No. 21-51178

In the United States Court of Appeals for the Fifth Circuit

NETCHOICE, LLC, ET AL.,

Plaintiffs-Appellees,

v.

KEN PAXTON,

Defendant-Appellant.

AMICUS BRIEF OF THE STATES OF FLORIDA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, AND SOUTH CAROLINA IN SUPPORT OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

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CERTIFICATE OF INTERESTED PERSONS

NO. 21-51178

NETCHOICE, LLC, ET AL.,

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v.

KENNETH PAXTON,

Defendant-Appellant.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, amici, as governmental parties, need not furnish a certificate of interested persons.

/S/ Henry C. Whitaker
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INTERESTS OF AMICI CURIAE

States have a strong interest in guaranteeing that their citizens enjoy full access to the free flow of information and ideas. That is nothing new. Governments have long demanded that "communications enterprises" allow all people to communicate. *Cellco P'ship v. F.C.C.*, 700 F.3d 534, 545 (D.C. Cir. 2012). Those demands drove measures designed to preclude purveyors of new technology, like telegraphs, telephones, and cable television, from arrogating to themselves the power to "decide what" information "millions" of people could consume. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring in part, dissenting in part).

Social media has now taken the place of the technology of old. It is, in many ways, "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Social media companies, moreover, often restrict information by "unfairly censor[ing]" users. An Act Relating to Social Media Platforms, Ch. 2021-32 (S.B. 7072) § 1(9) (Fla. 2021). Those actions can stultify the free flow of ideas because the "concentration" of power in social media companies "gives some digital platforms enormous control over speech." *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring).

To address those harms, Texas enacted HB 20—the law at issue in this appeal. HB 20 requires that social media companies disclose facts about their content moderation. Tex. Bus. & Com. Code §§ 120.051–53. It also requires that social media platforms refrain from censoring based on viewpoint or location. Tex. Civ. Prac. &

Rem. Code § 143A.002.

Texas is not alone. In 2021, Florida enacted S.B. 7072. That law requires covered platforms to "publish the standards . . . used for determining how to censor, deplatform, and shadow ban." Fla. Stat. § 501.2041(2)(a). Platforms are required to notify users when censoring, deplatforming, or shadow banning users or their posts, *id.* § 501.2041(2)(d)(1). Related to all this disclosure, the Act requires that platforms apply their own content moderation rules "in a consistent manner among [their] users." *Id.* § 501.2041(2)(b). And finally, for certain users who are likely to have uniquely important contributions to the public square—qualified political candidates and journalistic enterprises—the Act requires platforms to host certain speech. *Id.* §§ 106.072(2); 501.2041(1)(d), (2)(j).

Many states have been considering similar legislation. *See, e.g.*, Agenda, *Business & Labor Interim Comm.*, 2021 Leg. (Utah Sept. 15, 2021), https://tinyurl.com/3zavhy9m; *Hearing, Free Speech & Social Media: H. Comm. on Sci. & Tech.*, 2021 Leg. (Ga. May 20, 2021), https://tinyurl.com/muxjpyyn; *Social Media Censorship Complaint Form*, Ala. Att'y Gen. Office, https://tinyurl.com/nb8rpz3j; *Social Media Complaint Form*, Att'y Gen. Jeff Landry, La. Dep't of Justice, https://tinyurl.com/338meu8h. By one count, "[a]t least 30 state legislatures have introduced some form of a content-moderation bill in this [past] legislative session." Jennifer Huddleston & Liam Fulling, *Examining State Tech Policy Actions in 2021*, Am. Action Forum (July 21, 2021), https://tinyurl.com/2vhftt42. And more states are

expected to consider such legislation in the 2022 term. *See* Margaret Harding McGill & Ashley Gold, *The state tech policy battles that will rage in 2022*, Axios (Jan. 4, 2022), https://tinyurl.com/2p9xuzk4.

