, 512 U.S. at 663.

Second, the Platforms have used their control to "silence the voice of competing speakers with a mere flick of the switch." *Id.* at 656. Commentators have warned that if the First Amendment prohibits States—and by extension Congress—from preventing such censorship, the results will be "the suppression of domestic political, religious, and scientific dissent." Brief of Amicus Curiae Prof. Philip Hamburger at 21 (Fifth Cir. Mar. 6, 2022). Indeed, such suppression has already happened. *Supra* at 4-5; *see also* Eugene Volokh, *Treating Social Media Platforms Like Common Carriers*?, 1 J. FREE SPEECH L. 377, 397-97 (2021) (documenting examples).

Third, the Platforms' dominance is likely "entrench[ed]" to the point where regulation is the only practical solution to this problem. *Knight*, 141 S. Ct. at

1224 (Thomas, J., concurring). This is largely the result of network effects, whereby the Platforms can remain dominant because they already *are* dominant. New users come because that is where the rest of the public already is. *Id.* at 1224 (Thomas, J., concurring).[11]

Fourth, 47 U.S.C. § 230, which generally shields the Platforms from liability for what users say, eliminated more traditional ways for users to seek redress for the Platforms' misconduct. *See infra* at 23-24. That legal protection is grounded, however, on the factual premise that the Platforms—like telephone companies—are not responsible for the formation of their users' speech. *See infra* at 23. It is, at a bare minimum, very difficult to square that factual premise with petitioners' insistence (*e.g.*, at 15) that they have a First Amendment right to control what their users say. If that position is correct, it makes the Platforms perhaps the only commercial enterprises in American public life that can claim a constitutionally protected right to do whatever they want with their business and a statutory immunity from any legal consequences for what flows from their decisions. Given the Platforms' ability to dominate public discourse, that argument should raise profound public concerns.

B. Although their challenge to Section 7 is the heart of petitioners' complaint, respondent agrees with

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[11] To be clear, respondent is not claiming that "private entities . . . lose First Amendment rights for being large or popular." *Contra* Pet. 26. But a platform's scope and scale could very well matter when it comes to the State's interests in regulating that platform: for example, a State may have special interests related to the protection of children that apply only to social-media platforms popular among minors, while a State's interest in protecting the modern public square may well be stronger when 50 million speakers are involved, rather than a thousand. *See U.S. Telecomm. Ass'n v. FCC*, 855 F.3d 381, 426 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

petitioners (at 9) that Section 2 also presents issues that warrant this Court's review given "confusion among the lower courts over the standard for compelled commercial disclosures." This confusion arises because the Court has had limited opportunities to explore the reach of its *Zauderer* decision, which held that the compelled disclosure of "purely factual and uncontroversial information" generally presents no First Amendment problem. 471 U.S. at 651. The lower courts have expressed uncertainty over, for example, whether *Zauderer* applies outside of regulations designed to prevent deceptive advertising, what makes a disclosure "factual" and "uncontroversial," and when a disclosure becomes "unduly burdensome." Pet. 11-12. Respondent agrees that, given the widespread use of disclosure laws, such confusion merits this Court's attention.

II. The Court Should Grant Review Here Regardless of Whether It Grants the Petition in *Moody*.

Respondent also agrees with petitioners (at 35) that this case presents an appropriate vehicle for resolution of these important issues. But respondent does not agree with petitioners (at 2) that the Court should hold this petition pending *Moody*. Although the Florida law at issue in *Moody* is similar in purpose to HB 20, the two laws differ significantly and in ways that may affect this Court's resolution of both cases. Since at least some of those differences are of indisputable constitutional significance under this Court's current case law, resolving only *Moody* will likely result in the same parties returning next Term to present the same or similar questions—and at great expense to both the parties and the federal courts. Respondent respectfully suggests the better route would be to grant *both Moody* and *Paxton* at the same time.

