Nos. 25A1389, 25A1390

In the Supreme Court of the United States

STUDENTS ENGAGED IN ADVANCING TEXAS, ET AL.,

Applicants,

v.

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

Respondent.

COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,

Applicant,

v.

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

Respondent.

On Applications to the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit

BRIEF FOR AMICI CURIAE NETCHOICE, THE CATO INSTITUTE, CHAMBER OF PROGRESS, CLAY CALVERT, THE COMPETITIVE ENTERPRISE INSTITUTE, CONSUMER CHOICE CENTER, THE DEVELOPERS ALLIANCE, THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, THE INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION, THE JAMES MADISON INSTITUTE, PARKVIEW INSTITUTE, THE PELICAN INSTITUTE FOR PUBLIC POLICY, REASON FOUNDATION, TAXPAYERS PROTECTION ALLIANCE, TECHFREEDOM, AND WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPLICANTS AND VACATUR

Christopher J. Marchese
Paul D. Taske
NETCHOICE
1401 K St. NW, Suite 502
Washington, DC 20005

Counsel for Amicus Curiae NetChoice

Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036

Counsel for Amicus Curiae Washington Legal Foundation

Steven P. Lehotsky
Counsel of Record
Jeremy Evan Maltz
LEHOTSKY KELLER COHN LLP
200 Massachusetts Ave. NW,
Suite 700
Washington, DC 20001
(512) 693-8350
steve@lkcfirm.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

INTEREST OF AMICI CURIAE

Amici and their members represent a diverse coalition with a substantial shared interest in the pending applications.[1] Amici and their members both develop mobile apps and use such apps to reach their audiences. Amici likewise have extensive experience litigating—and participating as amici in cases involving—governmental restrictions on access to online speech.

Here, the Fifth Circuit motions panel permitted Respondent Texas Attorney General to enforce a law that transformed internet access in Texas overnight, and could permit similar transformation nationwide. That outcome alone warrants amici's interest and justifies this Court's review. Furthermore, the Fifth Circuit's rationale—that app stores facilitate access to solely "commercial speech," CCIA.App'x.4a—risks broad ramifications for amici and their members, if left uncorrected.

NetChoice is a national trade association of e-commerce and online businesses that share the goal of promoting convenience, choice, and commerce on the internet. For over two decades, NetChoice has worked to increase consumer access and options via the internet, while minimizing burdens on small businesses that are making the internet more accessible and useful. NetChoice has opposed laws that require app stores to verify the ages of their users and process parental consent for minors to

[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

access the fully protected speech those app stores provide. *E.g.*, NetChoice, The App Store "Accountability" Act Takes Power From Parents, https://perma.cc/MKJ6-VD7W; Patrick Hedger, *NetChoice Testifies Against ID for Apps Mandate in Virginia*, NetChoice (Feb. 12, 2026), https://perma.cc/8C4Y-C2D8.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward that end, Cato's Robert A. Levy Center for Constitutional Studies publishes books and studies about legal issues, conducts conferences, produces the Cato Supreme Court Review, and files *amicus* briefs.

Chamber of Progress is a tech-industry coalition that seeks to protect Internet freedom and free speech, promote innovation and economic growth, and empower technology customers and users. In keeping with that mission, Chamber of Progress believes that a legal framework that permits the free exchange of ideas will benefit society at large. Chamber of Progress's work is supported by its corporate partners, but its partners do not sit on its board of directors and do not have a vote on, or veto over, its positions. Chamber of Progress does not speak for individual partner companies and remains true to its stated principles when its partners disagree.[2]

Clay Calvert is a nonresident senior fellow at the American Enterprise Institute, where he writes about technology and free speech issues, and a professor

[2] A list of Chamber of Progress's partners can be found at https://perma.cc/DW25-MSRP.

emeritus at the University of Florida, where he taught media law. He has published extensively on age-verification and parental-consent regulations.

