No. 21A720

In the Supreme Court of the United States

NETCHOICE, L.L.C., D/B/A NETCHOICE; AND COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION D/B/A CCIA,

Applicants,

v.

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

Respondent.

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

MOTION BY PROPOSED *AMICI* PROFESSOR PHILIP HAMBURGER, GIGANEWS, AND GOLDEN FROG FOR (1) LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENT'S OPPOSITION TO APPLICATION TO VACATE STAY AND (2) LEAVE TO FILE THE BRIEF ON LETTER-SIZED PAPER

W. Scott McCollough
MCCOLLOUGH LAW FIRM, P.C.
2290 Gatlin Creek Rd.
Dripping Springs, TX 78620

Evan M. Goldberg
EVAN MILES GOLDBERG, PLLC
400 East 57th Street, Ste. 8F
New York, NY 10022

Shon Hopwood
Counsel of Record
Kyle Singhal
HOPWOOD & SINGHAL, PLLC
1701 Pennsylvania Ave., N.W.
Washington, DC 20006
Tel: (202) 769-4080
shon@hopwoodsinghal.com

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND FOR LEAVE TO DO SO ON LETTER-SIZED PAPER

Movants respectfully request leave of the Court to (1) file the attached *amici curiae* brief in support of respondent's opposition to the application to vacate the stay issued by the Fifth Circuit and (2) to do so on 8½-by-11-inch (letter-sized) paper.

Positions of the Parties

All parties consent to this motion.

Identities of *Amici*; Rule 29.6 Statement

No proposed *amicus* is a publicly held corporation, and no amicus has any parent corporation that is a publicly held corporation. Proposed *amici* are:

- **PROFESSOR PHILIP HAMBURGER** of Columbia Law School. Professor Hamburger has long studied the freedom of speech. He has written extensively on how governments, in the seventeenth century and again today, tend to privatize their censorship, leaving their dirty work to less accountable, private actors. So he is deeply concerned about the threats to the freedom of speech from government enabled censors.
- **GIGANEWS, INC. ("Giganews")**, a distributed discussion system or "Usenet" service that was founded in 1994. Giganews is one of the largest global Usenet providers. It has customers ("members") in over 170 countries. Unlike the technology giants that dominate Silicon Valley, Giganews offers a largely unmoderated forum for its news-going members.
- **GOLDEN FROG, GMBH ("Golden Frog")**, a worldwide provider of applications and services that preserve an open, privacy-enhancing and secure Internet

experience. VyprVPN™, one of Golden Frog's service offerings, provides "virtual private network" (VPN)-based online privacy and security from monitoring or attacks.

Format and Timing of Filing

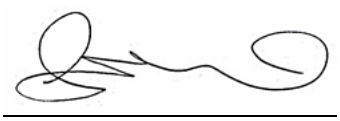
Applicants' emergency application was filed on May 13, 2022. In light of the response deadline of May 18, 2022, Movants lacked sufficient time to prepare and print their *amici curiae* brief in booklet form as is ordinarily required by Rule 33.1.

Conclusion

For the foregoing reasons, Movants respectfully request that the Court grant this motion and accept the attached proposed brief for filing.

May 18, 2022

Respectfully submitted,



Shon Hopwood
Counsel of Record
Kyle Singhal
HOPWOOD & SINGHAL, PLLC
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Washington, DC 20006
Tel: (202) 769-4080
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BRIEF OF *AMICI CURIAE* PROFESSOR PHILIP HAMBURGER, GIGANEWS, AND GOLDEN FROG IN SUPPORT OF RESPONDENT'S OPPOSITION TO APPLICATION TO VACATE STAY

W. Scott McCollough
MCCOLLOUGH LAW FIRM, P.C.
2290 Gatlin Creek Rd.
Dripping Springs, TX 78620

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EVAN MILES GOLDBERG, PLLC
400 East 57th Street, Ste. 8F
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Kyle Singhal
HOPWOOD & SINGHAL, PLLC
1701 Pennsylvania Ave., N.W.
Washington, DC 20006
Tel: (202) 769-4080
shon@hopwoodsinghal.com

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INTERESTS OF THE *AMICI* AND RULE 37.6 DISCLOSURE

Amici include:[1]

- **PROFESSOR PHILIP HAMBURGER** of Columbia Law School. Professor Hamburger has long studied the freedom of speech and has an interest in protecting it from censorship.
- **GIGANEWS, INC. ("Giganews")**, a distributed discussion system or "Usenet" service.
- **GOLDEN FROG, GMBH ("Golden Frog")**, a worldwide provider of virtual private network services. Giganews and Golden Frog have an interest in promoting the freedom of speech online and in protecting content from censorship by Applicants.