A. This case presents an ideal vehicle to resolve the scope of the Platforms' First Amendment rights.

Petitioners concede (at 35) that this case presents an appropriate vehicle; respondent agrees and submits that this case presents an ideal opportunity to review the scope of the Platforms' First Amendment rights. As discussed below (*infra* Part III), there are some issues in this case that are hotly disputed, such as whether the Platforms' censorship is a form of protected "speech" instead of unprotected conduct. But if it is, perhaps the key question will be whether the law "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Section 7 provides an excellent vehicle to determine what legislation targets no more than the exact evil it seeks to remedy. Because the law applies only to the most dominant social-media platforms, Tex. Civ. Prac. & Rem. Code § 143A.004(c), it does not present questions of whether the State can force individual proprietors or small businesses to provide undifferentiated services, *cf. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 96-97 (1980) (Powell, J., concurring). Because it simply prohibits service denial based on viewpoint or location in Texas, Tex. Civ. Prac. & Rem. Code § 143A.002(a)-(b), it does not present questions of whether the State can require the Platforms to host only political or social groups, *cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256, 258 (1974). Because the law expressly allows the Platforms to remove content prohibited by federal law, Tex. Civ. Prac. & Rem. Code §§ 143A.006(a), there are no messy questions of preemption that prevent the Court from reaching the constitutional issue.

In addition, none of the traditional vehicle problems that concern this Court are present here. There is no chance that the case's outcome will have no lasting impact; it is positioned to impact many States' regulatory plans (not to mention individuals' ability to access the modern public square). There are no material factual disputes—the most prominent factual dispute appears to be only whether HB 20 covers three companies or seven. *Supra* at 6-7. But because those companies are all, by definition, large market players, that fact should not affect the Court's resolution of the threshold question of to what extent governments may permissibly regulate the Platforms' discriminatory practices. Nor will any additional percolation be forthcoming in the near term: this case and *Moody* are, to the best of respondent's knowledge, the only cases raising these questions. Other States are considering similar laws, but they appear to be waiting for final resolution of this case. Cong. Research. Serv., *Free Speech Challenges to Florida and Texas Social Media Laws* (Sept. 22, 2022), https://tinyurl.com/pe96vyz9 (indicating that no laws had been enacted since petitioners' 2021 stay application). As a result, petitioners are correct (at 35) that this presents an appropriate vehicle to resolve the constitutionality of HB 20 and similar laws.

B. *Moody* does not provide an adequate substitute for reviewing these issues.

By contrast, review in *Moody* will not suffice to answer the questions presented in this case, and that case is not a one-size-fits-all stand-in for other potential laws regulating the Platforms' discriminatory practices. *Contra* Pet. 35. As the Fifth Circuit observed—and petitioners do not seem to dispute—Texas's and Florida's laws, although overlapping in significant respects, also are

"dissimilar . . . in many legally relevant ways." Pet. App. 99a. As a result, even a win for petitioners in *Moody* will not necessarily resolve *this* case in their favor; it would only protract this litigation, placing a drain on both the State's resources and the federal courts'.

Most prominently, Texas's and Florida's laws differ because Texas's protects all consumers equally. Tex. Civ. Prac. & Rem. Code § 143A.002(a)-(b). Florida's law provides a special right of access to journalists and political candidates. *See* Fla. Stat. §§ 106.072(2), 501.2041(2)(h), (2)(j). This distinction is of constitutional import for at least two reasons. *First*, as this Court has recognized, "[t]he First Amendment is a kind of Equal Protection Clause for ideas." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2354 (2020). Thus, whatever the merits of Florida's approach, the fact that its law distinguishes among speakers may change the First Amendment inquiry as between Florida's and Texas's laws. *Second*, that Florida distinguishes between consumers affects whether its law can be defended in full on the same grounds as historic public-accommodation laws, which required that all consumers be treated equally. *See infra* at 18-20. The laws also differ as to whether they can be considered regulations of the Platforms purely as venues for speech. That is because Texas's law does not apply to the Platforms' own speech, including recommendations or flags on user content. By contrast, one provision of Florida's law prohibits platforms from posting any "addendum" to a user's post. Fla. Stat. § 501.2041(1)(b).