The Competitive Enterprise Institute ("CEI") is a nonprofit educational and research organization headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation through policy analysis, commentary, and litigation. CEI pursues public-interest litigation to ensure that federal agencies and states act within the constraints of the U.S. Constitution. CEI's mission is to develop and advocate for policies that advance the right to freedom, fairness, property, and prosperity for Americans.

The Consumer Choice Center ("CCC") is an independent, nonpartisan consumer advocacy organization founded in 2017. CCC promotes policies that expand consumer choice, encourage innovation, and increase access to affordable goods and services. It advocates for evidence-based, technology-neutral, and pro-growth regulatory frameworks that advance consumer welfare. CCC works with consumers and partner organizations across North America, Europe, and other regions, and regularly provides analysis and commentary on regulatory, legislative, and legal issues affecting consumers. CCC has participated in public policy debates before legislative bodies, administrative agencies, and courts on matters concerning consumer choice, innovation, and economic liberty.

The Developers Alliance advocates on behalf of developers, the companies they lead, and the industries that depend on them. We help policymakers and

stakeholders understand the specific needs of the developer workforce and advocate for policies that responsibly advance the broader tech sector.

The Foundation for Individual Rights and Expression ("FIRE") is a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended these rights nationwide without regard to speakers' views, through public advocacy, strategic litigation, and participation as amicus curiae in cases involving expressive rights, including in the digital realm. *See, e.g.*, *NetChoice, LLC v. Bonta*, 170 F.4th 744 (9th Cir. 2026); *Volokh v. James*, 148 F.4th 71 (2d Cir. 2025), *certifying questions to* N.Y. Ct. App., 267 N.E.3d 1245 (N.Y. 2025) (*accepting certified question*); *see also* Br. for FIRE et al. as Amici Curiae Supp. Pet'r, *Anthropic PBC v. U.S. Dep't of War* (D.C. Cir. filed Apr. 22, 2026) (No. 26-1049); Br. for FIRE et al. as Amici Curiae Supp. Pet'rs, *TikTok Inc. v. Garland*, 604 U.S. 56 (2025) (No. 24-656); Br. for FIRE as Amicus Curiae Supp. Resp'ts, *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) (Nos. 22-277, 22-555).

The Information Technology and Innovation Foundation ("ITIF") is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute founded in 2006 that has been recognized repeatedly as the world's leading think tank for science and technology policy. ITIF's mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. ITIF's goal is to provide policymakers around the

world with high-quality information, analysis, and actionable recommendations they can trust.

The James Madison Institute is a non-profit, non-partisan research organization based in Tallahassee, Florida, whose north star is to advance the principles of free markets, limited government, and economic liberty. For close to 40 years, we have championed these principles in Florida and beyond.

Parkview Institute is a non-partisan policy think tank eager to turn a great economic future into a spectacular one by correcting mistaken notions about markets and policy that continue to stalk both sides of the ideological aisle.

The Pelican Institute for Public Policy is Louisiana's free market think tank and works to ensure that every Louisianan—and every American—has the opportunity to flourish. The Pelican Institute's mission is to research and develop policy solutions to address the most significant barriers to opportunity in Louisiana and across the United States. We educate the public about the benefits of individual liberty and free enterprise, turn great ideas into powerful policy solutions that make a meaningful difference in people's lives, and fight to ensure the rights of working families are protected in state and federal courts.

Reason Foundation ("Reason") is a nonpartisan and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of law. Reason advances its mission by publishing the critically acclaimed Reason magazine, as well as commentary on its websites, www.reason.com and www.reason.org. To further Reason's commitment to

"Free Minds and Free Markets," Reason has participated as amicus curiae in numerous cases raising significant legal and constitutional issues, including cases implicating free expression and digital apps. Reason also has an interest in this case as a speaker because its most important avenue for distributing its speech and content is via an app it makes available on all app stores.