[1] No proposed *amicus* is a publicly held corporation, and no amicus has any parent corporation that is a publicly held corporation.

No counsel for any party authored any part of this brief, and no person other than *amici*, their members, or their counsel made any monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

HB20 is constitutional. The arguments to the contrary misapply precedent or bypass relevant legal principles. And there is no irreparable harm in this case because HB20's disclosure and anti-discrimination chapters do not provide for damages.

First, common carrier regulation of the sort adopted by HB20 is consistent with the First Amendment. Under centuries-old precedent that no court has ever questioned, Texas has the power to regulate the social media platforms covered by HB20 ("the Platforms") as common carriers.

Second, Texas has a compelling interest in protecting the free exchange of expression, and HB20 is narrowly tailored to that interest. Such an interest, however, is unnecessary to defend HB20, because the Platforms have little or no speech interest here. They are affected only in their role as common carriers or conduits for other people's speech, not their own speech. Moreover, to the extent the Platforms enjoy section 230 immunity for silencing speech on their conduits, *see* 47 U.S.C. § 230, they are censoring the speech under color of federal law. They have no free speech interest in this *federally* privatized censorship. Even if they had such an interest, it would be of no avail against the *state's* compelling interest in protecting free expression.

Third, this case involves no irreparable harm. HB20's disclosure and anti-discrimination chapters provide for injunctive and declaratory relief, not damages. HB20 imposes no legal consequences on the Platforms for disobeying the disclosure

and anti-discrimination provisions until after a trial and judgment. And even then, the only consequence is an order to comply. That is not irreparable harm. The real danger is that by vacating the stay below, this court will, without justification, disrupt the ordinary and orderly due process of the courts.

ARGUMENT

I. The Platforms Are Common Carriers and Can Be Regulated Without Violating the First Amendment

John Stuart Mill, in his *On Liberty* (1859), observed that the tyranny of government was often matched by the tyranny of the majority. A majority, or those who act in its name, can threaten free speech through government and, even more effectively, through the private efforts of those in the society who demand conformity:

> Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant—society collectively, over the separate individuals who compose it—its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries.

John Stuart Mill, *On Liberty* 13 (London, John W. Parker & Son 1859). Therefore, quite apart from any limits on government censorship, society needed limits on nongovernmental suppression:

> Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them . . . . There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.

Id. at 13-14. HB20 shields against private suppression of private speech, and it fits squarely within the scope of common-carrier regulation.

Common carrier law has always existed in America. As applied to

communications carriers, it recognizes that some firms offer conduits for expression that must be nondiscriminatory. Although the firms are private, their conduits are open to the public and serve a public function, and thus must be offered without discrimination. The anti-discrimination requirement is compatible with the First Amendment because, far from limiting the speech of the companies, it protects the openness of their conduits for the speech of others.

A. Social Media Platforms May Lawfully Be Designated Common Carriers

Since medieval times, common carriers and public accommodations have been barred from discriminating—as Professor Adam Candeub, the leading scholar on the history of common carriage, described in his expert opinion in the district court. *See* Federal Rule of Civil Procedure 26(a)(2)(B) Expert Witness Report of Adam Candeub 3–8, *NetChoice, LLC v. Paxton*, No. 21-cv-00840-RP (W.D. Tex. Nov. 22, 2021). Common-carriage law was the beginning of anti-discrimination law. Indeed, common-carrier regulation inspired modern civil-rights laws. *See* Charles M. Haar & Daniel Wm. Fessler, *The Wrong Side of the Tracks: A Revolutionary Rediscovery of the Common Law Tradition of Fairness in the Struggle Against Inequality* 15 (1986).