The district court, however, ruled that the First Amendment stops all those state efforts in their tracks. It ruled that because social media companies (apparently all of them, as a facial matter) exercise "editorial" judgment, the First Amendment precludes states from regulating, for nearly any reason, at any time, their discretion over their websites. The district court's reasoning seriously misses the mark. *First*, in enjoining Texas's rules regulating how social media platforms host speech, the district court misunderstood the First Amendment interests at stake. When a social media platform creates a forum for billions of speakers to express their messages, the First Amendment does not prohibit laws that regulate the manner in which the platform hosts those messages. Mandatory hosting requirements are "often a perfectly legitimate thing for the Government to do." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2098 (2020) (Breyer, J., dissenting). Regulation becomes suspect only when it curtails the host's own message. But HB 20 does not do that—it permits social media platforms to say whatever they like; they simply must not stifle the speech of others in darkness. *Second*, the district court compounded its error by finding that HB 20's hosting rules were infected with content and speaker bias. But that confuses a regulation of the manner in which content is *hosted*—which may be based on such considerations—with content- or speaker-based regulation of the *host*'s expression itself—which triggers

stricter scrutiny. In the former category, the Supreme Court has upheld a law that required law schools to host military recruiters—and only military recruiters. If such a law—which expressly targets only military recruiters and their recruiting content at higher-education establishments—is permissible, then HB 20 must be as well. *Third*, in rejecting Texas' disclosure requirements, the district court took a dangerously overbroad view of the burdens of factual disclosures, especially given the public's need to know the rules of the game in the modern public square. *Fourth*, the district court failed to grapple with the states' long-established compelling interests in the free flow of information and ideas.

The district court's mistaken ruling threatens to hamstring the authority of states to prevent online censorship and foster the free flow of information and ideas on the internet more generally. Indeed, many of the district court's mistakes mirror those committed by the district court that preliminarily enjoined Florida's social media law. *See NetChoice, LLC v. Moody*, 4:21CV220-RH-MAF, 2021 WL 2690876, at *1 (N.D. Fla. June 30, 2021). The states thus have a keen interest in this case, and they submit this brief to aid the Court in resolving these novel constitutional issues.

ARGUMENT

I. The district court erred in concluding that HB 20's hosting rules are impermissible because they interfere with "editorial" judgments.

HB 20 requires social media platforms to host on equal terms the speech they have invited onto their platforms—and from which they reap billions of dollars in

profits. Hosting rules are "often . . . perfectly legitimate." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2098 (2020) (Breyer, J., dissenting). And thus, "the degree to which the First Amendment protects private entities . . . from government legislation or regulation requiring those private entities to open their property for speech by others" is a "distinct question" from whether the government can itself dictate the content of a private entity's speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931 n.2 (2019) (cleaned up).

When it comes to hosting, the Supreme Court has left plenty of room for states to regulate. For example, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court held that the First Amendment was no obstacle to a California mandate that the owner of a shopping center allow petitioners to collect signatures and distribute handbills on shopping center property—even if the shopping center had a policy against such expressive activity. *Id.* at 86–88. Likewise, in *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47 (2006), the Court held that law schools had no First Amendment right to flout Congress's mandate in the Solomon Amendment that schools "afford equal access to military recruiters." *FAIR*, 547 U.S. at 60–68. Chief Justice Roberts explained for a unanimous court that "[a]s a general matter, the [Solomon Amendment] regulates conduct, not speech. It affects what law schools must do—afford equal access to military recruiters—not what they may or may not say." *Id.* at 60.

HB 20 is a limited hosting rule. Social media companies need not host all of their users' speech. They can remove speech that (a) federal law specifically requires to be

removed; (b) concerns sexual exploitation of children, or harassment of sexual abuse survivors; (c) incites criminal activity or violence in various ways; or (d) is otherwise unlawful. Tex. Civ. Prac. & Rem. Code § 143A.006. They can also adopt their own content-moderation standards that limit the types of speech they are willing to host. The one thing they cannot do, however, is censor speech based on viewpoint or location. *Id.* § 143A.002.

In that way, HB 20 mirrors the law upheld in *FAIR*. Like in *FAIR*, HB 20 requires the platforms to host speech even if the platform disagrees with the viewpoint the speech expresses. That was, indeed, the entire dispute in *FAIR*. The law schools did not want to host the military because they rejected the military's viewpoint. *FAIR*, 547 U.S. at 64–65. The Supreme Court held the schools could be required to host the military, nonetheless. And in many ways, HB 20 is less intrusive than the law upheld in *FAIR*. The Solomon Amendment required law schools to express the viewpoints that the schools disagreed with—the law schools could be required to "send e-mails or post notices on bulletin boards on [the military] employer's behalf." *Id.* at 61. The same is not true of HB 20.