The Taxpayers Protection Alliance ("TPA") is a nonprofit 501(c)(4) educational group with a focus on defending free enterprise and championing reduced taxation and limited government principles. Founded in 2011, TPA furthers its mission through the preparation and dissemination of articles, analyses, and opinion pieces, and through broadcast television, social media, video, and congressional testimony. To advance its mission, TPA—and its affiliated 501(c)(3) organization, the Taxpayers Protection Alliance Foundation—has participated in cases in front of the Court as amicus curiae across a range of issues, including government regulation of electronic tobacco products, *see FDA v. Wages and White Lion Invs., LLC*, 604 U.S. 542, 565 n.3 (2025), and the First Amendment speech and association rights of social media platforms infringed by two state content moderation laws, *see Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). TPA fights tirelessly for the rights of taxpayers and for consumers struggling to navigate a marketplace made increasingly complex and less free by government interference. Millions of Americans experience the internet as a revolutionary way to speak their truth and access the speech of others, which must be allowed without their First Amendment rights being unduly burdened. Users' right to use apps to access constitutionally protected speech, including

anonymously, is in danger due to the Texas App Store Accountability Act, which threatens the very core of online free speech.

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It opposes ever-evolving government efforts to meddle in online speech. *See, e.g.*, Br. of TechFreedom, *NetChoice v. Jones*, No. 26-1252 (4th Cir., May 22, 2026) (opposing Virginia social media screentime cap); Br. of TechFreedom, *NetChoice, LLC v. Griffin*, No. 25-1889 (8th Cir., Jan. 28, 2026) (opposing Arkansas social media age-verification law); Br. of TechFreedom, *Bonta v. NetChoice, LLC*, No. 23-2969 (9th Cir., Feb. 14, 2024) (opposing California social media "design" code).

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, it often appears as amicus curiae in important First Amendment cases to oppose government efforts to compel speech. *E.g.*, *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Texas has done something unprecedented. It has attempted to age-gate internet use. And it has deputized private app-store operators as government-mandated gatekeepers to the internet's wealth of protected speech, information, and speech-facilitating tools. A Fifth Circuit motions panel short-circuited the normal appellate process to permit Respondent to immediately enforce Texas's revolutionary law.[3] In explaining why, the Fifth Circuit declared seemingly much of the internet to be "commercial speech" that government can regulate so long as it meets the court's lax application of intermediate scrutiny. The Fifth Circuit's decision is exceedingly important—and demonstrably wrong. The stay should be vacated. Amici submit this brief to make three points.

First, app stores engage in—and provide their users access to—incredible amounts of fully protected, non-commercial speech. For many Americans, mobile apps are now the primary means to access the internet's wealth of protected expression, information, and speech-creating tools. Among that protected expression are mobile apps provided by amici and their members. Texas's App Store Accountability Act ("Act") regulates those app stores with a law that is content-based both on its face and in its purpose. The Act thus triggers, and fails, strict scrutiny.

Second, the Fifth Circuit's contrary holding—that app stores and the apps on them engage in nothing more than "commercial speech"—is wrong as a matter of law

[3] Although Judge Haynes concurred in granting the stay, she did not join in the panel's rationale. So references to the "Fifth Circuit's" or "panel's" rationale refer only to the panel majority's opinion.

and fact. Offering access to expressive, informative, and speech-facilitating apps does far more than "propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). The panel's reasoning risks recasting much of the internet as "commercial speech" stripped of the First Amendment's full protections.

Third, the Fifth Circuit should not have rendered this hugely consequential decision outside of the normal appellate procedure. The stay has massively disrupted the "status quo" that prevailed before Texas age-gated internet use. *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978) (Rehnquist, J., in chambers).

This Court should grant the Applications.

ARGUMENT

I. App stores facilitate access to fully protected, non-commercial speech.

Texas attempts to restrict access to mobile apps, which are the primary way many Americans access the internet's wealth of fully protected speech, information, and speech-facilitating tools. Texas has done so with a facially content-based law animated by a content-based and censorial purpose. The Act's unprecedented speech burdens thus trigger strict First Amendment scrutiny.

