No. 21-51178

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

Plaintiffs–Appellees,

v.

Ken Paxton, in his official capacity as Attorney General of Texas,

Defendant–Appellant.

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

BRIEF OF *AMICUS CURIAE* THE KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY IN SUPPORT OF PLAINTIFFS–APPELLEES

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Certificate of Interested Persons

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The undersigned counsel of record for *amicus curiae* certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1, in addition to those listed in the Appellees' Certificate of Interested Persons, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amicus curiae: The Knight First Amendment Institute at Columbia University is a not-for-profit corporation. It has no parent corporation, and no publicly-held corporation owns 10 percent or more of its stock.

Counsel for amicus curiae: Scott Wilkens, Alex Abdo, and Jameel Jaffer of the Knight First Amendment Institute at Columbia University.

/s/ Scott Wilkens
Scott Wilkens

Counsel for Amicus Curiae

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Interests of Amicus Curiae[1]

The Knight First Amendment Institute at Columbia University ("Knight Institute" or "Institute") is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute's aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government.

Amicus has a particular interest in this case because of the vital role social media platforms play as forums for public discourse. The case may have far-reaching implications for the free speech rights of the platforms and their users, and for the ability of government to enact legislation essential to ensuring that the digital public sphere serves democracy.

The Institute asks this Court to affirm the decision below as to Section 7 of HB20—the anti-censorship ("must-carry") provision. In addressing the must-carry provision, the Institute seeks to clarify certain aspects of First Amendment law the parties misconstrue. The Institute also seeks to clarify the legal framework that applies to HB20's disclosure provisions, which are contained in Section 2.

[1] No counsel for a party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. The parties have consented to the filing of this *amicus* brief.

Summary of the Argument

This case raises a host of novel questions about the application of the First Amendment to laws that regulate social media. The Knight Institute submits this brief to make three points:

First, the Court should reject both parties' broadest statements about the application of the First Amendment in this context. For example, Texas contends that the platforms' content-moderation decisions do not implicate the First Amendment at all, and Plaintiffs suggest that any regulation implicating the platforms' content-moderation decisions must be regarded as unconstitutional per se. In effect, the parties offer two diametrically opposed theories of the First Amendment—one that would give the government sweeping authority over the digital public sphere and impede social media companies from addressing real harms online, and another that would make it nearly impossible for governments to enact even carefully drawn laws intended to ensure that the digital public sphere serves democracy. The Court should reject both of these theories. First Amendment doctrine requires a more nuanced analysis than either party seems to recognize.

Second, the Texas law's must-carry provision is unconstitutional. It is subject to strict scrutiny as a content-based regulation of speech. The provision is a regulation of speech because it regulates the platforms' content-moderation decisions, and these decisions entail the exercise of editorial judgment. And the

provision is content-based because its purpose is to restrict the platforms' editorial decisionmaking based on the viewpoint expressed in the underlying content. The provision cannot survive strict scrutiny because a generic interest in "protecting the free exchange of ideas and information"—which is the interest Texas asserts here—is not by itself a compelling interest sufficient to justify overriding the platforms' editorial judgment.

Third, at least some of the law's disclosure provisions should be evaluated under the framework the Supreme Court established in *Zauderer v. Office Of Disciplinary Counsel Of the Supreme Court Of Ohio*, 471 U.S. 626 (1985). In *Zauderer* and its progeny, the Supreme Court has made clear that, in the commercial context, compelled disclosures of "purely factual and uncontroversial information about the terms under which [a company's] services will be available" are constitutional unless they are "unjustified" or impose an "undu[e] burden[]" on protected speech. *Zauderer*, 471 U.S. at 651. The disclosure provisions addressed in this brief should be evaluated under *Zauderer* because they require the disclosure of purely factual and uncontroversial information about the terms on which the platforms' services are offered. The Court should uphold the disclosure provisions if it determines that they are not unjustified and do not impose an undue burden on

speech. The Knight Institute takes no position on whether HB20 satisfies these requirements.[2]

Argument

I. The Court should reject the parties' categorical arguments about the application of the First Amendment to regulation of social media.