Common carriers have been defined narrowly or broadly, depending on the extent of the regulation. For purposes of rate setting and other relatively intrusive regulation, common carriers have been defined relatively narrowly, often focusing on essential industries with market dominance. *See, e.g.*, *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 525 F.2d 630, 641–45 (D.C. Cir. 1976) (defining common carrier

status for telephones). But for anti-discrimination purposes, common carriers (and the associated category of public accommodations) have been defined more broadly—by function, not dominance—to include all conveyances and accommodations that serve the public, for example, innkeepers and restaurants. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 284 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 302–05 (1964) (regarding restaurants).

Here, because only the dominant social media platforms are covered—not to mention that communications networks have been regulated for centuries as common carriers—the Platforms are well within even narrow conceptions of common carriers. There consequently is no question that Texas has legislative power to impose the mild informational and nondiscrimination requirements found in HB20.

No one doubts that social media companies are communications firms that carry expression, and communications firms have long been regulated as common carriers. By way of illustration, the Communications Act of 1934, which established the Federal Communications Commission, contains this definition: "The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission . . . ." 47 U.S.C. § 153(11).

In section 230, Congress recognized that the Platforms and other social media firms function as common carriers of communications. Passed as part of the Telecommunications Act of 1996, section 230 protects social media platforms from being treated as "the publisher or speaker of any information provided by another

information content provider." 47 U.S.C. § 230(c)(1). The section thus recognizes that the Platforms are conduits for others' information. And as with common carriers, the Platforms are exempted from liability for carrying unlawful information on behalf of their users. The Platforms have vigorously pursued this common-carriage liability exemption in the courts and have urged Congress not to ditch it. *See, e.g.*, *Tech CEOs Senate Testimony Transcript Oct. 28, 2020*, at 19:11 (Oct. 28, 2020), https://www.rev.com/blog/transcripts/tech-ceos-senate-testimony-transcript-october-28 (statement of Jack Dorsey); *id.* at 32:52–34:32, 2:44:39 (statements of Mark Zuckerberg).

Beyond bearing an unmistakable similarity to other types of communications providers that are regulated as common carriers, such as telegraph and telephone companies, social media firms easily satisfy the explicit common carrier tests set forth by the courts. When a company serves a public function and offers its services to the public, it can qualify as a common carrier merely on this account—so even a small bus company can be treated as a common carrier. This test involves only "[t]he common law requirement of holding oneself out to serve the public indiscriminately." *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014) (quoting *Nat'l Ass'n of Regul. Util. Comm'rs*, 525 F.2d at 642). Another test is market dominance, which exists when the services of one or a few companies are so prevalent as to leave the public with only meager alternatives.

The Platforms meet both definitions. First, they serve a public function, providing the communications conduit for the information age, and they offer their

services to anyone who opens an account. The internet is the "modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

Second, the Platforms enjoy sufficient market dominance to be recognized as common carriers. *See Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) (noting that, like utilities, "today's dominant digital platforms derive much of their value from network size").

Yet another characteristic of a common carrier is that it receives numerous government privileges—with the expectation that it will serve the public. A government franchise or other similar privilege comes with corresponding duties. As put over 100 years ago, "In the use of such franchises all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike." Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 Colum. L. Rev. 514, 531 (1911) (quoting *Messenger v. Pa. R.R. Co.*, 36 N.J.L. 407, 413 (1873)). In this instance, the Platforms have benefited profoundly from government, most notably from section 230(c), which gives them an immunity not enjoyed by those who engage in communication through print or in person. So great a privilege, like a franchise, subjects the Platforms to common carrier duties.

For any of these reasons—the Platforms' function, market dominance, and privileged status—the Platforms qualify as common carriers and can be regulated as such. Indeed, HB20 begins with legislative findings that "social media platforms function . . . as common carriers . . . and have enjoyed governmental support in the United States," and that the "social media platforms with the largest number of users

are common carriers by virtue of their market dominance." HB20 § 1(3)–(4).

Nonetheless, the district court declared that "HB20's pronouncement that social media platforms are common carriers . . . [did] not impact [its] legal analysis." Dist. Ct. Op, 15. This is astonishing, for courts must uphold the legislature's determination, unless the statutory determination is so arbitrary and capricious as to be without a rational basis. *See Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 491 (1955). As has been seen, this legislative determination is far from being without rational basis. Indeed, it is eminently justified by the platforms' function, market dominance, and privileged status.