A. Mobile apps are how many Americans access the internet, which is full of fully protected speech, information, and tools to create yet more speech.

The internet offers people "unlimited, low-cost capacity for communication of all kinds." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)). All manner of speech, "from 'pictures, films, paintings, drawings,' . . . to 'oral utterance and the printed word'[] qualify for the First Amendment's protections . . . [when] conveyed over the Internet." *303*

Creative LLC v. Elenis, 600 U.S. 570, 587 (2023) (quoting *Kaplan v. California*, 413 U.S. 115, 119-20 (1973)).

Furthermore, the internet has been a democratizing force on information access, where people may seek out diverse sources and underrepresented voices—not just incumbent media giants. Online services like apps "allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Packingham*, 582 U.S. at 107 (quoting *Reno*, 521 U.S. at 870). As a result, the internet contains everything from high literature to fan fiction; sports highlights to academic research; cutting-edge news to age-old philosophical debates; amateur short-form videos to cinematic classics; crossword puzzles to 3D games; and more information than any library has ever held—or could ever hold.

Over time, the way that people access the internet has changed, from bulletin boards on modems to browsers on desktop computers to mobile apps on smartphones and tablets. Instead of typing web addresses into a web browser, users can download an app from an app store that provides access to the content and tools available on web-based services.[4]

For many people, therefore, mobile apps *are* the internet. This Court observed as much over a decade ago:

> There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps

[4] In this way, apps are similar to the desktop shortcuts that browsers allow users to create. *E.g.*, Mozilla Support, Create Desktop Shortcut to a Website (Aug. 3, 2025), https://perma.cc/U76E-34SL ("You can use Firefox to create a shortcut on your computer's desktop to a page you've visited.").

> for every conceivable hobby or pastime . . . . The average smart phone user has installed 33 apps.

Riley v. California, 573 U.S. 373, 396 (2014). Today, more Americans report smartphone use than desktop and laptop use. *See* NTIA, Data Explorer, https://perma.cc/SM6B-SPZT; Tushar Thakar, *Mobile vs. Desktop Statistics 2026: Shocking Trends*, TechRT (Jan. 8, 2026), https://perma.cc/SB9L-E668 ("As of mid-2025, roughly 62-64% of web traffic worldwide comes from mobile devices.").

These apps offer their users services that run the gamut of expressive activities. And the apps themselves come from all manner of publishers, from the Louis XIII-era Académie Française (established in 1635 to ensure common standards for the French language) to the latest start-up mobile developer.[5] Put otherwise, app stores have helped tear down barriers to entry, providing more people with access to more information from more (and more diverse) sources.

Many apps are full of expressive content in their own right. That includes movies, books, games, journalism, and myriad other forms of expressive content. It also includes apps that "engage[] in expression" by "display[ing]," "compiling, and curating" protected user-generated speech. *Moody v. NetChoice, LLC*, 603 U.S. 707, 716-17, 731 (2024).

Yet more apps provide their users with access to "information," which is likewise protected by the First Amendment. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). This includes anything from weather forecasts to measurement conversion

[5] Apple App Store, Dictionnaire de l'Académie française, https://perma.cc/WB3J-EQK4.

apps.[6] It also includes mobile web browsers, which are themselves apps that compete for users based on the features they offer. As this Court has recognized, "if the act of . . . 'publishing' information does not constitute speech, it is hard to imagine what does fall within that category." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (citation modified). This holding flows from the Court's longstanding observation that the First Amendment's freedoms of speech and press exist, in part, to ensure the free flow of information. Consequently, "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); *see* Thomas M. Cooley, A Treatise on the Law of Torts 219 (Chicago, Callaghan & Co. 1879) ("The privilege of the press is not confined to those who publish newspapers and other serials, but extends to all who make use of it to *place information before the public*." (emphasis added)).