The parties take extreme, opposing positions regarding the application of the First Amendment to social media platforms. Texas contends that laws forbidding the platforms from curating the speech on their sites do not implicate the First Amendment "because they do not regulate [the platforms'] speech at all—they regulate [only the platforms'] conduct."[3] It also argues that "no First Amendment problem arises when government requires platforms to merely host third-party content."[4] Plaintiffs, by contrast, take the broadest possible view of social media platforms' First Amendment rights. In this case, and in a parallel one challenging a Florida law, Plaintiffs suggest that any law implicating editorial judgment must be subject to strict scrutiny, or perhaps even regarded as per se unconstitutional. They

[2] The Knight Institute does not address Plaintiffs' other claims, including its claim that Texas's law is facially invalid because it was enacted with a viewpoint discriminatory purpose and its claim that a number of provisions of the law are unconstitutionally vague. If the Court agrees with those claims, it may not need to reach the questions the Institute addresses in this brief.

[3] Brief for Appellant at 16, *NetChoice, LLC v. Paxton*, No. 21-51178 (5th Cir. Mar. 2, 2022).

[4] Appellant's Reply in Support of Motion to Stay Preliminary Injunction Pending Appeal at 2, *NetChoice, LLC v. Paxton*, No. 21-51178 (5th Cir. Dec. 30, 2021).

argue that the law's disclosure provisions, for example, are "*per se* invalid as intrusions targeting editorial functions."[5]

Thus, the parties offer two theories of the First Amendment—one that would render the First Amendment largely irrelevant to the question of how governments may regulate social media, and another that would insulate the platforms from almost any kind of regulation. But the Court need not choose between "all" or "nothing" in this sphere. The Plaintiffs are correct that social media companies' content-moderation policies and decisions reflect the exercise of editorial judgment. A law is not unconstitutional, however, merely because it implicates editorial judgment. Content-based laws are constitutional if they survive strict scrutiny, and content-neutral laws are constitutional if they survive intermediate scrutiny. Moreover, laws requiring the disclosure of purely factual and uncontroversial information about the terms on which a service is offered are constitutional if they are not unjustified and do not impose an undue burden on speech.

The Court should accordingly reject both Texas's theory of the First Amendment (the "nothing" theory) and Plaintiffs' theory (the "all" theory). It should reject these theories because they are inconsistent with controlling caselaw, but also because neither of them would serve First Amendment values well in the digital age.

[5] Plaintiffs' Motion for Preliminary Injunction at 24, *NetChoice, LLC v. Paxton*, No. 1:21-cv-00840 (W.D. Tex. Nov. 1, 2021).

Texas's version of the First Amendment would give the government sweeping authority over the digital public sphere and impede social media companies from addressing real harms online. Plaintiffs' theory would make it extremely difficult, if not impossible, for governments to enact even carefully drawn laws intended to protect the free speech rights of the platforms' users and to ensure that our system of free expression serves democracy. Neither of these theories is defensible, and the Court should reject them both.

II. The Texas law's must-carry provision is unconstitutional.

The must-carry provision is a content-based regulation of speech and therefore must be evaluated under strict scrutiny. The provision regulates social media platforms' content moderation decisions, which involve the exercise of editorial judgment, an aspect of speech. The must-carry provision is content-based because its purpose is to restrict the platforms' editorial decisionmaking based on the viewpoint expressed in the underlying content. The must-carry provision fails strict scrutiny because Texas's asserted interest—a generic interest in "protecting the free exchange of ideas and information"—is not by itself a compelling interest sufficient to justify overriding the platforms' exercise of editorial judgment. Nor is the provision narrowly tailored to Texas's stated interest.

A. The First Amendment protects the exercise of editorial judgment.

In an important series of cases, the Supreme Court has recognized that the First Amendment protects the exercise of "editorial judgment." In *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), the Court invalidated a statute requiring newspapers that criticized political candidates to afford those candidates an opportunity to reply, in the newspapers' own pages, free of charge and with equal prominence and space. 418 U.S. at 244 & n.2. The Court concluded that the statute "fail[ed] to clear the barriers of the First Amendment because [it] intru[ded] into the function of editors" by compelling them "to publish that which 'reason' tells them should not be published." *Id.* at 256, 258.

