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 Civil Action No. 1:21-CV-00840-RP

BRIEF OF IP JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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7 April 2022

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

No. 21-51178

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record for amicus curiae Robin Gross certifies that the following listed persons and entities 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.

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CORPORATE DISCLOSURE STATEMENT

As required by Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29.2, Amicus Curiae IP Justice further certifies that it is not a publicly held corporation, nor a subsidiary or affiliate of any publicly-owned parent corporations, and has not issued any stock. Therefore, no publicly traded corporation owns ten percent or more of its stock. Amicus Curiae is not aware of any publicly-owned corporation that has a financial interest in the outcome of this litigation and has not cooperated with any such corporation.

None of the counsel for the parties in this litigation has authored this brief, in whole or in part. Furthermore, no party, party's counsel, or outside organization has funded the research, writing, preparation, or submission of this brief.

All parties have consented to the filing of this amicus brief.

Dated: 04/07/2022 Respectfully submitted,

/s/ Robin D. Gross
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INTEREST OF AMICUS CURIAE

IP Justice is an international 501(c)(3) non-profit charitable organization based in the United States. IP Justice has been operating as an international technology rights and civil liberties organization since 2002. It promotes intellectual freedoms and advancement through Internet freedom, innovation policy, and a balance of intellectual property rights between content holders and users. IP Justice contends that a free and open Internet is a prerequisite for a robust democracy, promoting innovation, technological advancement, and economic growth.

Over the last two decades, IP Justice has selectively partnered with Amici Curiae to provide courts with unbiased insights on critical legal issues. Additionally, IP Justice participates in international policymaking forums, including the United Nations (UN) World Intellectual Property Organization (WIPO), the United Nations Internet Governance Forum (IGF), and the Internet Corporation for Assigned Names and Numbers (ICANN). IP Justice has held an accredited consultative status with the Economic and Social Council of the United Nations (ECSOC) since 2003. The organization has been invited to

testify before the U.S. Copyright Office as part of its rulemaking procedures under the Digital Millennium Copyright Act (DMCA). IP Justice has authored numerous academic works on the interplay of technology and law, focusing on global issues affecting digital rights and Internet governance.

SUMMARY OF ARGUMENT

The Fifth Circuit should affirm the District Court for the Western District of Texas' ruling that HB 20 is an unconstitutional restraint on freedom of expression. HB 20 violates social media platforms' First Amendment rights by compelling speech and restricting platforms' editorial discretion. HB 20's disclosure requirement unfairly burdens platforms to publicly disclose their private business management information. HB 20's enforcement will bring disastrous effects on Texas and global Internet freedom, hinder innovation, and create negative cascading effects on consumers and the burgeoning Internet economy.

BACKGROUND

In December 2021, Texas passed HB 20 to regulate Internet speech by requiring that anything designated as a social media platform must disclose its content moderation practices, algorithms, data management, and other business practices. This bill will create cascading effects on Internet freedom by strictly regulating online speech and information. Allowing companies to self-regulate the content on Internet platforms without unnecessary and intrusive governmental control is essential for maintaining robust economic competitiveness

and access to information within Texas, the United States, and worldwide.

ARGUMENT

I. HB 20 IS A VIOLATION OF PLATFORMS' FIRST AMENDMENT RIGHTS TO EDITORIAL DISCRETION

A. HB 20 Violates the First Amendment by Prohibiting Platforms' Protected Editorial Discretion

It is long established that editorial discretion in newspaper and printed media has enjoyed First Amendment protection against government intrusion. The *Tornillo* Court held that it is impermissible for the government to mandate a private editor to "publish that which reason tells [it] should not be published." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974). The Internet—as "the most participatory form of mass speech yet developed," —is entitled to "the highest protection from governmental intrusion." *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 863 (1997).

a. Platforms are Private Companies that Engage in Protected Editorial Discretion, Government May Not Intrude on this First Amendment Right.

Governments cannot compel private companies to "propound political messages with which they disagree." *Pac. Gas & Elec. Co. v.*

Pub. Utilities Comm'n of California, 475 U.S. 1, 20–21 (1986). Social media websites are private companies that curate information as business services for their customers.

Legal precedents have long rebutted Texas's position that platforms are public places or "squares". Platforms do not become public functions simply because the platforms are used as forums for public debate, election discussions, pandemic information, or candidate campaigns. In *Manhattan Community Access Corp. v. Halleck* 139 S. Ct. 1921 (2019), the Court rejected cable channel Manhattan Neighborhood Network (MNN) as a public function by operating publicly available channels. *Id.* at 1930. A private entity is a governmental actor only if it performs a traditionally exclusive public function. Since governments do not traditionally and exclusively operate media platforms, like MNN, social media platforms are not performing a function traditionally or exclusively performed by the government. Platforms offer services adjacent to peer support groups and community whiteboards that are offered in many privately-owned salons, cafes, co-ops, and grocery markets. Therefore, because these platforms are not government

entities subject to the Free Speech Clause, they retain editorial discretion over their content.