Finally, apps also provide means for their users to engage in their own expression. For instance, people can use Procreate to make digital art or BandLab to create music. Such tools likewise receive the First Amendment's protections, lest the government be able to suppress speech by regulating prior steps "in the speech process." *Citizens United v. FEC*, 558 U.S. 310, 336 (2010); *see, e.g.*, *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983) (rejecting tax of paper and ink necessary to produce newspapers).

[6] *See* Apple App Store, Top Charts: Weather, https://perma.cc/253Y-YYY6; Google Play Store, Search: "Measurement Conversion," https://perma.cc/4SZ4-FUC3.

B. By providing access to apps, app stores help their users access the internet's fully protected speech.

App stores are engaged in expressive activity protected by the First Amendment.

Like web browsers before them, app stores provide users with means to access the internet's vast amounts of fully protected speech. So app stores are not merely retail channels for software. They are modern distribution points for protected expression across media: films and video services, books and audiobooks, news, messaging, web browsing, educational tools, and games, among others. The First Amendment has long protected distributors of expression, including booksellers, film exhibitors, the mails, libraries, and the internet itself. *E.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 812 (2019) ("community bulletin boards" and "[c]omedy clubs" hosting "open mic nights"); *Reno*, 521 U.S. at 870 (internet); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994) (cable operators); *Bd. of Educ. v. Pico*, 457 U.S. 853, 868-69 (1982) (libraries); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682 (1968) (movie theaters); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (mail); *Smith v. California*, 361 U.S. 147, 150 (1959) ("dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (movies). The only difference is that app stores lack the physical restraints of these brick-and-mortar locations, and can thus act as bookstores, research libraries, movie theaters, record stores, video game arcades, and more—all in one convenient place. That is, app stores facilitate access to far more expression than brick-and-mortar analogs.

The Act here burdens the same constitutional interests that apply to those other distributors by conscripting app stores into regulating access to lawful speech.

C. Texas's App Store Accountability Act uses content-based coverage criteria and was animated by a content-based and censorial purpose.

The First Amendment's "most basic" principle is that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790-91 (2011) (quotation omitted). Consequently, "[c]ontent-based laws"—those that "appl[y] to particular speech because of the topic discussed or the idea or message expressed"—"are presumptively unconstitutional" and trigger "strict scrutiny." *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015). "Strict scrutiny is unforgiving . . . [and] fatal in fact absent truly extraordinary circumstances." *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 484-85 (2025).

Here, the Act is content-based both on its face and in its undisputed purpose. Either would be sufficient to subject the Act's speech restrictions to strict scrutiny.

First, the Act exempts particular apps from its restrictions based on "the topic discussed" on the app. *Reed*, 576 U.S. at 163-64. In particular, the Act exempts apps that provide emergency services or standardized testing. Tex. Bus. & Com. Code § 121.022(h). "As a result, it is inevitable that the burdens Texas's ASAA imposes on access to speech are applied depending on the substantive content of the speech." ACT, Fifth Circuit Lays an Egg on Age Verification, https://perma.cc/TU3G-M2GX. Such exemptions subject the Act's provisions to strict scrutiny. *E.g.*, *Barr v. Am. Ass'n*

of Pol. Consultants, Inc., 591 U.S. 610, 619 (2020) (plurality op.) (content-based exceptions render law content-based); *Sorrell*, 564 U.S. at 563-64 (similar).

Second, "'a content-based [governmental] purpose may be sufficient in certain circumstances to show that a regulation is content based.'" *Reed*, 576 U.S. at 165 (quoting *Turner*, 512 U.S. at 642). This Court has gone further and suggested that the "improper censorial goals of the legislature" are enough to invalidate a law, and not merely subject the law to strict scrutiny. *Minneapolis Star*, 460 U.S. at 580. Here, the record is replete with impermissible content-based and censorial justifications for the Act's speech restrictions. From the Act's enactment history to Respondent's defense of the law in the courts below, it is plain that Texas intends the law to restrict minors' access to "unsuitable" and "objectionable" "material." CCIA.App'x.172a, 174a.