Observing that "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising," the Court held that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* at 258. In his concurrence, Justice White underscored that "the very nerve center of a newspaper," is "the decision as to what copy will or will not be included," and that the First Amendment prohibits the government from dictating "the contents of [a newspaper's] news columns or the slant of its editorials." *Id.* at 259–61 (White, J., concurring); *see also Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412

U.S. 94, 124 (1973) ("editing is what editors are for; and editing is selection and choice of material").

Since *Tornillo*, the Court has held that the First Amendment protects the exercise of editorial judgment in other contexts, and by other kinds of actors. For example, in *Pacific Gas & Electric Company v. Public Utilities Commission of California*, 475 U.S. 1 (1986) (plurality op.),[6] the Court considered a Public Utilities Commission order requiring a public utility to include a third party's opposing views in the utility's billing envelopes. *Id.* at 5–7.[7] The Commission issued the order after finding that the utility's customers "'will benefit . . . from exposure to a variety of views.'" *Id.* at 6 (quoting Public Utilities Commission). The Court invalidated the order, however, concluding that it impermissibly interfered with the utility's editorial judgment by requiring it to disseminate views opposed to its own, which in turn forced the utility to dissasociate itself from those views. *Id.* at 14–16. The Court wrote: "[t]hat kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Id.* at 16.

In *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994), the Court considered must-carry provisions that required cable operators to carry a set number

[6] All subsequent citations to *Pacific Gas* are to the plurality opinion.

[7] The billing envelopes already included the utility's own newsletter, which the Court analogized to a small newspaper. *Id.* at 5, 8.

of local broadcast stations. *Id.* at 661. Congress enacted the provisions in order to "correct [a] competitive imbalance" between cable and broadcast television that was "endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues." *Id.* at 633. The Court held that "through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'seek[] to communicate messages on a wide variety of topics and in a wide variety of formats.'" *Id.* at 636 (quoting *Los Angeles v. Preferred Commc'n, Inc.*, 476 U.S. 488, 494 (1986)). While the Court ultimately upheld the must-carry provisions, it did so only after recognizing that the "provisions interfere[d] with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations." 512 U.S. at 643–44.

The Supreme Court's nearly contemporaneous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), conferred First Amendment protection on yet another form of editorial judgment. In *Hurley*, a gay rights group challenged its exclusion from a parade under a state court's interpretation of Massachusetts's public accommodations law. *Id*. at 566. There was no dispute that gay people could participate in the parade as members of individual parade units. *Id.* at 572. The dispute arose because the state court applied

the public accommodations law to require that the gay rights group be admitted "as its own parade unit carrying its own banner." *Id.*

The Court held that the parade organizer exercised editorial judgment in excluding the gay rights group, likening the organizer's selection of participants to a newspaper's selection of news stories and editorials. *Id.* at 570. The participation of the gay rights group in the parade, the Court reasoned, would signify the parade organizer's endorsement of the group's message, which would alter the parade's expressive content and thus the organizer's own message. *Id.* at 572–75.

The protection that the Court conferred on editorial judgment in *Tornillo*, *Pacific Gas*, *Turner*, and *Hurley* is vital for more than one reason. Protecting editorial discretion in these contexts was a way of recognizing and affirming speakers' autonomy by giving them control over their own message. *Hurley*, 515 U.S. at 573; *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790–91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."). It was also a way of protecting public discourse from government intervention that might have distorted democratic self-governance. *E.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) (noting that "content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government

to distort public debate"). As the Court has noted, the First Amendment "embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad." *Brown v. Hartlage*, 456 U.S. 45, 60 (1982); *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945) (First Amendment intended to ensure "the widest possible dissemination of information from diverse and antagonistic sources"); *see also Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam).

B. The must-carry provision overrides social media platforms' editorial judgment.

Social media companies exercise editorial discretion in at least two contexts: when they specify "community standards" that restrict what categories of content users can post, and when they remove or attach warning labels to user content.