B. Texas's Regulation of the Platforms as Common Carriers Complies with the First Amendment

HB20 is consistent with the First Amendment's speech and press guarantee because the Platforms are in fact common carriers. Not only as determined by the legislature but also in reality, the Platforms serve as conduits for the speech of others. So, in barring the Platforms from discriminating in those conduits on the basis of viewpoint, HB20 does not restrict their speech.

Barring discrimination in such conduits is the most basic purpose of common carrier doctrine, and it is clearly and unequivocally constitutional for a state civil-rights statute to forbid viewpoint discrimination by communications carriers. *See* Fred H. Cate, *Telephone Companies, the First Amendment, and Technological Convergence*, 45 DePaul L. Rev. 1035, 1037 & n.14 (1996) (first citing *Missouri Pac. Ry. v. Larabee Flour Mills Co.*, 211 U.S. 612, 619 (1909) ("This lies at the foundation of the law of common carriers. Whenever one engages in that business, the obligation

of equal service to all arises, and that obligation . . . can be enforced by the courts."); then citing *Scofield v. Lake Shore & Mich. S. Ry.*, 3 N.E. 907, 919 (Ohio 1885) ("The duty to receive *and* carry was due to every member of the community, and in an equal measure to each.")).

Each new communications technology has been subject to common carrier non-discrimination regulation without violating the First Amendment. This was true of the telegraph. *Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 14 (1894) (holding that telegraphs, because they "resemble[d] railroad companies and other common carriers," were "bound to serve all customers alike, without discrimination"). It was true of the telephone. *W. Union Tel. Co. v. Call Publ'g Co.*, 181 U.S. 92, 100 (1901) ("As a consequence of [public service], all individuals have equal rights both in respect to service and charges."); *State ex rel. Webster v. Neb. Tel. Co.*, 22 N.W. 237, 239 (Neb. 1885) (holding that a telephone company, as a common carrier, must provide service to all customers without discrimination). Today, it is true of social media platforms.

Whenever common carrier status was applied to a new communications technology, the affected companies protested that they were different and so should not be considered common carriers. Here, the social media firms are doing the same. But the Platforms clearly qualify and so can be barred from discriminating without violating the First Amendment. (If they not are not common carriers and so are not subject to anti-discrimination regulation, then that also must be true for telephones, radio, and other information conduits.)

Far from threatening the First Amendment, the application of common-carrier

laws to communications companies is understood to have created a "second free speech tradition." Tim Wu, Brookings Inst., Is Filtering Censorship? The Second Free Speech Tradition 2 (2010), at https://www.brookings.edu/research/is-filtering-censorship-the-second-free-speech-tradition. To be precise, "a rich body of common carrier and quasi–common carrier law prevented many of these companies from engaging in viewpoint discrimination or otherwise threatening the interests that the First Amendment protects." Genevieve Lakier, "The Non-First Amendment Law of Freedom of Speech," 134 Harv. L. Rev. 2299, 2319 (2021).

The underlying reasoning why anti-discrimination laws do not violate the First Amendment rights of common carriers is that the companies serve as conduits for the speech of others. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 629 (1994); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (both regarding "conduit"). Indeed, the Platforms themselves repeatedly assert that they carry only the speech of others. Section 230(c)(1) protects the Platforms from being treated as the "publisher or speaker" of the speech they convey. 47 U.S.C. § 230(c)(1). Relying on this provision to insist that the speech they carry is not their speech, the Platforms have secured extensive protection from liability.

The Platforms want to have their cake and eat it too. They cannot claim that they convey only third-party speech for section 230 immunity and then claim that speech as their own for First Amendment purposes.

Not merely their position, this is federal law. This Court cannot treat them as publishers unless section 230 itself—which precludes treatment of the Platforms as

the publishers of their users' speech—is unconstitutional. But that isn't what the Applicants are arguing.

The mistake is in assuming that the Platforms are being barred from expressing themselves in their own speech. In fact, they are being prohibited from discriminating against the speech of others. Newspapers select and publish their articles; their articles pages are not open to the public to post their own articles. So a newspaper is speaking for itself when it makes editorial decisions about letters and other outside contributions. In contrast, the Platforms open up their conduits to members of the public to convey their speech. Only after individuals say something "objectionable" do the Platforms kick some of them off.