Newspapers are not required to offer public officials an opportunity to dispute defamatory content. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). The First Amendment protection against government intrusion does not categorize speech as left-leaning or right-leaning, contrary to HB 20's stated legislative intent to curb liberal views. "Public officials and public figures are expected to absorb "vehement, caustic, and sometimes unpleasantly sharp attacks" as part of the give-and-take of our political system." *Id.* at 270–71. (See citing *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131; *271). Requiring platforms to publish public officials' defense forgoes First Amendment protection for free discussion. HB 20 is thus a content-based, viewpoint-based, and speaker-based regulation that is forbidden by the First Amendment because it "seeks to manipulate the public debate through coercion rather than persuasion." *Turner Broad Sys, Inc. v. FCC 512 U.S.* 622, 641 (1994).

The State of Texas incorrectly contends that HB 20 only regulates the conduct of platform activity. However HB 20 does, in fact, regulate

speech. The District Court for the Western District of Texas held that HB 20 puts social media companies in the untenable position of choosing which content to keep up and which content to take down due to its vague viewpoint requirement. This requirement by the government infringes on social media companies' freedom of speech rights by telling them which speech to regulate. HB 20 thus burdens social media platforms' speech and burdens the platforms' editorial discretion to curate their property as they see fit.

b. Internet Platforms' Editorial Discretion is Similar to Print Media

The Supreme Court, the Western Texas District Court and HB 20's text all acknowledged that social media platforms exercise some form of editorial discretion, whether or not the State agrees with how that discretion is exercised. *NetChoice, LLC v. Paxton*, 1:21-CV-840-RP, 2021 WL 5755120, at *8 (W.D. Tex. Dec. 1, 2021).

The government may not tell Twitter or YouTube what videos to post or tell Facebook or Google what content to favor. *See United States Telecomms. Ass'n v. FCC*, 423 U.S. App. D.C. 183 (2016). "Social media users employ these websites to engage in a wide array of protected First Amendment activity." *Packingham v. North Carolina*, 137 S. Ct. 1730,

1735–36 (2017). "A search engine is akin to a publisher, whose judgments about what to publish and what not to publish are protected by the First Amendment." *e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-cv-646, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017).

In *Turner*, the Court held that because the regulation does not discriminate based on content or viewpoint, intermediate scrutiny is warranted. "The appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662, (1994). Since HB 20 discriminates based on content or viewpoint, and is not content-neutral, it warrants strict scrutiny. Texas would therefore need a compelling governmental interest and HB 20 must be narrowly tailored for it to pass strict scrutiny. HB 20 failed this required test.

Texas incorrectly argues that platforms do not have a speech right when blending private speakers' and platforms' speech together. "A private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569–70 (1995). Platforms' speech is manifested in its curation, and broadcasting of combined voices from users. This speech is protected by the First Amendment regardless of whether they edit their speech or not.

c. Internet Platforms' Inherently Expressive Speech Warrants First Amendment Protection.

The editorial function itself is an aspect of speech. *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996).* Monitoring, screening, and deletion are all "quintessentially related to a publisher's role." *See Doe v. Internet Brands, Inc.,* 824 F.3d 846 (9th Cir. 2016) (citing *Green v. America Online,* 318 F.3d 465 (3d.Cir. 2003*).* Search rankings are protected opinions. *Search King, Inc. v. Google Tech.*, Inc., No. CIV-02-1457, 2003 WL 21464568, at *2–4 (W.D. Okla. May 27, 2003). Excluding certain content from search results is entitled to First Amendment protection. *Langdon v. Google*, Inc., 474 F. Supp. 2d 622, 629–30 (D. Del. 2007). A platform deciding whether to take down or leave a post is within the protection the First Amendment affords. *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017).

Texas erroneously states that companies use algorithms to control access to information and censor viewpoints. In actuality, companies are just providing users with the content they want to see so that they will continue to use their website. In *Gonzalez v. Google*, the Court explained that algorithms function like traditional search engines and select content based on user inputs. *Gonzalez v. Google LLC*, 2 F.4th 871, 896 (9th Cir. 2021). Algorithm's selection of speech reflects the users' selection rather than just 'that of the platforms'. This broadcasting function and deference to the users' choice is exactly the quintessential service that platforms provide to their customers.