And as the Fifth Circuit noted, there are also many distinctions between Texas's and Florida's laws that are "highly relevant" to whether the laws would "satisfy heightened First Amendment scrutiny." Pet. App. 100a-

101a. Specifically, the laws differ with regard to whether they "target[] . . . no more than the exact source of the 'evil'" they "seek[] to remedy." *Frisby*, 487 U.S. at 485. For example, Florida's law prohibits platforms from changing their moderation policies more than once every 30 days. Fla. Stat. § 501.2041(2)(c). HB 20 contains no such prohibition and is thus less intrusive on any constitutionally protected right the Platforms claim to have in setting those policies. Similarly relevant to whether the law is appropriately tailored, Florida's law provides for statutory and punitive damages, Fla. Stat. § 106.072(3), but HB 20 permits only declaratory and injunctive relief along with attorney's fees, Tex. Civ. Prac. & Rem. Code § 143A.007.

Finally, Florida's petition for certiorari does not address the inconsistency between the Platforms' First Amendment argument and their historical embrace of Section 230's protections. 47 U.S.C. § 230. That was an important part of the Fifth Circuit's analysis, Pet. App. 48a-55a, and has been recognized as relevant by multiple members of this Court, *Paxton*, 142 S. Ct. at 1717 n.2 (Alito, J., dissenting).

For these reasons, respondent disagrees with the petition (at 2, 35) that this Court's analysis of the Platforms' First Amendment protections would be complete by holding this case pending *Moody*. This Court's review in this case is necessary.

III. The Fifth Circuit's Decision Is Correct.

The parties also obviously disagree on the merits. For the many reasons that respondent explained when petitioners sought to vacate the Fifth Circuit stay and that the Fifth Circuit elaborated on in its 90-page opinion, Sections 7 and 2 both survive the Platforms' facial challenge.

A. Section 7 is constitutional.

1. Petitioners do not have a constitutional right to deny the public undifferentiated service.

The Platforms' First Amendment theory falters at the outset because HB 20 regulates conduct, not speech: their censorship decisions constitute not a communicative act but a refusal to provide undifferentiated access to what is otherwise open to all comers. And, absent something more making the provision of the service a communicative act by the provider in the eyes of a reasonable observer,[12] denials of service are a form of "conduct, not speech." *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 60 (2006) ("*FAIR*"); *PruneYard*, 447 U.S. at 88. That is why it is "perfectly legitimate" for government to require that some businesses "host another's speech." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 140 S. Ct. 2082, 2098 (2020) (*USAID*) (Breyer, J., dissenting). It is similarly why "[a] State enjoys broad authority to create rights of public access on behalf of its citizens." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

True, a State generally cannot force a business to perform an act that is "inherently expressive." *FAIR*, 547 U.S. at 64. But "it is a general rule" that objections to a customer's viewpoint or lifestyle "do not allow business owners and other actors in the economy and in

[12] For example, a website designed for specific expressive purposes likely could not be required to host unwanted speakers consistent with their "freedom of expressive association." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). But HB 20 does not apply to such expressive websites—only to the largest of social-media platforms who hold themselves open to all comers. Tex. Bus. & Com. Code § 120.001.

society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. v. Col. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). The opposite conclusion would rip a "gaping hole in the fabric" of public accommodations laws. *FTC v. Superior Ct. Trial Laws*, 493 U.S. 411, 431-32 (1990). After all, absent some requirement that the service be perceived by a reasonable person as communicative by the provider, an enterprise could always re-package its discriminatory service denials as "inherently expressive." This Court rightly rejected that view decades ago. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968). It should not change course now.

The Platforms' challenge also fails because HB 20 is the modern-day analogue to rules deemed "permissible at the time of the founding." *Knight*, 141 S. Ct. at 1223-24 (Thomas, J., concurring) (citing *United States v. Stevens*, 559 U.S. 460, 468 (2010)). "For centuries, common carriage principles have structured the transportation and communications industries." *Cellco P'ship v. FCC*, 700 F.3d 534, 545 (D.C. Cir. 2012). Thus, entities like FedEx, AT&T, and Western Union have never had a right to act as "a censor of public or private morals, or a judge of the good or bad faith of any party who may seek to send a" message. *W. Union Tel. Co. v. Ferguson*, 57 Ind. 495, 498 (1877). On the contrary, such entities could constitutionally be required to transmit messages with "impartiality and good faith." *W. Union Tel. Co. v. James*, 162 U.S. 650, 651 (1896); 47 U.S.C. § 202.