Put differently, a publisher's editorial discretion comes before anyone can publish in their publications. This prior editing is jealously guarded because what a newspaper or other publisher publishes under its name is its expression. The Platforms do the opposite. They broadly allow members of the public to express themselves on their platforms, and only later do the Platforms remove some individuals' posts. That is not editing the Platforms' speech but excluding the speech of others.[2]

The social media companies themselves say they offer "platforms," not "publications." A platform is a place to be occupied by the public, a publication ordinarily is not.

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[2] Similarly, a private club with selective membership can discriminate, but a store that allows members of the public to enter the premises can be barred from discriminating.

So, when Texas forbids the Platforms from discriminating against speech on grounds of viewpoint, it is protecting the public's speech, not limiting the speech of the Platforms.[3]

C. Existing Discrimination Is No Excuse for Violating Common Carrier Nondiscrimination Duties

The district court and Applicants brush aside the common-carrier argument by claiming that social media engage in discriminatory "editorializing" and, therefore, cannot be treated as common carriers. The district court opined that it "starts from the premise that social media platforms are not common carriers" and justifies this startling and conclusory claim with the assertion that "social media platforms 'are not engaged in indiscriminate, neutral transmission of any and all users' speech.'" *NetChoice, LLC*, 2021 WL 5755120, at *8 (citing *U.S. Telecom Ass'n*, 825 F.3d at 742). (The quotation is puzzling, as it comes from a case that upheld the FCC's network neutrality rule issued pursuant to its authority to regulate common carriers under 47 U.S.C. § 201 and does not even mention social media platforms.)

But a company's existing discrimination does not mean that it cannot be barred from discriminating as a common carrier. If that strange standard were to prevail, then states could never bar racial, sexual, or viewpoint discrimination by common carriers. Such a result defies both common sense and the law.

Common carriers have long been said to be companies that hold themselves

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[3] Of course, if a Platform chooses to convey only limited types of content, it can have a First Amendment right against being forced to carry other content. *See Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (regarding indecent content). But that is not the question here, where the Platforms are barred only from discriminating on the basis of viewpoint.

out to the public for business. The Platforms absurdly twist this legal proposition, arguing that because they kick users off their platforms or otherwise discriminate against them, they cannot be holding themselves out to the public. But the holding-out standard for determining whether a company can be considered a common carrier is not the same as the duty of common carriers not to discriminate, and the two shouldn't be conflated.

To hold out oneself out to the public merely means to offer one's services to the public, even if not all the public. It was in this sense that the Heart of Atlanta Motel held itself out to the public and so could be regulated as a public accommodation. Similarly, railways, bus companies, and communications carriers can be regulated as common carriers. The point isn't that they don't discriminate, but that they offer services to the public and so can be barred from discriminating.

The Platforms also attempt to escape their common carrier status on the theory that their services are particularized. But so are the services of a railway company. Members of the public can select particular routes, times, and classes of car. The offer of such services to the public means that the company is a common carrier.

As put long ago by Burdick, "a person, by holding himself out to serve the public generally, assumed two obligations," one of which was "to serve all who applied." Burdick, *supra*, at 518. Even earlier, Lord Chief Justice Holt explained that "one engaged in a common calling" has taken "upon himself a public trust for the benefit of the rest of his fellow-subjects" and has "made profession of a trade which is for the public good"—that he has "made profession of a public employment." *Lane v. Cotton*

[1700] 88 Eng. Rep. 1458, 1464–65. Thus, "If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier . . . ." *Id.* This was an anti-discrimination duty imposed by law, regardless of the previous propensity of a carrier to discriminate.

* * * *

For all the reasons recited above, the Platforms are common carriers, and being conduits for the speech of others, they can constitutionally be barred from engaging in viewpoint discrimination. Far from interfering with the Platforms' own speech, HB20 requires them not to discriminate against other people's speech in conduits that the Platforms open to the public. This fits squarely within established common carrier doctrine.

II. Texas Has a Compelling Interest in Preventing Viewpoint Discrimination, Whereas the Platforms Have No Corresponding Speech Interest

Government has a central role in defending civil liberties, including a profound interest in protecting the open exchange of expression. HB20 itself declares that "this state has a fundamental interest in protecting the free exchange of ideas and information in this state." HB20, § 1(2). This openness in sharing ideas and information is the essential foundation of political freedom, scientific progress, artistic and cultural excellence, and much else that is invaluable. So, Texas has an interest of the highest order in adopting this statute.