II. The Fifth Circuit's conclusion that app stores facilitate access to solely commercial speech risks erroneously rendering much of the internet "commercial speech."

Ignoring the weight of authority, the Fifth Circuit held in a single paragraph that the Act, "*at most*, . . . regulates speech that 'proposes a commercial transaction'"—*i.e.*, commercial speech. CCIA.App'x.4a (emphasis added) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)). The panel further suggested that the Act does not regulate speech at all. CCIA.App'x.5a n.7. This conclusion is wrong.

A. App stores' provision of access to apps is not commercial speech or commercial conduct under this Court's precedent and common sense.

This Court has cabined the First Amendment commercial-speech doctrine to speech that "does no more than propose a commercial transaction." *United Foods*, 533

U.S. at 409. Much like this Court's narrow definitions of unprotected speech, the commercial-speech doctrine must be applied strictly to avoid burdening other forms of fully protected speech. *See* CCIA.App.24.

Offering access to expressive, informative, and speech-facilitating apps certainly does "more than propose a commercial transaction." *United Foods*, 533 U.S. at 409. Time and again, this Court has rejected arguments to expand the scope of the commercial-speech doctrine.

For example, the fact that speech is offered for profit is "insufficient by itself" to transform speech into "commercial speech." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983). The "First Amendment extends to all persons engaged in expressive conduct, including those who seek profit." *303 Creative*, 600 U.S. at 600; *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("[T]he degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away."). The government can no more "prohibit[]" the "selling [of] books" than it can restrict "the writing of them." *Brown*, 564 U.S. at 792 n.1; *id.* ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference."). In *Brown* itself, this Court rejected the assertion that restricting "the sale or rental" of expression to minors regulates mere conduct. *Id.* at 792 n.1.[7] Otherwise, any number of publications,

[7] *See* Pet.'s Reply Br., *Brown v. Ent. Merchs. Ass'n*, 2010 WL 4034925, at *3-4, *11-18 (U.S. Oct. 8, 2010) (arguing law "cover[ed] only commercial transactions entered into by minors outside the presence of parents").

including books, newspapers, magazines, television channels, and streaming services could be deemed commercial speech. *303 Creative*, 600 U.S. at 594.

Indeed, "[s]ome of our most valued forms of fully protected speech are uttered for a profit." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989). Seeing a movie or play often requires buying a ticket. Reading a book often requires paying a university bookstore for a textbook or Amazon for an ebook. Streaming and buying music requires monetary payment. The examples are boundless. Put another way, some kind of transaction is often a necessary part "in the speech process." *Citizens United*, 558 U.S. at 336. Accordingly, the fact of such transactions does not convert either the sale of speech or the underlying speech itself into commercial speech.

Likewise, it does not matter that app stores might also separately advertise particular apps (qualifying as commercial speech) or that apps themselves might include commercial speech in their broader offerings of fully protected speech. For example, this Court has observed "that much of the material in ordinary newspapers is commercial speech." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993). After all, the newspaper industry long relied on advertising revenue, such that detailed reporting on political scandals coexisted with full-page advertisements for department-store sales. Nevertheless, newspapers do far "more than propose a commercial transaction." *United Foods*, 533 U.S. at 409. In such cases, the commercial-speech advertisements are "inextricably intertwined with otherwise fully protected speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). And the government cannot "separate the component parts of" commercial

speech "from the fully protected whole." *Id.* So the presence of advertisements in a publication does not permit regulating access to newspapers, any more than it can justify regulating apps and the broader internet.