These rules "are not new," rather, Section 7 just "applie[s] [them] to new circumstances." *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422, 424 (1859) (early application to

telegraphs).[13] These rules were applied to telegraph and telephone services in the mid-1800s and early 1900s when the services were both new and competitive. And the rules were also applied notwithstanding that these entities vigorously desired to censor based on viewpoint. Pet. App. 59a-60a. The same applies to the Platforms as today's media of communication, and it will apply to technologies that are yet to be developed.

2. Petitioners cannot avoid this conclusion by invoking their purported "editorial discretion."

The Platforms' contrary argument—that they have a right to deny undifferentiated service as a matter of "editorial discretion"—fails on four levels.

First, even if the Platforms' theory were correct, it would not support a facial challenge like the one brought here. That is, assuming they are correct that there is a freestanding right to edit materials on their spaces,

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[13] Though monopoly power is neither necessary nor sufficient for an entity to be regulated like a common carrier, courts sometimes consider an entity's market power in determining whether it should be subject to the legal obligations associated with being a common carrier. *Knight*, 141 S. Ct. at 1223-24 (Thomas, J., concurring) (collecting authorities). Because the district court sharply limited discovery before issuing its preliminary injunction, the parties have not yet had the opportunity to develop many factual questions, including whether the Platforms possess market power, and how any potential network effects interact with whatever market power they possess. Several jurists have suggested that they believe the Platforms wield such power. *See, e.g.*, *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring); *Tah*, 991 F.3d at 255 n.11 (Silberman, J., dissenting). Respondent will, if necessary, develop these factual questions below once discovery resumes. *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 187 (1997) (*Turner II*) (reviewing "must-carry" rules for cable providers after remand).

Section 7 would not be facially unconstitutional because its "antidiscrimination provisions . . . certainly could be constitutionally applied at least to some" of the Platforms' conduct. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11-12 (1988). Specifically, petitioners' asserted right (at 3-4) to police their "community standards" is irrelevant to Section 7's ban against discrimination based on a user's *off-platform* speech and geographic location. Tex. Civ. Prac. & Rem. Code § 143A.002(a), (b). Nor does petitioners' theory apply when petitioners serve as the agent of the federal government's desire to remove what it deems to be misinformation, *see supra* at 5-6, or at the command of advertisers, *contra* Pet. 5. After all, there is no First Amendment right for an enterprise to deny service in order to "increase the price that they w[ill] be paid for their services." *Superior Ct. Trial Laws*, 493 U.S. at 427.

Second, the premise of petitioners' argument is wrong because there is no free-standing First Amendment "editorial discretion" right. For the reasons the Fifth Circuit recognized, there was no such right at the Founding. Pet. App. 20a-24a. To the contrary, it was understood that "liberty . . . cannot long subsist if the channels of information be stopped." *See* 3 Annals of Cong. 289 (1791) (Elbridge Gerry).

And this Court has never understood bare invocation of "editorial discretion" as having independent constitutional significance. Otherwise, *FAIR* would have been decided differently; the law schools there aggressively asserted an "editorial" right to deny access to speakers they disagreed with. *See* Br. for Respondents at *27-28, *Rumsfeld v. FAIR*, 2005 WL 2347175 (U.S.). But that failed, and the Court recognized that the law schools there sought to "stretch a number of First Amendment

doctrines well beyond the sort of activities these doctrines protect." 547 U.S. at 70. Instead, the concept of "editorial discretion" has only been referenced as part of a larger analysis of whether a law—read in context—alters the entity's own speech. *See, e.g.*, *Miami Herald*, 418 U.S. at 256, 258; Pet. App. 43a.

Third, even if there were a free-floating "editorial discretion" right, the conduct regulated by HB 20 is not "editorial discretion" properly defined. As this Court has noted, "editors" are legally and reputationally "responsible" for content that, in their discretion, they affirmatively choose to reproduce. *Assoc. Press v. NLRB*, 301 U.S. 103, 127 (1937); *see also Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Relations*, 413 U.S. 376, 386 (1973). That is, an enterprise exercises editorial discretion when it decides how to select and present others' speech with the understanding that onlookers will associate the editor with that content. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998).