Despite all that, the district court granted the injunction on the premise that Plaintiffs could prove a First Amendment violation by showing that HB 20 required them to "disseminate third-party content" and thus "interfere[d] with their editorial discretion over their platforms." ROA.2581. But that is the exact argument rejected in *FAIR*. There the law schools argued that "[j]ust as the government may not force a

newspaper to publish specified opinion pieces, *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974), it cannot force a school to print specified recruiting messages." Brief for the Respondents, *Rumsfeld v. Forum for Academic and Institutional Rights*, 2005 WL 2347175, at *22 (U.S.). And in drawing out the newspaper analogy, the law schools asserted that a "school has the right to make the *same editorial judgments* as to which messages it will facilitate and which it will resist." *Id.* at *27 (emphasis added). The law schools even claimed they "exercised their editorial function vigilantly—much more vigilantly than the St. Patrick's Day parade organizers" in *Hurley*, a case in which the Supreme Court had held that parade organizers had a First Amendment right to exclude marchers who expressed a message with which they did not agree. *Id.* at *28 (discussing *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 576 (1995)).

The Supreme Court in *FAIR* unanimously rejected the argument. What mattered was not whether the schools exercised an editorial function but rather whether "the complaining speaker's own message was affected by the speech it was forced to accommodate." *FAIR*, 547 U.S. at 64. *FAIR* thus makes clear that the First Amendment is not violated because the speaker can draw analogies to newspaper editors or is required to host unwanted speech.

Rather, the Supreme Court's precedents provide three guiding principles to assess whether the regulation of speech hosting is permissible: (i) the ability of the host to speak and dissociate from hosted speakers; (ii) the risk that listeners will mistakenly attribute the hosted speech to the host; and (iii) whether the host curates the speech of

others to create its own unified speech product. *See id.* at 63–65.

Here, all three factors indicate that HB 20's hosting rule is permissible.

Ability to Speak. Like the laws upheld in *FAIR* and *PruneYard*, the hosting regulations here do not meaningfully "interfere with any message" the platforms would otherwise communicate. *Id.* at 64. As the Supreme Court explained in *FAIR*, "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* at 65. The owner of the shopping center in *PruneYard* could likewise "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." 447 U.S. at 87. By contrast, the same could not be said about parades, which lacked a "customary practice whereby private sponsors disavow any identity of viewpoint between themselves and the selected participants." *Hurley*, 515 U.S. at 576 (quotation marks omitted). Nor was such distancing practical on the editorial page of a newspaper or in an envelope of a quarterly utility newsletter sent in the mail to customers. In both instances, the limitations of the host's physical medium meant the hosted speech took up scarce space that "could be devoted to other material the newspaper" and utility operator "may have preferred to print." *FAIR*, 547 U.S. at 64 (quoting *Tornillo*, 418 U.S. at 256, and citing *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Ca.*, 475 U.S. 1, 16–18 (1986) (plurality op.)).

The hosting regulations here leave social media platforms free to speak on their own behalf and make clear their own views. Social media platforms are free to tell the

public at large that hosted users "are communicating their own messages by virtue of state law." *PruneYard*, 447 U.S. at 87. And social media platforms remain free and able to speak with their own voice on any issue, both on their own platforms and outside them.

In fact, the platforms do just that. The platforms are careful to disassociate themselves quite explicitly from their users' speech. *See, e.g.*, Facebook, Terms of Service § 4.3 ("We do not control or direct what people and others do or say, and we are not responsible for their actions or conduct . . . or any content they share[.]"); Twitter, Terms of Service § 3 (similar). And the platforms frequently invoke these disclaimers to obtain dismissal of lawsuits seeking to hold them liable for their users' posts. *E.g.*, *Morton v. Twitter, Inc.*, No. CV 20-10434, 2021 WL 1181753 (C.D. Cal. Feb. 19, 2021); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056 (N.D. Cal. 2016). These disclaimers thus make explicit what every reasonable user already understands: the content posted by the platforms' users is not the platforms' own speech.