B. The Fifth Circuit erroneously concluded otherwise, and its rationale risks being dangerously sweeping.

At core, the problems with the Fifth Circuit's analysis are perhaps best illustrated by replacing the word "app" with "book" in the panel's analysis: "After all, users browsing [a book] store can see a catalog of [books], obtain additional information, and download or purchase [a book]." CCIA.App'x.4a. From these observations, the panel concluded that "[a]pp listings propose commercial transactions," which purportedly allows Texas to impose "'modes of regulation that might be impermissible in the realm of noncommercial expression.'" CCIA.App'x.4a & n.5 (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995)). If the Fifth Circuit "were correct, the Government could prohibit" people from accessing books under the guise of regulating commercial transactions. *Citizens United*, 558 U.S. at 349. "This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure." *Id.* The two additional reasons the court offered are likewise flawed.

First, the court concluded that "[a]pp listings propose commercial transactions, regardless of whether any monetary payment is made" because "the 'payment' for apps that are purportedly 'free' is access to user data and private information."

CCIA.App'x.4a.[8] As Applicants recount, the record contains no evidence supporting this conclusion. *E.g.*, CCIA.App.24. Besides, the fact that fully protected speech is offered for sale does not make that expression "commercial speech." *See supra* pp.18-19. If paying money for expression is not enough to make the speech "commercial," purportedly "paying" with "data" cannot either.

Moreover, the Fifth Circuit's "data-for-speech" analysis risks making much of the internet "commercial speech." Simply put, internet use requires some amount of data collection and processing. Otherwise, online services could not operate and provide the vast amount of expression and information they do. Digital services often collect users' Internet Protocol addresses, as well as technical data about the user's device, operating system, and screen resolution. Services may also use data about a user's preferred language, age, and preferences to inform what content the user sees. In recognition of the internet's reliance on "data," true, comprehensive data-privacy laws—including Texas's—permit online services to collect data that is "adequate, relevant, and reasonably necessary." Tex. Bus. & Com. Code § 541.101(a)(1).

Consequently, the Fifth Circuit's hasty conclusion—if taken to its logical end—could render much of the internet commercial speech. *See* Catholic Charities USA, Privacy Policy (Oct. 31, 2023), https://perma.cc/8R8D-EMA5 ("CCUSA may collect personal or aggregate information about Users of the Website. . . . We use the information we collect from you for the following purposes: . . . other legitimate

[8] As Applicants note, many apps on the app stores are offered for free. *See* CCIA.App.24.

business purposes."); PBS, PBS Privacy Policy (Apr. 11, 2023), https://perma.cc/Q9DE-N3N3 ("We may use cookies, web beacons, local shared objects, and other similar technologies to collect information about your use of the Services."); The Associated Press, AP Privacy Policy (Nov. 5, 2025), https://perma.cc/FVH2-DCTC ("We may collect information from you automatically when you use our Services."). That would be contrary to this Court's long line of precedent evaluating online speech restrictions under traditional First Amendment scrutiny. *E.g.*, SEAT.App.13-14.

Second, the Fifth Circuit observed that "[a]ny minor who downloads an app must *accept its terms of service*, including agreements about how the minor's data is used." CCIA.App'x.5a (emphasis added). Here too, the Fifth Circuit's "terms of service" rationale risks stripping many websites internet-wide of the First Amendment's protections, and does not support the panel's conclusion that offering apps is "commercial speech." "Many websites . . . authorize a user's access only upon his agreement to follow specified terms of service." *Van Buren v. United States*, 593 U.S. 374, 394 (2021). Much like collecting data, agreeing to terms of service online is ubiquitous because it is often required. For example, state, federal, and international data-privacy regulations make such terms of service *necessary* for online services to operate responsibly and lawfully. *E.g.*, 16 C.F.R. § 312.10 (federal Children's Online Privacy Protection Act regulations requiring "retention policy"); Tex. Bus. & Com. Code § 541.102(a) ("A controller shall provide consumers with a reasonably accessible and clear privacy notice."); Regulation 2016/679 of the European Parliament and of

the Council of 27 April 2016, arts. 12-14, 2016 O.J. (L 119) 1 (European General Data Protection Regulation requiring privacy notice). Yet, under the panel's rationale, websites' attempts to comply with law could be what strips them of their First Amendment protections. There is no basis for that in this Court's precedent.