Texas' rhetoric fails to consider consumers' choice by stating that HB 20 is designed for the state to combat what they perceive to be big tech liberal views. *Twitter v. Paxton*, No. 21-15869 (9th Cir. filed July 23, 2021) (detailing Attorney General's stated intent to use Texas Deceptive Practices Law to police bias). Platforms disseminate speech by arranging to recommend and present content so that the messages are worthy of presentation. *Hurley, supra,* 514 US at 575. The District Court correctly acknowledged that platforms curate content to convey a message of the type that community users try to foster. Consumers can

fully participate in the platforms that provide communities and terms of service that they like and terminate association from the platforms they do not which to associate with. HB 20 eliminated consumers' freedom to associate and restricted them from building digital communities of their own choice.

B. HB 20's Disclosure Requirement is Unconstitutional and Overly Burdensome.

HB 20's Section A120.051 Disclosure Requirement unfairly burdens platforms by requiring them to submit confidential information about their business management, data retention, and trade secrets. Additionally, HB 20's restriction is based on the size of the platform, discriminating against "big" platforms over "smaller" platforms. Finally, HB 20's required disclosure does not facilitate any legitimate public interests. Favoring certain speech is not a legitimate public interest for the State to hold.

d. Disclosure is Forbidden for No Valid Reasons and Did Not Further Public Interests.

The First Amendment prohibits any "law that subjects the editorial process to private or official examination merely to satisfy curiosity or serve some general end such as the public interest." *Herbert v. Lando* 441 US 153, 174 (1979). Here, HB 20 objectives serve only government interests and do not advance any public interest for the users. Disclosures regarding political advertisements on websites intruded into the function of editors and unconstitutionally compelled speech. *Washington Post v. McManus*, 944 F.3d 506, 518 (4th. Cir. 2019).

e. Disclosure Requirements Based on Size Unfairly Burden Small Businesses and Inhibit Commerce.

HB 20 Section A120.002 Definition of Social Media Platforms discriminates against platforms based on size. HB 20 applies the restrictions only to platforms with more than 50 million monthly active users in the United States. Many companies have over 50 million users, however they do not have the capacity or resources to comply with the stringent disclosure requirement.

Platforms of any size have a constitutional right to their data management and to arrange their business any way they see fit, including moderating user-generated content. *Manhattan Community*

Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) (recognizing private entities' rights to exercise editorial control over speech and speakers on their properties or platforms.). In *Halleck*, the city did not own or lease the public access channels, nor did it possess any formal easement or other property interest in the channels. *Id. at* 1924. The Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property. *Id.* at 1931 (citing *Hudgens'* decision that private property owners providing a forum for speech are constrained by the First Amendment would be "to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country.").

Requiring businesses to expose how they curate and target content to users, promote content, moderate content, and enforce user policy entrenches on companies' private property rights, and intellectual property rights in securing their business model patents, and trade secrets.

The Transparency Report under HB 20 obligates platforms to count the number of every user complaint, and all removals, and

suspensions. These requirements are impossibly burdensome to comply with. As we submit this brief, Facebook users generate 4 petabytes of data per day—that's a million gigabytes.[1] About 400 users sign up for Facebook each minute. *Id.* Every 60 seconds, 510,000 comments are posted, 293,000 statuses are updated, 4 million posts are liked, and 136,000 photos are uploaded. *Id.* When HB 20 requires removal notice every single time in the vast amount of information flow, it becomes impractical, burdensome, and oppressive and will stifle speech.

HB 20's disclosure requirements are unconstitutional and overly burdensome to comply with. These private companies are allowed their own editorial discretion over user-generated content by the First Amendment. Further, disclosure would cause companies to reveal proprietary business information. Due to the overwhelmingly vast amount of content posted every minute, these requirements would be impossible to comply with. Companies are already offering transparency reports for what they are able to disclose. The

[1] *Wild and Interesting Facebook Statistics and Facts (2022), Maddy Osman, January 3, 2021.*

requirements that HB 20 seeks are simply impossible to achieve, especially at this scale.

II. HB 20 WOULD CAUSE SEVERE ECONOMIC DAMAGE AND HARM INNOVATION

A. Liability for User-generated Content would Drown Companies in Endless Litigation and Force Them to Allow Very Limited Speech on Their Websites.

HB 20 contradicts a series of holdings that free speech should flourish on the Internet and not be controlled by any single entity. "No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web." *Reno v. ACLU*, 521 U.S. 844, 853 117 S. Ct. 2329 (1997). Section 230 of the Communications Decency Act has continued to bolster the First Amendment by allowing this speech, and the Internet, to flourish (47 U.S.C. § 230). Texas seeks to directly contradict *Reno* decades later by deciding that Texas should be the "organization" to regulate Internet speech.