When social media companies specify and enforce community standards, they make decisions roughly analogous to the ones the Supreme Court held to be protected in *Tornillo*, *Pacific Gas*, *Turner*, and *Hurley*. They decide what categories of content will appear on their platforms and what categories will not. Their decisions reflect judgments about the relative value of those categories of content. And collectively, these decisions determine the expressive character of the product they provide to their users.[8] In *Tornillo*, the Court observed that "[t]he choice of

[8] *See* Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, Knight First Amendment Institute at Columbia University (March 25, 2020), https://perma.cc/M2SP-2WSA (observing that social media platforms, like

material to go into a newspaper" is at the core of editorial judgment. 418 U.S. at 258; *see also id.* at 261 ("the decision as to what copy will or will not be included" is "the very nerve center of a newspaper") (White, J., concurring); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673, 683 (1998) (rejecting First Amendment challenge to broadcaster's exclusion of political candidate from debate because excluding candidate was in "the nature of editorial discretion"). Here, too, decisions about what content to include or exclude are properly characterized as editorial in nature.

The platforms also exercise editorial judgment when they attach labels to third-party content. Platforms deploy these labels for a variety of reasons, including to alert users to content that may be disturbing and to flag content that platforms believe to be misleading or false.[9] Whereas most content posted on social media platforms is generated by users, labels are distinctive in that they are generated by the platforms themselves.[10] They are roughly analogous to newspaper editorials, in which newspapers speak directly on matters of public concern. As such, they fall

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twentieth-century mass media, "set boundaries on permissible content" and thereby "curate public discourse").

[9] Yoel Roth & Nick Pickles, *Updating our approach to misleading information*, Twitter Blog (May 11, 2020), https://perma.cc/9JJ7-JDBM.

[10] *E.g.*, Eugene Volokh, *Treating Social Media Like Common Carriers?*, 1 J. Free Speech L. 377, 433 (2021) (acknowledging that "posting fact-checks or warnings" is platform speech).

comfortably within the scope of "editorial judgment" as the Supreme Court has defined the concept. As the Court made clear in *Tornillo*, editorial judgment encompasses the "treatment of public issues," which the attachment of warning labels generally is. 418 U.S. at 258. And attaching labels to content also reflects decisions about the value of the speech to which the labels are attached, just as specifying community standards does. Even if the attachment of a warning label did not entail the exercise of editorial judgment, it would still constitute speech protected by the First Amendment, for the same reasons that an editorial constitutes speech.

That social media companies exercise editorial judgment in these two contexts does not mean that all of their business practices fall within the scope of the First Amendment, of course. The relevant inquiry is not whether a regulated entity exercises editorial judgment in *some* contexts, but whether the entity exercises editorial judgment in the specific context addressed by the regulation. *See e.g.*, *Assoc. Press v. NLRB*, 301 U.S. 103 (1937) (upholding NLRB order directing Associated Press to reinstate editor fired for his union activity, because the order did not in any way limit the Associated Press's freedom to publish the news as it saw fit).

HB20's must-carry provision overrides the platforms' exercise of editorial discretion by prohibiting them from removing or attaching warning labels to user content. Specifically, the law prohibits "censor[ship]" based on "viewpoint," Tex.

Civ. Prac. & Rem. Code § 143A.002, and it defines "censor" to encompass not only removing user content, but also "restrict[ing], deny[ing] equal access or visibility to, or otherwise discriminat[ing] against" such content, which necessarily includes labeling. *Id.* § 143A.001. In practical terms, because much user content expresses a viewpoint, the must-carry provision prevents platforms from enforcing their community standards, or from attaching labels to user content.

C. The must-carry provision cannot survive strict scrutiny.

HB20's must-carry provision is subject to strict scrutiny because it is a content-based regulation of editorial judgment. The must-carry provision is content-based because its purpose is to restrict the platforms' editorial decisionmaking based on the viewpoint expressed in the underlying content. *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). Therefore, the must-carry provision is constitutional only if it serves a compelling government interest and is narrowly tailored to achieve that interest.

The law cannot survive this scrutiny. As an initial matter, the *generic* interest in protecting the free exchange of ideas and information—which is the interest that Texas cites in defense of the law[11]—is not by itself a compelling one within the meaning of the First Amendment. If it were, all of the must-carry cases cited above—including *Tornillo*, *Pacific Gas*, and *Hurley*—might have come out the other way.