But such an interest, although compelling, is not needed to justify HB20. On

the contrary, as discussed below, the compelling government interest test is inapplicable, because communications common carriers do not have a significant constitutional interest in the speech they carry for others, and because the Platforms are acting under color of federal law, sometimes even at the behest of government officials, when they silence disfavored viewpoints.

A. The State Has a Compelling Interest in Preventing Viewpoint Discrimination, and HB20 Is a Narrowly Tailored Regulation

Protecting freedom of debate is one of the most fundamental of state interests, and HB20 is narrowly tailored to protect that interest. All that is valuable depends on open inquiry and exchange of opinion. Free and unfettered discussion is essential for political knowledge and accountability, for religious inquiry, and for cultural and scientific progress. Without freedom of speech, government itself would lose its legitimacy. So, when much of the nation's political, religious, cultural, and scientific debate has ended up on the Platforms, the states have a deep, even existential, interest in barring viewpoint discrimination.[4]

This is especially clear because section 230 privileges social media (over print media and in-person communication) to censor Americans and the content they produce, "whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2)(A). This is *federally* privatized censorship. It therefore is crucial to recognize the *state* interests in protecting speech against the danger of illicit

[4] It is commonly assumed that only political speech is at risk from tech censorship, but scientific speech is also affected. *See* Brief for Amicus Curiae Donald W. Landry, M.D. in Support of Defendant-Appellant in *NetChoice v. Paxton*, 5th Cir. No. 21-51178.

influence by the federal government. Indeed, the common-carrier anti-discrimination requirement gives private companies the spine to resist government pressure for censorship.

That states have a compelling interest in barring privatized censorship is familiar from John Stuart Mill's great book *On Liberty*. Worried primarily about private penalties on opinion (as noted at the top of this argument), Mill explained how such penalties ground down individuality and deprived society of the freedom that was the source of its moral and other progress. Such penalties dampened not only the efforts of "great thinkers" but also the mental advancement of "average human beings." Mill, *supra*, at 62. Especially in a nation such as ours, in which we aspire to govern ourselves, all of us need freedom of inquiry and debate.

HB20 is narrowly tailored to this overriding interest. The statute merely seeks disclosure and bars viewpoint discrimination. *See* HB20 §§ 120.051, 143A.002. It doesn't bar content discrimination. It doesn't indulge in rate setting or other severe common carrier regulations. It affects only those platforms that most clearly are common carriers—those that qualify by both function and dominance. *See id.* §§ 120.001–.002. And it permits only injunctive and declaratory relief, not damages or penalties. *Id.* § 143A.007(b). It thus fits the state's existential interest very tightly.

B. Common Carriers Have No Speech Interest in Suppressing the Views of Others Conveyed in Their Conduits

Notwithstanding that there is a compelling government interest in protecting open debate, a compelling interest is more than is needed to defend HB20. The reason

is that the Platforms' speech interests here are at best minimal.

The Platforms have little or no First Amendment speech interest here because they are affected only in their role as conduits for other people's speech, not their own speech. Of course, they may have a personal or economic interest in suppressing some views and permitting others. But because the speech they suppress is not theirs, they do not have a constitutionally recognized interest in it as their own speech. So they cannot have a speech interest in discriminating against minority or dissenting viewpoints.

The Platforms say the statute's ban on viewpoint discrimination will prevent them from taking down all sort of bad speech, including pornography, terrorist propaganda, Nazi opinion, and Holocaust denial. But the Platforms protest too much. For example, as to pornography, they widely permit it while barring the speech of public officials and witnesses in congressional hearings. And in any case, HB20 forbids only viewpoint discrimination, not content discrimination. So in fact the Platforms are not barred from taking down pornography.

When it comes to terrorist speech, federal law already prohibits the Platforms from providing material support for terrorist organizations (including hosting their accounts and videos). 18 U.S.C. § 2339b. Once again, contrary to their protestations, the Platforms can remove the worrisome material.