The Platforms are not engaged in editorial discretion because they do not affirmatively select almost any user content, and no reasonable observer associates the Platforms with making those kinds of choices. Petitioners claim for the first time in this litigation that they "take *reputational* responsibility for expression they publish." Pet. 18 (emphasis altered). That claim is, at best, legally dubious as they have repeatedly represented to courts that they are *not* responsible, in any legally significant way, for others' speech. *See, e.g.*, Pet. App. 52a-53a. And even their reputational responsibility is hard to see: the Platforms have grown to such dominant positions based largely on their assertions that they are *not* responsible for such content. *Supra* at 3-4. As a result, no reasonable observer thinks petitioners "edit" user conversations

because they happen on the Platforms.[14] Under such circumstances, a requirement that the Platforms host user communications "does not sufficiently interfere with any message of the" enterprise itself to implicate that enterprise's First Amendment rights. *FAIR*, 547 U.S. at 64. That remains true no matter how much the enterprise "object[s]" to the content of that exclusively third-party speech. *Id.* at 52.

Fourth, and relatedly, petitioners' insistence upon editorial discretion is irreconcilable with their exploitation of a legal regime set up by Congress to treat them as conduits, not editors of communication. Specifically, 47 U.S.C. § 230(c)(1) tells courts not to "treat[]" Internet platforms as the "publisher or speaker" of another person's speech for the purpose of common-law torts such as defamation. But the protection is inapplicable if the platform is "responsible" for the speech it facilitates in any meaningful respect. 47 U.S.C. § 230(f)(3).

This distinction reflects a traditional principle long applicable to other speech conduits: conduits for speech have no legal responsibility for their users' speech, but also no First Amendment right to control it. Telephone companies, for example, are not liable for what users say on their lines. RESTATEMENT (SECOND) OF TORTS § 581 cmt.b (1977). But telephone companies also have lawfully been required to transmit messages without discrimination. *See, e.g.*, 47 U.S.C. § 202.

HB 20 lawfully treats the Platforms like phone companies because the Platforms have long asked States—

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[14] At minimum, what reasonable observers think would present a question of fact that the district court never resolved before issuing the underlying injunction. *Cf. Irish-Am. Gay, Lesbian & Bisexual Grp. v. City of Boston*, 418 Mass. 238, 241 (1994) (*Hurley* case decided after trial).

and particularly state courts—to do so. For years, the Platforms have exploited Section 230 to avoid responsibility for user content because they supposedly operated as neutral "conduits" when they host user speech. Pet. App. 52a-53a (documenting some of the Platforms' representations). HB 20 merely took them at their word. Their current claim that they actually exercise editorial discretion over what appears in their spaces is irreconcilable with their earlier positions. *See, e.g.*, *id.* Given petitioners' efforts to have it both ways, their current position is entitled to no weight.

3. Petitioners' authority is not to the contrary.

The Platforms' trio of "editorial discretion" cases, *see* Pet. 13-14—*Miami Herald*, *Hurley,* and *Pac. Gas & Elec. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) ("*PG&E*")—also get them nowhere because these cases are distinguishable in a variety of critical respects.

First, in *Hurley*, the Court concluded a parade organizer could not be forced to include an unwanted group because the host's own message would be diluted, and because the public would likely "misattribut[e]" the unwelcome unit's speech to the parade's organizer. *See* 515 U.S. at 577. The Court arrived at that conclusion based on how reasonable observers would have understood the parade. *Id.* at 568-69, 576-77; *see also FAIR*, 547 U.S. at 65 (reaffirming reasonable-observer standard). *Hurley* is irrelevant here where there is no such chance of reasonable misattribution. *USAID*, 140 S. Ct. at 2088 (describing *Hurley* as a "speech misattribution" case). And even if reasonable misattribution were possible here (it is not), it would depend on fact-finding in which the district court never engaged. *See supra* n.15.

Second, in *Miami Herald*, the Court concluded that a newspaper could not be ordered to dilute its own message by devoting finite space to unwanted speech that it could have "devoted to other material" that it "preferred to print." *Miami Herald*, 418 U.S. at 256. That was particularly so when the duty attached only as a penalty for the newspaper's earlier "choice of material." *Id.* at 258. *Miami Herald* is inapposite because the Platforms possess essentially infinite space for hosting speech, *see Knight*, 141 S. Ct. at 1224-25 (Thomas, J., concurring), and Section 7 operates independently of the Platforms' own speech.