[11] Brief for Appellant, *supra* at 30.

These cases make clear, at a minimum, that any must-carry rule must be predicated on a more specific interest than the one Texas cites here.

In addition, Texas makes no effort to show how the must-carry provision advances its asserted interest. *Turner*, 512 U.S. at 664. As the Supreme Court made clear in *Turner*, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Id.* (citation and internal quotation marks omitted); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000). It must show instead that the law would redress a specific harm. The government did so in *Turner* by showing that the must-carry provisions at issue there were designed to protect the survival of over-the-air broadcast television against the anticompetitive practices of cable operators. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196–213 (1997). Texas's reliance on *Turner* is misplaced, because the state makes no comparable showing here.[12] Texas has not shown that the platforms' enforcement of their acceptable use policies is endangering the free exchange of ideas or information.

Finally, even if HB20's must-carry provision advanced a compelling interest, Texas has failed to show that the provision is narrowly tailored to that interest. For example, HB20 forbids social-media platforms from appending labels to users'

[12] Brief for Appellant, *supra* at 28–30.

posts, but Texas has not explained how this prohibition furthers the free exchange of ideas. It seems clear that barring a category of speakers from contributing to public discourse undermines the free exchange of ideas, rather than furthers it.

III. Several of HB20's disclosure provisions should be evaluated under *Zauderer*.

At least some of HB20's disclosure provisions should be evaluated under the framework the Supreme Court established in *Zauderer*, because they compel the disclosure only of "purely factual and uncontroversial information about the terms under which [the companies'] services will be available." *Zauderer*, 471 U.S. at 651. As *Zauderer* makes clear, compelled disclosures that meet these threshold conditions are subject to a deferential level of scrutiny, under which they will be upheld unless they are "unjustified" or impose an "undue burden" on protected speech.

A. *Zauderer* established a legal framework for analyzing compelled disclosures in the commercial context.

The Supreme Court has held that laws that compel the disclosure of "purely factual and uncontroversial information about the terms under which [a company's] services will be available," should be evaluated less stringently than laws that compel the disclosure of other forms of protected speech. *Zauderer*, 471 U.S. at 651; *see also Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018). Under *Zauderer*'s deferential level of scrutiny, such compelled commercial

disclosures will be upheld unless they are unjustified or impose an undue burden on protected speech. *NIFLA*, 138 S. Ct. at 2372, 2378; *see also Zauderer*, 471 U.S. at 651. The government bears the burden of proving that the disclosure requirement "is neither unjustified nor unduly burdensome." *NIFLA*, 138 S. Ct. at 2377.

In *Zauderer* itself, the Court upheld a rule that required lawyers who advertised their services on a contingency-fee basis to disclose that clients could be required to pay fees and costs. *Zauderer*, 471 U.S. at 650–53. The Court emphasized that the disclosure requirement did "not attempt[] to prevent attorneys from conveying information to the public," but "only required them to provide somewhat more information than they might otherwise be inclined to present"—"purely factual and uncontroversial information about the terms under which [their] services will be available." *Id.* at 650–51. The attorney's "constitutionally protected interest in *not* providing any particular factual information in his advertising [was] minimal," the Court reasoned, because the First Amendment's "protection [of] commercial speech is justified principally by the value to consumers of the information such speech provides." *Id.* (emphasis in original). The Court thus concluded that while "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech, . . . an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*

While *Zauderer* itself concerned a law intended to address consumer deception in commercial advertising, its reasoning applies more broadly, as multiple courts have recognized.[13] Indeed, while the Supreme Court has not addressed the question,[14] all circuit courts to have done so now recognize that *Zauderer* extends beyond the interest in consumer deception and beyond the context of commercial advertising. *See, e.g.*, *CTIA—The Wireless Ass'n v. City of Berkeley, Cal.*, 928 F.3d 832, 844 (9th Cir. 2019) (collecting cases holding that *Zauderer* is not limited to consumer deception).[15] This consensus in the circuit courts is supported by the reasoning of *Zauderer* itself. As the Court recognized in that case, compelled