As for Nazi speech and Holocaust denial, *amicus* Professor Hamburger has distinctively personal reasons to consider it regrettable. But like other viewpoints, it is part of free debate. It should not be used as a bogey man to excuse the suppression

of domestic political, religious, and scientific dissent.

HB20's common carrier approach mimics the First Amendment's barrier to viewpoint discrimination. As conduits, the Platforms cannot have a speech interest in suppressing the speech of others.

C. The Platforms Have No Speech Interest in Carrying Out Privatized Government Censorship

Accentuating this point—that the Platforms lack any First Amendment speech interest in shutting down speech—is that the federal government is using the Platforms to privatize censorship. Private companies have no First Amendment speech interest in effectuating government suppression.

Seventeenth-century English censorship was run through private entities (the Universities and the Stationers Company), *see generally* Philip Hamburger, "The Development of the Law of Seditious Libel and the Control of the Press," 37 Stan. L. Rev. 661 (1985), and this was the primary example of what was forbidden by the First Amendment's speech and press guarantee. Now, Congress, through section 230, has privileged social media companies from legal recourse when they restrict material in accord with a congressional list of disfavored materials. This doesn't mean the companies are violating the First Amendment. But it does indicate that the federal government, in working through private companies, is abridging the freedom of speech and that the companies are cooperating. Entities that are privileged by government to restrict speech "whether or not such material is constitutionally protected," 47 U.S.C. § 230(c)(2)(a), cannot claim to have a free speech interest in such suppression.

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Texas's interest goes far beyond what is required to uphold its anti-discrimination statute. This is especially clear because the Platforms have no free speech interest in stifling the speech of others or in carrying out privatized government censorship.

III. There Is No Irreparable Harm, So Vacating the Stay Would Undermine the Regular Due Process of the Courts

An emergency application to a Supreme Court justice makes sense in a case involving grave harm, such as an execution. But no irreparable harm or other emergency arises from HB20. So, the real danger is that the ordinary and orderly due process of the courts will be circumvented.

A. There Is No Irreparable Harm from HB20

The Applicants justify their emergency application by claiming they will suffer irreparable harm. They say they face "immediate irreparable injury many times over" because it will be "impossible" to comply with the anti-discrimination provisions without losing money from advertisers who want the discrimination.

But it is not evident that there is any emergency or other threat of irreparable harm. Why not? The statute's disclosure and anti-discrimination chapters provide for only injunctive and declaratory relief, not damages. HB20 §§ 120.051, 143A.007-008. This mild statute imposes no legal consequences on the Platforms for disobeying the disclosure and anti-discrimination provisions until after a trial and judgment. And even then, the only consequence is an order to comply. It is implausible that HB20

will open the floodgates to users' lawsuits that irreparably harm the largest tech platforms in the world.

If the Platforms believe that adhering to HB20 will hurt their constitutional or business interests, they are not constrained to comply. If they win their challenge in the ordinary course of justice, the Platforms will be vindicated. If they lose and the statute is upheld as constitutional, then they presumably will change their behavior and comply—but face no consequence for their prior failure to comply.

So what is the emergency? Where is the irreparable harm?

B. Vacating the Stay Would Circumvent the Regular and Orderly Course of Justice

In relying on claims of irreparable harm, the Applicants will have avoided having the legal questions in this case decided in ordinary and orderly trial proceedings. This is not to say that is their goal, but it is the effect.

Trials take time, but they provide for necessary factual development. In contrast, when claims of urgency are used to secure special judicial treatment—in the form of a preliminary injunction and an emergency application to the Supreme Court—a party can avoid the ordinary proceedings of the courts. The special proceedings supplant careful inquiry and reasoning with demands that courts act quickly, even sometimes spasmodically.

The Applicants are not morally superior to others who come before this Court. They can await the outcome of careful trial proceedings and then, if necessary, seek review all the way up to this Court on a full trial record, without suffering any irreparable harm. That would allow discovery on all sort of important factual

questions—such as whether the Platforms cooperated with the government in censoring Americans. There also could be extensive briefing from *amici* on the common-carrier and free-speech questions—briefing that is necessarily truncated on this emergency application.