Third, *PG&E* essentially reprised the *Miami Herald* problem, *FAIR*, 547 U.S. at 64, except that it applied to a company newsletter rather than a newspaper of general circulation. *PG&E*, 475 U.S. at 9; *id.* at 24 (Marshall, J., concurring). In addition, there was concern that because it was a company newsletter, there was a risk of PG&E's customers misattributing the source of the speech. *Id.* at 15-16 & n.11. Again, here, there is no risk of misattribution and HB 20 does nothing to crowd out the Platforms' speech. Indeed, unlike Florida's law, HB 20 allows the Platforms to add speech to the user's post—the Platforms merely cannot discriminate in providing an otherwise undifferentiated service to the user.

Moreover, as a group, these cases are inapposite because none involved a commercial enterprise "generally open to the pubic" refusing to provide undifferentiated service to consumers, which has been considered relevant in this Court's constitutional analysis. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021); *PruneYard*, 447 U.S. at 87. None of them involved a communications provider analogous to common carriers.

Supra at 19-20. And none implicated anything like the Platforms' Section 230 inconsistency. *Supra* at 23-24.

Miami Herald and *PG&E* are also inapposite because they involved content-based rules privileging specific speech proffered by specific speakers. *PG&E*, 475 U.S. at 13. Although those laws thus have some passing similarity to some provisions at issue in *Moody*, "unlike the access rules struck down in those cases," Section 7 is "neutral in application," *Turner*, 512 U.S. at 654, imposing a nondiscrimination requirement that protects all users equally, regardless of the content of their speech.

At most all three cases stand for the proposition that requiring an enterprise to host third-party speech can implicate the enterprise's speech rights when doing so would cause the enterprise's "own message [to be] affected by the speech it [i]s forced to accommodate." *FAIR*, 547 U.S. at 63-65 (describing all three cases). To the extent the Platforms even have any kind of identifiable message, Section 7 does not affect it.

4. Section 7 would satisfy even heightened scrutiny.

Even if the Court were to disagree with all of the above and conclude that Section 7 is subject to some heightened form of scrutiny due to the Platforms' novel "editorial discretion" right, Section 7 would still survive.

a. In the *Turner* cases, this Court applied intermediate scrutiny to Congress's requirement that cable-television operators reserve over one-third of their channels for local broadcasters to use. This reservation implicated cable-television operators' rights because it "reduce[d] the number of channels over which cable operators exercise[d] unfettered control," and it implicated cable programmers' rights because it "render[ed] it more difficult for cable programmers to compete for carriage

on the limited channels" not reserved. *Turner*, 512 U.S. at 637. Nevertheless, the requirement survived intermediate scrutiny as to both operators' and programmers' First Amendment rights because the requirement advanced the government's interest in the "widest possible dissemination of information from diverse and antagonistic sources." *Turner II*, 520 U.S. at 189, 192.

Just like in the *Turner* cases, Section 7's anti-discrimination requirement advances the numerous important government interests discussed above, *supra* Part I, and particularly the State's interest in the widest possible dissemination of information from diverse and antagonist sources.

The Platforms' core response is to repeatedly invoke (*e.g.*, at 16-17) *Reno v. ACLU*, and its statement that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to" the Internet. 521 U.S. 844, 870 (1977). Respondent agrees with that general premise—but it works against the Platforms, not in their favor. Nothing in *Reno* gives the Platforms heightened First Amendment protections simply because they operate online.

Nor did "*Reno* h[o]ld that *Turner's* intermediate-scrutiny analysis about broadcast television channels does not apply to Internet websites." Pet. 24. In *Turner*, the government asked the Court to apply a lower level of scrutiny to cable-television regulation, like it had previously done for other communications media. *Turner* 512 U.S. at 637. The Court rejected that suggestion, and held that "a less rigorous standard of First Amendment scrutiny . . . *does not* apply in the context of cable regulation." *Id.* (emphasis added). That is because "cable television does not suffer from the inherent limitations that characterize" other media that have received lesser First