On top of all that, the platforms—unlike even the malls in *PruneYard* or the law schools in *FAIR*—have a nearly infinite capacity to speak. "[S]pace constraints on digital platforms are practically nonexistent . . . so a regulation restricting a digital platform's right to exclude might not appreciably impede the platform from speaking." *Knight First Amendment Inst.*, 141 S. Ct. at 1226 (Thomas, J., concurring). And thus, there is even more reason here to think that the platforms' own speech will not be limited by hosting regulation.

Risk of Listener Confusion. The Supreme Court's compelled-speech cases also place significant weight on the extent to which a reasonable listener would (mis)identify the hosted speaker's views with those of the host. *FAIR*, 547 U.S. at 65. There is no interference with a host's speech when observers "can appreciate the difference" between speakers whom a host endorses and speakers whom a host "permits because legally required to do so, pursuant to an equal access policy." *Id.* Under the Act's hosting regulations, a reasonable user of a typical social media platform would not identify the views expressed on the platform as those of the platform itself. On most platforms, users are designated with usernames and other identifying information. That information allows a reasonable viewer to understand that the user, not the platform, is speaking.

Regardless of whether a social media platform applauds or rejects the speech it hosts, no reasonable user thinks that the platform is the entity speaking when viewing other users' posts. *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (rejecting misattribution fear as implausible). Indeed, "the proposition that" social media platforms "do not endorse everything they fail to censor is not complicated." *Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.). And any "fear of a mistaken inference of endorsement" by a social media platform "is largely self-imposed, because" the platform "itself has control over any impressions it gives its" users. *Id.* at 251.

Nor is it sufficient for the platforms to say that there is a risk of misattribution

because "they could be viewed as sending the message that they see nothing wrong" with speech they are required to host. *FAIR*, 547 U.S. at 64–65. That is precisely the argument the Supreme Court rejected in *FAIR*. *Id.* at 65. So too here. If, as the Supreme Court has held, "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy," then surely the public can differentiate between a social media platform's own speech and the speech it is required to host. *Id.* (citing *Mergens*, 496 U.S. at 250).

Unified Speech Product. Finally, in asking whether a host of speech has a First Amendment right to be free of regulation, it matters whether the speech "comports with" or "contribute[s] something to a common theme." *Hurley*, 515 U.S. at 574, 576. The Supreme Court has held, for instance, that mandates to accommodate speech in a parade, *id.* at 566, a utility newsletter, *Pacific Gas & Elec. Co.*, 475 U.S. at 20–21 (plurality op.); *id.* at 25 (Marshall, J., concurring in judgment), or a newspaper, *Tornillo*, 418 U.S. at 258, were unconstitutional. In those instances, however, the hosted speech formed a unified speech product in which each unit of hosted speech "affects the message conveyed," thus "alter[ing] the expressive content" of the whole. *Hurley*, 515 U.S. at 572–73.

The analysis is different where, as here, a mandate is imposed on an entity that does not produce a unified speech product. The Supreme Court rejected the free speech challenge in *FAIR* because it concluded that law schools did not have such a product.

Although the law schools in *FAIR* intended to "send[] the message" that they found something wrong with the military's policies, the general activity involved—providing recruiting services to law students—"lack[ed] the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; [the school's] accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school." *FAIR*, 547 U.S. at 64–65.

So it is here. At least generally—which is all that matters in the context of this pre-enforcement facial challenge—social media companies cannot be said to produce a unified speech product like a newspaper. As "could . . . be said of the recruiting in various law school rooms in [*FAIR*], or the leafleters' and signature gatherers' speech in various places at the mall in *PruneYard*," the posts hosted by typical social media platforms are "individual, unrelated segments that happen to be [hosted] together." Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. of Free Speech L. 377, 426 (2021). "Twitter letting people go to individual pages . . . , Facebook letting people go to individual Facebook pages, YouTube letting people view individual videos, and the like" in no way contributes to a "common theme" or "overall message." *Id.* There is no common theme in the material that a social media platform hosts and allows users to access.

* * *

The ultimate question is whether "the complaining speaker's own message [is] affected by the speech it [i]s forced to accommodate." *FAIR*, 547 U.S. at 63. Here,

Plaintiffs' members have made clear that their speech is distinct from their users' speech. They have said so in their terms of service. They have said so to win dismissal of lawsuit after lawsuit. And they have said so in their public statements. A users' speech on a social media network is therefore not the platform's speech. Regulating the manner in which a platform hosts the speech of others as HB 20 does is thus constitutional.