The preliminary injunction, being obtained on an accelerated schedule compared to regular trial proceedings, already unnecessarily sidetracked this case away from the orderly processes of the courts—so that this case has now come up through the courts with an inadequate record. Rather than encourage this sort of unwarranted departure from regular process, this Court should refuse to vacate the stay. If this Court were to vacate the stay, it would allow the Applicants to use an unjustified claim of irreparable harm to escape the ordinary and orderly course of law, including the formation of a full record and the development of complex legal arguments on that record.

C. Risks of Relying on the Emergency Application to Grant Vacatur

Some of the risks for this Court are evident from the Applicants' emergency application. First, the Applicants suggest that the Texas anti-discrimination statute would "substantially injure" the Platforms such as by preventing them from removing pornography and spam, ultimately costing them millions in lost revenue. Emergency Application, 6, 8-9, 39-40. But HB20 bars viewpoint discrimination, not content discrimination. HB20 § 143A.002. So it leaves the Platforms free to remove porn and spam; no emergency would result from the Platforms' claimed inability to moderate vile content.

Second, the application's discussion of likelihood of success on the merits is replete with misstatements that evince the Platforms' desire to raise alarm bells rather than seek careful resolution of this matter through the ordinary course of litigation. For example, the Applicants say that HB20's definition of social media platforms "is content based, because it excludes certain websites based on content—like news, sports, and entertainment." Emergency Application, 29. But that statement is misleading. As the emergency application notes elsewhere, the statute's definition of social media platforms "expressly excludes certain businesses based on content: services that 'consist[] primarily of news, sports, entertainment, or *other information or content that is not user generated*.'" *Id.*, 10, quoting HB20 § 120.001(1)(C) (italics added). In other words, the recitation of "news, sports, and entertainment" information is just illustrative. The statute goes on to exclude all relevant services that provide "other information or content that is not user generated." The statute thereby makes sure that information services of all sorts do not get confused with information conduits or carriers. So the claim about a content-based definition of social media platforms is simply not true.

For another example, the statute applies only to social media platforms with more than 50 million monthly active users in the United States, in response to which the Applicants claim that this number is "arbitrary," that there is no legitimate reason for it, and that it therefore "can be explained only as viewpoint discrimination against 'Big Tech.'" Emergency Application, 30, 33. But there is of course the alternative explanation that the statute is aimed at regulating common carriers. *See*

supra, 7.

And then there is the claim that the Platforms remove material and so cannot be common carriers, Emergency Application, 26-27—as if discrimination by a bus company or AT&T could justify them in saying that they were not common carriers and so could not be subjected to common carrier anti-discrimination requirements.

The application further suggests that the Platforms have an expressive right to exclude some colors of opinion, because this sort of exclusion is an expression of the Platforms' views. Emergency Application, 19-20. Similarly, railroads once thought they were constitutionally protected in excluding some colors of persons. Undoubtedly, this exclusion expressed their views about such persons. But conduits and common carriers do not have an expressive right to discriminate.

Finally, the Platforms say that the Texas's statute is "similar" to Florida's law against Tech censorship, Emergency Application, 2—thereby tarnishing the Texas law with the failings of the Florida law. In fact, the Texas statute is carefully framed to comply with the First Amendment in ways that the Florida statute was not.

The emergency application is thus replete with mistaken, misleading, or at least questionable statements. It thereby illustrates some of the risks of acting on an "emergency" application when there is no emergency or other irreparable harm. More generally, the application suggests the danger of allowing a party to use an exaggerated claim of irreparable harm to evade the regular and orderly due process of the courts, including the in-depth development of a factual record and legal arguments based on that record.

CONCLUSION

Because HB20 is a constitutional regulation of the Platforms as common carriers, because the Platforms have little or no speech interest here, and because no irreparable harm would result from the stay, this Court should deny the application to vacate the stay.

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Respectfully submitted,

Shon Hopwood
Counsel of Record
Kyle Singhal
HOPWOOD & SINGHAL, PLLC
1701 Pennsylvania Ave., N.W.
Washington, DC 20006
Tel: (202) 769-4080
shon@hopwoodsinghal.com

W. Scott McCollough
McCollough Law Firm, P.C.
2290 Gatlin Creek Rd.
Dripping Springs, TX 78620

Evan M. Goldberg
Evan Miles Goldberg, PLLC
400 East 57th Street, Ste. 8F
New York, NY 10022