[13] Some courts initially read *Zauderer* more narrowly, but these decisions have been reconsidered. *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213 (D.C. Cir. 2012) (*Zauderer* limited to consumer deception context), *overruled by Am. Meat Inst. v. U.S. Dep't of Agric.* (*AMI*), 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc) ("The language with which *Zauderer* justified its approach . . . sweeps far more broadly than the interest in remedying deception."); *Nat'l Ass'n of Mfrs. v. SEC* (*NAM*), 800 F.3d 518, 522–23 (D.C. Cir. 2015) (interpreting *Zauderer* to be limited to commercial advertising disclosures); *Am. Hosp. Ass'n v. Azar* (*AHA*), 983 F.3d 528, 541 (D.C. Cir. 2020) (explaining that, contrary to *NAM*, "our court has not so limited" *Zauderer*).

[14] Plaintiffs cite *NIFLA* for the proposition that *Zauderer* is limited to "commercial advertising," Brief of Appellees, *supra* at 52, but as a district court recently observed, *NIFLA* "said nothing" of the sort. *Am. Hosp. Ass'n v. Azar*, 468 F. Supp. 3d 372, 392 (D.D.C. 2020), *aff'd, AHA*, 983 F.3d 528.

[15] This Court applied *Zauderer* in a case involving disclosure requirements in attorney advertising that were intended to prevent consumer deception, but the Court did not interpret *Zauderer* as limited to the consumer deception or commercial advertising contexts. *Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 227–29 (5th Cir. 2011).

commercial disclosures serve the principal justification for "[extending] First Amendment protection to commercial speech" in the first instance—namely, "the value to consumers of the information such speech provides." 471 U.S. at 651; *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (holding that "the free flow of commercial information is indispensable" to the "public['s] interest that [economic] decisions, in the aggregate, be intelligent and well informed"). This reasoning applies with equal force to all required disclosures of purely factual and uncontroversial information by commercial entities about the services they offer.

National Electric Manufacturers Association v. Sorrell, 272 F.3d 104 (2d Cir. 2001), is instructive. In that case, the Second Circuit addressed a state product-labelling law that required manufacturers of mercury-containing light bulbs to note on their packaging that the bulbs contained mercury and that the products should be disposed of as hazardous waste. *Id.* at 107. The court upheld the disclosure requirement because its purpose—"to better inform consumers about the products they purchase"—was consistent "with the policies underlying First Amendment protection of commercial speech," namely, "the robust and free flow of accurate information." *Id.* at 114–15; *see also Disc. Tobacco City & Lottery v. United States*, 674 F.3d 509, 555 (6th Cir. 2012) ("Protecting commercial speech under the First

Amendment is principally justified by protecting the flow of accurate information, and requiring factual disclosures furthers that goal.").

Post-*Zauderer* caselaw also sheds light on the meaning of each of *Zauderer*'s threshold requirements—that a compelled disclosure be (i) purely factual, (ii) uncontroversial, and (iii) relate to the regulated entity's services.

First, whether a mandated disclosure is "purely factual" turns on whether the disclosure is "literally true" (i.e., fact rather than opinion), and whether, even if "literally true," it is "nonetheless misleading and, in that sense, untrue." *CTIA*, 928 F.3d at 847.

Second, whether a mandated disclosure is "uncontroversial" turns on whether the disclosure would require the speaker to take sides in a heated political controversy. In *NIFLA*, the Court considered the constitutionality of a state law requiring *licensed* pro-life pregnancy clinics to disseminate notices about state-provided pregnancy services, including abortion; and requiring *unlicensed* clinics to prominently display government-written notices disclosing that the clinics were unlicensed. 138 S. Ct. at 2372. In invalidating the provision relating to licensed clinics, the Court noted that abortion is "anything but an 'uncontroversial' topic." *Id*. The Ninth Circuit, which is the only circuit that has addressed this particular aspect of *NIFLA*'s reasoning, has observed that the Supreme Court in *NIFLA* did *not* suggest that "any purely factual statement that can be tied in some way to a

controversial issue is, for that reason alone, controversial." *CTIA*, 928 F.3d at 845. Instead, the Supreme Court determined the compelled statement to be "controversial" because it effectively required the clinic to "t[ake] sides in a heated political controversy, forcing the clinic to convey a message [about abortion] fundamentally at odds with its mission." *Id.*

Third, whether a mandated disclosure relates to the regulated entity's services turns on whether the disclosure concerns the regulated entity's services rather than the services of, say, the state. As noted above, in *NIFLA* the Supreme Court invalidated the provision relating to licensed clinics because the disclosure was "controversial." The Court also rejected that provision, however, on the ground that it required the clinics to provide information not about their own services but about services offered by the government. *NIFLA*, 138 S. Ct. at 2372.