Amendment scrutiny. *Id.* at 638-39. In *Reno*, the same question about a lower level of scrutiny arose. 521 U.S. at 868. And *Reno* approvingly cited *Turner*'s summary of how other media had received reduced scrutiny. *Id.* But, far from repudiating *Turner*, *Reno* simply concluded that the Internet—just like cable television—is subject to the *normal* level of scrutiny. *Id.* at 869-70.

b. Finally, Section 7 would even survive strict scrutiny. The *Turner* dissent, for example, would have applied strict scrutiny to the must-carry cable regulations because the regulations selected favored speakers for preferential treatment. *Turner*, 512 U.S. at 683 (O'Connor, J., dissenting in part). But as the *Turner* dissent recognized, traditional common-carriage treatment would not present nearly as sharp of constitutional concerns as the must-carry requirement, because "it st[ood] to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies." *Id.* at 684. As the Fifth Circuit explained, that is functionally what Section 7 asks of the largest social-media platforms Pet. App. 75a.

The Platforms also argue (at 20-23) that Section 7 would not survive heightened scrutiny because its application to specific platforms and exceptions to its common-carriage requirement discriminate among speakers, types of content, and viewpoints without adequate justification. But nothing in Section 7 discriminates in any of these ways.

First, petitioners miss the mark when they claim (at 21) that Section 7 discriminates by exempting "website[s] . . . consist[ing] primarily of news, sports, entertainment, or other information that is not user generated but is preselected by the provider," Tex. Bus. & Com. Code § 120.001(1)(C)(i). All news, sports, or

entertainment content transmitted on the Platforms is subject to Section 7. The exemption simply clarifies that certain websites whose information "is not user generated but is preselected by the provider," *id.*, does not fall within the scope of a statute aimed at preventing discrimination against users providing content. It is unclear whether such an exception was even necessary, but it certainly does not show content discrimination. Even if it did, the proper remedy would be to sever this exception—not to facially enjoin HB 20's enforcement. Pet. App. 203a-205a (HB 20's intricate severability provision); *Barr*, 140 S. Ct. at 2352-55.

Second, petitioners are also wrong (at 22-23) that Section 7's other exemptions for unlawful, and similar, content, *see supra* at 8, make the law content- or viewpoint- based. It is difficult to see how these exceptions could inflict a First Amendment injury on the *Platforms* by giving them the discretion but not the obligation to remove certain content—much of which is illegal or falls outside the First Amendment. *E.g.*, *Dennis v. United States*, 341 U.S. 494 (1951). But if they do, once again, the proper remedy is severance. *Barr*, 140 S. Ct. at 2352-55.

Third, petitioners refer (at 21) to Governor Abbott's signing statement about protecting conservative speech. But the subjective view of the Governor does not render unconstitutional that which the First Amendment would otherwise permit. *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). And the law plainly protects all viewpoints and speakers, not just conservative ones.

None of this is to say that comparable regulation of *any* Internet websites would be constitutional. But many of the Platforms' arguments sound in "property" rights. Pet. App. 79a, n.33. A claim under the Takings Clause could, in theory, be viable, *PruneYard*, 447 U.S. at 82,

but petitioners have not asserted a Takings Claim—likely because a regulatory taking would be difficult to prove given the Platforms' size and market dominance. But given their size and market dominance, the Constitution allows States additional leeway to regulate the Platforms' activities in order to ensure that citizens have access to the means of communication necessary to participate in public discourse. *Id.* at 96-97 (Powell, J., concurring); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 621 (1984). For these reasons, the Fifth Circuit correctly held that HB 20 does not transgress the limits of that leeway.

B. Section 2 is constitutional.

1. Section 2 is also constitutional. This Court has held that the government can require commercial enterprises to disclose "purely factual and uncontroversial information about" their services, so long as that disclosure would not be "unduly burdensome." *Zauderer*, 471 U.S. at 651. Section 2 comfortably fits within this world of accepted disclosure laws.

There is no merit to the Platforms' blizzard of arguments (at 28-31) that *Zauderer* does not apply. They are wrong that Section 2's disclosure requirements warrant strict scrutiny as content-, speaker-, or viewpoint-based. Almost all disclosure requirements apply to only certain businesses regarding certain information—but this Court has not faulted those requirements as content- or speaker-based discrimination. *See Milavetz v. United States*, 559 U.S. 229, 250 (2010) (applying *Zauderer* review to law that established specific content to be disclosed only by "debt relief agenc[y]").