II. The district court erred in finding that HB 20's hosting rules were content- and speaker-based.

The district court compounded its error by concluding that HB 20 was constitutionally suspect because its hosting rules are content- and speaker-based. ROA.2592–94. They are not.

The district court characterized as an impermissible "content based" regulation of speech Texas's decision to exempt from HB 20's hosting regulation materials that involve the exploitation of children or the survivors of sexual abuse, as well as content that incites criminal activity or threatens violence. Similarly, the district court viewed HB 20 with suspicion because it regulated only some companies rather than others. Those arguments are irreconcilable with the Supreme Court's decision in *FAIR*, which upheld Congress's decision to require law schools to host military recruiting—and only military recruiting—content. 547 U.S. at 51, 70.

Hosting regulation could not function without the ability to differentiate between types of content or speakers, which is why federal law has long mandated that broadcasters that host speech by political candidates "afford equal opportunities to all

other such candidates for that office in the use of such broadcasting station." 47 U.S.C. § 315(a); *see Farmers Educ. & Co-op Union v. WDAY, Inc.*, 360 U.S. 525 (1959) (holding that § 315(a) does not allow broadcasters to censor even false statements); *see also* 47 U.S.C. § 312(a)(7), 315(b). That is why the Supreme Court has rejected the conclusion that "the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 660 (1994). "[H]eightened scrutiny is unwarranted when the differential treatment is justified by some special characteristic of the particular medium being regulated." *Id.* at 660–61 (quotation marks omitted). And here, the Texas Legislature was clear that it was regulating the networks with the largest number of users because of "their market dominance." HB 20 § 1(4). That is the exact "special characteristic" that the Supreme Court endorsed in *Turner*. *See Turner Broad. Sys.*, 512 U.S. at 660–61; *see also Knight First Amendment Inst.*, 141 S. Ct. at 1224 (Thomas, J., concurring) ("Much like with a communications utility, this concentration gives some digital platforms enormous control over speech.").

Ultimately, the district court found a speaker-based problem because it concluded—without any evidentiary citation—that HB 20 was passed with illegitimate intentions. ROA.2594. But "[w]e are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment). Here, the law regulates neutrally—it protects Texans of all viewpoints and locations.

III. The district court erred in enjoining HB 20's disclosure provisions.

In addition to regulating the manner in which platforms host speech, HB 20 also requires a narrow set of disclosures. It demands that platforms (1) describe how they moderate and manage content, Tex. Bus. & Com. Code § 120.051; (2) publish an "acceptable use policy" informing users what content is permitted, *id.* § 120.052; (3) publish a biannual transparency report documenting certain facts about how the platform managed content during a specific time period, *id.* § 120.053; and (4) maintain a complaint-and-appeal system for users who believe action contrary to the disclosures has taken place, *id.* § 120.101–04.

The First Amendment does not prohibit this type of neutral disclosure regime. *E.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 248–53 (2010). For example, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, the Supreme Court rejected a First Amendment challenge to a requirement that legal advertisers disclose certain costs that clients might incur. *See* 471 U.S. 626, 650–53 (1985). The Court recognized the "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. And the Court reasoned that disclosure requirements are substantially less onerous because they do not prevent businesses "from conveying information to the public," but "only require[] them to provide somewhat more information than they might otherwise be inclined to present." *Id.* Because a business's interest in withholding information from consumers is minimal, the Court concluded that mandatory disclosure rules are permissible if they "are

reasonably related to the [government's] interest in preventing deception of consumers." *Id.* at 651.

Nonetheless, the district court enjoined HB 20's disclosure rules, finding them "burdensome given the unfathomably large numbers of posts on these sites and apps." ROA.2591. But the burden of making most of the disclosures that HB 20 requires does not depend on the number of posts that a platform hosts. The requirements to publish the rules, an "acceptable use" policy, and a biannual transparency report, Tex. Bus. & Com. Code §§ 120.051–53, for example, require the type of point-in-time disclosures that are familiar to corporate life. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Indeed, if requiring a biannual transparency report and the like offends the First Amendment, then the SEC's voluminous annual reporting, the FTC's merger disclosure rules, or even many tax filing obligations might likewise be constitutionally suspect.