Under *Zauderer*, a disclosure mandate that meets the three conditions described above is constitutional unless it is "unjustified" or imposes an "undue burden" on protected speech.[16] Again, *NIFLA* is instructive. As the Court noted in that case, a disclosure requirement "risk[s] chilling protected speech" unless it "remed[ies] a harm that is potentially real not purely hypothetical," and "extend[s]

[16] It bears emphasis that the relevant question is not whether the disclosure mandate would impose a burden, but whether it would impose a burden on *speech*. *AHA*, 983 F.3d at 541; *see also Zauderer*, 471 U.S. at 651; *NIFLA*, 138 S. Ct. at 2378.

no broader than reasonably necessary." *NIFLA*, 138 S. Ct. at 2377 (internal quotation marks and citations omitted). Applying these principles, the Court held that the provision relating to unlicensed clinics was unconstitutional. Because the state "ha[d] not demonstrated any justification for the unlicensed notice that [was] more than 'purely hypothetical,'" it had failed to meet its burden of "prov[ing] a justification for the unlicensed notice." *Id.* And the mandated disclosure was unduly burdensome because it would chill protected speech. The Court noted that, according to the law's requirements, "a billboard for an unlicensed facility that sa[id] 'Choose Life' would have [had] to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages." *Id.* at 2378. That requirement was so onerous, the Court reasoned, that it would "drown out the [clinic's] own message." *Id.* In effect, it "'rule[d] out' the possibility of having such a billboard in the first place." *Id.* (quoting *Ibanez v. Florida Dep't of Bus. and Pro. Reg., Bd. of Accountancy*, 512 U.S. 136, 146 (1994)).

B. Several of the Texas law's disclosure requirements should be subject to *Zauderer* scrutiny.

At least some of HB20's disclosure requirements should be subject to *Zauderer* scrutiny because they compel the disclosure of only purely factual and uncontroversial information about the services social media platforms offer to their users. This is true at least with respect to the following HB20 disclosure provisions: (1) the portions of the "Acceptable Use Policy" provision that require a social media

platform "to publish an acceptable use policy" that "reasonably inform[s] users about the types of content allowed on the [] platform," and "explain[s] the steps the social media platform will take to ensure content complies with the policy," (2) the "Biannual Transparency Report" provision, and (3) the portions of the "Removal of Content" provision that require a social media platform to notify users of the removal of their "content based on a violation of the platform's acceptable use policy," and "explain the reason the content was removed." Tex. Bus. & Com. Code §§ 120.052(a), (b)(1)(2); 120.053; 120.103(a)(1). The Knight Institute does not address HB20's other disclosure provisions.

As an initial matter, these mandated disclosures are factual and uncontroversial. All of the disclosures are factual in nature, and there is no reason to believe that they would be misleading. And while some aspects of the platforms' community standards—provisions relating to "hate speech," for example—"may be tied in some way to a controversial issue," *CTIA*, 928 F.3d at 845, this does not render the disclosure mandate "controversial" within the meaning of *Zauderer*, because the disclosure mandate would not force platforms to take "sides in a heated political controversy." *Id*.