The Platforms are wrong that their (non-existent) editorial discretion shields them from disclosure requirements. This Court rejected a similar argument by a

newspaper attempting to immunize its exercise of editorial discretion from discovery in defamation case. *Herbert v. Lando*, 441 U.S. 153, 174 (1979). Platforms provided no basis for asserting (at 29) that they warrant similar treatment to the press—let alone that they be treated *better* than the press.

And they are wrong (at 29-31) that *Zauderer* applies only to commercial speech, or to remedy consumer deception. Mandatory "health and safety warnings" with no apparent commercial component have "long [been] considered permissible," *NIFLA v. Becerra*, 138 S. Ct. 2361, 2376 (2018), and have long been reviewed under the *Zauderer* standard.

2. The Platforms' arguments under the *Zauderer* standard also fail. They do not genuinely contend that Section 2 forces disclosure of information that is not purely factual and uncontroversial; instead, they claim (at 31-34) that Section 2's requirements are operationally onerous. Disclosure rules fail *Zauderer* review as "unduly burdensome" only if they "chill[] protected . . . speech." *Zauderer*, 471 U.S. at 651. For example, a disclosure requirement could be unduly burdensome if it "drowns out the [enterprise's] own message." *NIFLA*, 138 S. Ct. at 2378. But petitioners aim their fire on the law's *operational* burdens. It is not—and cannot be—the case that operationally burdensome disclosure requirements are facially invalid under the First Amendment. Otherwise, a host of reporting and other requirements that have long applied to a variety of commercial industries would be on the chopping block. *But see Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

In any event, the real-world costs or challenges that Section 2 might impose on any given platform at any given time are appropriate subjects for *as-applied*

challenges, not the *facial* challenge applicants press here. That facial challenge fails for at least three additional reasons.

First, HB 20's requirements that regulated platforms disclose their acceptable-use policies and how they manage data on their properties no more unduly burden speech than nutritional labels do. Each of these requirements may be satisfied by succinct, easily replicated statements that regulated platforms may append to their websites.

Petitioners assert (at 34) that Section 2 would "enable wrongdoers" and "reveal trade secrets." The Platforms provided no evidence other than their own conclusory declarations to prove this surprising outcome might occur. Nothing about Section 2 requires the Platforms to disclose either trade secrets or information that would "enable wrongdoers." And if the Attorney General were to sue one of the Platforms for failing to provide, for example, a legally protected trade secret, it could raise that property right in an as-applied challenge to the requirement of such a disclosure, or possibly in a Takings Clause claim following such a disclosure.

Second, Section 2's biannual transparency-report requirement can largely be satisfied with a top-line "number of instances" of certain categories of decisions, *see* Tex. Bus. & Com. Code § 120.053(a)(1); *id.* § 120.053(a)(2), and a general description of the tools that the Platforms use to enforce their acceptable use policies, *id.* § 120.053(a)(7). Demonstrably more demanding reporting requirements, such as the SEC's requirements regarding corporate proxy statements, are well-established and do not raise any constitutional problem. *See generally Ohralik*, 436 U.S. at 456.

The Platforms—some of the most sophisticated technology and computer companies ever to exist—next insist (at 33) that they are incapable of calculating the required top-line figures. That confession of computational incompetence is difficult to take seriously. It is also unsupported by any *bona fide* record explanation. *Cf.* Pet. 33 (Platforms' lawyer-declarant admitting he personally does not "know or understand the math" required).

Third, the operational provisions are ordinary regulations of business conduct that fall well outside the First Amendment's scope. These provisions essentially require the Platforms to maintain a customer-service department for processing complaints and reviewing user appeals. Tex. Bus. & Com. Code §§ 120.101-.104. Granted, customer-service representatives speak when interacting with customers. But Section 2 does not control what such representatives must say, and "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik*, 436 U.S. at 456. As this requirement does not meaningfully differ from similar longstanding consumer-protection laws, *e.g.*, 15 U.S.C. § 1681i (Fair Credit Reporting Act), the Platforms have not shown that the Fifth Circuit erred in concluding that the Attorney General was likely to prevail regarding the Platforms' facial challenge to these operational requirements as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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