The district court also objected to the requirement that social media companies set up a complaint-and-appeal system. It is true that a well-functioning appeal system may trigger many users to appeal decisions to moderate content, which in turn might trigger many notices. But Plaintiffs' own members—including Facebook, Twitter, and YouTube—have endorsed industry-wide calls to "provide notice to each user whose content is removed, whose account is suspended, or when some other action is taken due to non-compliance with the service's rules and policies, about the reason for the removal, suspension or action" and to offer "detailed guidance" about "[w]hat types of

content are prohibited."[1] And regardless, the requirement to set up a complaint-and-appeals system is not really regulation of "speech" that triggers the First Amendment scrutiny that applies to the compelled disclosures. Rather, it is a mine-run economic regulation that demands businessed be responsive to their users. Such regulations are commonplace, *e.g.*, 12 C.F.R. § 1002.9(a)(2) (TILA creditors must provide reasons for their actions and a point of contact), and do not themselves trigger close First Amendment scrutiny.

IV. The district court seriously undervalued the state's interest in regulation.

The district court further erred in discounting the compelling interest that HB 20 advances—ensuring that its citizens of all political and geographical stripes have full access to the free flow of information and ideas. The district court rejected this interest as inconsistent with *Tornillo*. ROA.2597. But *Tornillo* did not hold that states have no interest in ensuring the free flow of information to their citizens; *Tornillo* held only that the state's mechanism to achieve its interest there was unlawful. 418 U.S. at 254. The district court's analysis is contrary to the Supreme Court's recognition that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."

[1] *See The Santa Clara Principles on Transparency and Accountability in Content Moderation*, Santa Clara Principles, https://tinyurl.com/4shb6n4x; Gennie Gebhart, *Who Has Your Back? Censorship Edition 2019*, Electronic Frontier Foundation (June 12, 2019), https://tinyurl.com/2p93z6bc.

Turner, 512 U.S. at 663. That makes sense because "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality op.).

HB 20 vindicates this critical state interest. As the Texas Legislature found, "each person in this state has a fundamental interest in the free exchange of ideas and information, including the freedom of others to share and receive ideas and information," HB 20 § 1(1), and the state "has a fundamental interest in protecting the free exchange of ideas and information," *id.* § 1(2). Social media platforms now play a major role in disseminating those ideas—they are "central public forums for public debate." *Id.* § 1(3). Or put differently, social media platforms have become "the modern public square." *Packingham*, 137 S. Ct. at 1737.

But unlike the traditional public square, which was generally open and unregulated, the modern public square is dominated by "digital platforms" that exercise "enormous control over speech." *Knight First Amendment Inst.*, 141 S. Ct. at 1224 (Thomas, J., concurring). These social media companies "exercise[] . . . great[] control over access to the relevant medium," possess the power "to obstruct readers' access to" information, and can "prevent" the distribution of certain information that they do not like. *Turner*, 512 U.S. at 656; *see also Knight First Amendment Inst.*, 141 S. Ct. at 1224 (Thomas, J., concurring). Thus, "[b]y virtue of its ownership of the essential pathway," a social media platform "can . . . silence the voice of competing speakers with a mere flick of the switch." *Turner*, 512 U.S. at 656; *see also Knight First Amendment Inst.*, 141 S.

Ct. at 1224 (Thomas, J., concurring). "The potential for abuse of this private power over a central avenue of communication cannot be overlooked." *Turner*, 512 U.S. at 657. "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Id.*

HB 20 prevents "private interests" from restricting the "free flow of information." *Id.* Its hosting rules simply demand that Texas citizens have access to critical pathways of information no matter their viewpoint or location, and its disclosure rules allow citizens to understand the rules of the game when they join a social media network. It would turn the First Amendment on its head to rule that the Free Speech Clause disables the states from doing that.

CONCLUSION

The Court should reverse the district court's order preliminarily enjoining HB 20.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limits of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this document contains 4,961 words.

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

/s/ Henry C. Whitaker

CERTIFICATE OF SERVICE

I certify that on March 9, 2022, I electronically filed this brief with the Clerk of Court by using the Court's CM/ECF system, which will send a notice of electronic filing to all parties in the case who are registered through CM/ECF.

/s/ Henry C. Whitaker