If Texas wanted to regulate those terms of service—or any of their particular terms, such as "arbitration provisions," CCIA.App'x.5a (citation modified)—it could have targeted the terms of service themselves. It did not. Instead, the Act burdens threshold access to apps on app stores in particular, threatening Texans' access to the internet's trove of valuable expression and expression-facilitating tools.

III. The Fifth Circuit erred by short-circuiting the appellate process to stay the district court's preliminary injunction and upset the decades-old status quo.

The Fifth Circuit's order was the product of a process that bypassed much of the normal appellate procedure. Accordingly, it unnecessarily disrupted the status quo ante to allow Respondent to enforce revolutionary restrictions on access to the near sum-total of human knowledge.

For one, Respondent's actions belie that such drastic action was necessary. If enforcing the Act's requirements were critical, Respondent certainly did not act like it. As Applicants explain, Respondent waited nearly a month just to seek a stay of the preliminary injunction in the district court. *E.g.*, CCIA.App.13. And in the court of appeals, Respondent did not seek expedited review. To the contrary, Respondent asked for and received a one-month extension on its opening brief.

Even if Respondent had demonstrated the necessary diligence, the Fifth Circuit's order unnecessarily disrupted the status quo ante of free access to the internet's

wealth of fully protected speech. Overnight, the Fifth Circuit placed unprecedented burdens on Texans' access to the internet's protected speech. Of course, the Act will impede access to long-valued sources of expression, such as the Wall Street Journal and Disney. But the Act's effects may be most acutely felt for the small app developers, who (in some ways) are the internet's main beneficiaries. Those smaller apps may not reach their audiences without the app stores' help. And now those app stores are under "governmental authority, subject only to a parental veto." *Brown*, 564 U.S. at 795 n.3 (emphasis omitted).

The Fifth Circuit's process in granting the stay is not one designed to produce decisions based on rigorous evaluation of legal arguments. Nor is it the kind of process that makes for orderly litigation in the lower courts. It does, however, result in applications like these—where litigants must scramble to protect their rights. In fact, this case is not the first time the Fifth Circuit has issued stays of preliminary injunctions in cases with substantial First Amendment implications. *E.g.*, *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1715-16 (2022) (order vacating stay in First Amendment case); *see NetChoice, LLC v. Fitch*, 145 S. Ct. 2658 (2025) (order declining to vacate stay in First Amendment case); *id.* at 2658 (Kavanaugh, J., concurring) ("NetChoice has, in my view, demonstrated that it is likely to succeed on the merits[.]").

* * *

What Texas has done is unprecedented. But that does not mean this Court's precedents are ill-equipped to address the Act. To the contrary, well-established First

Amendment doctrine anticipates that new technologies will spark the same kinds of censorial governmental actions that animated the First Amendment. *E.g.*, *Moody*, 603 U.S. at 733. Under longstanding First Amendment principles, the Act's restrictions are unconstitutional.

CONCLUSION

The Applications should be granted.

Respectfully submitted,

Christopher J. Marchese
Paul D. Taske
NETCHOICE
1401 K St. NW, Suite 502
Washington, DC 20005

Counsel for Amicus Curiae NetChoice

Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036

Counsel for Amicus Curiae
Washington Legal Foundation

Steven P. Lehotsky
Counsel of Record
Jeremy Evan Maltz
LEHOTSKY KELLER COHN LLP
200 Massachusetts Ave.
NW, Suite 700
Washington, DC 20001
(512) 693-8350
steve@lkcfirm.com

Counsel for Amici Curiae

JUNE 2026