These mandated disclosures also relate to the terms on which the platforms' services are offered. Indeed, they relate directly to the platforms' "terms of service"—that is, to the contract that platforms enter into with their users. As a

precondition of posting content on any social media platform, users must agree to a platform's terms of service—an enforceable contract. *See, e.g., Darnaa, LLC v. Google, LLC*, 756 Fed. App'x 674, 676 (9th Cir. 2018). For example, Twitter's terms of service expressly provide that, "[y]ou may use the Services only if you agree to form a binding contract with Twitter."[17] In these contracts, the platforms agree to provide users with access to a range of features and applications.[18] In return, users allow the platforms to collect personal data, grant platforms a worldwide license to publish their content, and agree to comply with the platforms' acceptable-use policies, which are usually incorporated by reference.[19] Disclosures relating to the terms of service are, by definition, "about the terms under which [the] services [at issue] will be available." *Zauderer*, 471 U.S. at 651.[20]

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[17] *Twitter Terms of Service*, Twitter, https://perma.cc/UC2V-DWKU; *see also Terms of Service* (referring to "our contract"), YouTube, https://perma.cc/2CLP-J2ML.

[18] *See, e.g.*, *Terms of Service*, Meta, https://perma.cc/273Q-8DT4; *Terms of Service*, YouTube, https://perma.cc/2CLP-J2ML; *Twitter Terms of Service*, Twitter, https://perma.cc/UC2V-DWKU.

[19] *Id.*

[20] While a number of HB20's disclosure provisions are unclear (and perhaps unconstitutionally vague), the Knight Institute does not read these provisions to require platforms to *adopt* acceptable-use policies—only to disclose the policies they have already adopted. A law that required platforms to *adopt* acceptable-use policies would not be a disclosure mandate subject to *Zauderer*'s deferential level of scrutiny.

In resisting the applicability of *Zauderer* to HB20's disclosure provisions, Plaintiffs rely heavily on *Herbert v. Lando*, 441 U.S. 153 (1979), but that reliance is misplaced for three reasons.[21] First, *Lando* does not stand for the proposition that *any* inquiry into the editorial process violates the First Amendment. In *Lando*, a defamation case, the Supreme Court held that the press has no First Amendment privilege shielding it from civil discovery into "the state of mind of those who edit, produce, or publish, and into the editorial process," concluding that permitting this civil discovery would not "endanger[]" "sound editorial judgment." 441 U.S. at 157, 173. In a short passage Plaintiffs misconstrue, the Court distinguished subjecting a newspaper's editorial process to civil discovery from subjecting it to a "casual inquiry"—"private or official examination merely to satisfy curiosity or to serve some general end such as the public interest." *Id.* at 174. The Court said the latter would violate the First Amendment, *id.*, but the bulk of its opinion rejected the notion that any burden on editorial judgment is necessarily unconstitutional.

Second, HB20's disclosure requirements cannot plausibly be characterized as a "casual inquiry" into social media platforms' editorial judgment. The disclosures provide information about the services social media platforms offer to their users. A platform's community standards, methods of enforcement, and associated metrics, are relevant to a user's ability to understand the services the platforms offer, and thus

[21] Brief of Appellees, *supra* at 50.

to a user's decisions about whether to join or continue using the platform. Similarly, HB20's requirement that platforms give their users notice—of the removal of their content and of the basis for the removal under the platform's acceptable use policy—allows users to better understand the enforcement of contractual terms.

Third, Plaintiffs' interpretation of *Lando* cannot be reconciled with *Zauderer*. The Supreme Court made clear in *Pacific Gas* that, under *Zauderer*, the government has "substantial leeway in determining appropriate information disclosure requirements for business corporations." 475 U.S. at 15 n.12. The mere fact that a compelled disclosure *implicates* editorial judgment does not render it unconstitutional. Rather, the question is whether it imposes an undue burden on speech.

For these reasons, if the Court reaches the constitutionality of HB20's disclosures provisions, it should apply *Zauderer*'s deferential level of scrutiny to any provision requiring the disclosure only of purely factual and uncontroversial information about the terms on which the platforms offer their services.

Conclusion

Amicus asks this Court to affirm the grant of the preliminary injunction as to the must-carry provision.

April 8, 2022

Respectfully submitted,

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Certificate of Compliance

This brief complies with: the type-volume limitation of Fed. R. App. P. 29(a)(5), 32(a)(7)(B)(i), and 32(g)(1), because it contains 6,174 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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April 8, 2022

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Certificate of Service

I hereby certify that on April 8, 2022, I caused the foregoing Brief of the Knight First Amendment Institute at Columbia University as *Amicus Curiae* in Support of Plaintiffs-Appellees to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to all counsel of record.

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