HB 20 seeks to undo the Internet's progress and the economic growth that has been supported by the First Amendment and Section

230. HB 20 dis-incentivizes companies to make moderation decisions that best meet the interests of their user bases, and will greatly restrict user-generated content, and chill free speech. Content moderation protects users from undesirable content and establishes community standards that best cater to the needs of that self-selected community.

As those needs change, companies are naturally incentivized to make moderation decisions that keep their users happy, so they keep coming back. Consumers choose to engage on the platforms that broadcast the content they prefer and can leave the platforms that do not meet their needs and standards. Additionally, this allows for continued competition and steers away from the monopolization of one company and one point of view being promoted. Content moderation protects vulnerable groups and minority voices from being oppressed and even helps amplify them.

Self-regulation is more suitable for adjusting to changes that arise as technology continues to improve. Companies can implement new and improved measures for moderation and Trust & Safety without the red tape. Allowing companies to evaluate their own commitment to their users and stakeholders enhances consumers' trust and benefits the

long-term outlook of the digital economy for the state and the country. Again, the Internet has flourished, because of the lack of government regulation and the enormous growth of third-party content. HB 20 seeks to halt over 25 years of social progress and technological innovation, targeting one of the fastest growing sectors of the US economy.

B. The Costs of Compliance for Entry and Litigation would be Discouragingly Unbearable for the Majority of Current Websites and would Place a Significant Barrier Ahead of Newcomers.

HB 20 targets companies with over 50 million monthly active users per month in the United States. Meta has more than 1 billion users, YouTube has over 2 billion, and as of January 2022, TikTok has over 1 billion, globally.[2] Twitter hovers around 400 million, along with Pinterest and Reddit. Snapchat comes in around 500 million. *Id.* In the United States, applying the monthly active users metric, Meta has about 260 million (including Canada), YouTube has about 126 million,

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[2] Statista Research Department, *Twitter: Number of monetizable daily active U.S. users 2017-2021*, Statista, (January 28, 2022) https://www.statista.com/statistics/970911/monetizable-daily-active-twitter-users-in-the-united-states/ (Ran separate searches for all websites listed)

TikTok has about 138 million users, and Twitter has about 73 million. *Id.* Pinterest has about 86 million, Reddit 220 million, and Snapchat 107 million. *Id.*

What is the basis for the 50 million monthly active user in the United States threshold? HB 20 does not say. Santa Clara University School of Law Professor Eric Goldman and Jess Miers warn about the pitfalls of regulating Internet companies by size. These pitfalls include increased adjudication costs, companies being forced to make socially disadvantageous choices for users and the business or having to make counter-moves to the legislation such as breaking up the company, or merging with larger companies. An important piece to note is that each company has its own means for measuring its monthly active users. Legislation that attempts to regulate by simply stating "monthly active users" is inviting inconsistency.[3]

Even putting the size issue aside, Meta users upload over 100,000 pieces of content per minute. YouTube users upload 500 hours of video

[3] Eric Goldman and Jess Miers, *Regulating Internet Services by Size* (May 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3863015&fbclid=IwAR3ak5IA9OZKYGXdPeNlXBraTfp2wliRVdp0J_bH3jBF9pNc-HChUQb7shY

every minute, over 350,000 Tweets are sent every minute. [4] That is 6 million, 30,000, and 21 million per hour respectively. It is impossible for websites to monitor and manage content in the manner HB 20 requires.

These companies are currently working towards removing content through automated filters, which are imperfect, and through human moderators. Public transparency reports from the would-be-targeted companies ranging from July-September 2021 claim that about every hour, Meta would take down 600,000+ pieces of content,[5] YouTube would take down 515,000+ videos, channels, and comments,[6] and TikTok would take down 43,000+ videos.[7] In January-June 2021, Twitter would take down and take action against about 3,000 Tweets

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[4] Statista Research Department, *Hours of video uploaded to YouTube every minute as of February 2020*, Statista (February 23, 2022) https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/ (Ran separate searches for Meta and Twitter)

[5] Community Standards Enforcement Report, Meta https://transparency.fb.com/data/community-standards-enforcement/

[6] *YouTube Community Guidelines enforcement*, Google https://transparencyreport.google.com/youtube-policy/removals?hl=en&total_channels_removed=period:2021Q3&lu=total_comments_removed&total_comments_removed=period:2021Q3

[7] *Community Guidelines Enforcement Report*, TikTok (February 8, 2022) https://www.tiktok.com/transparency/en-us/community-guidelines-enforcement-2021-3/

and accounts an hour, for violations of Twitter Rules alone.[8] The Facebook/Meta Oversight Board would receive 100+ petitions to review a takedown decision.[9]

Having a headcount large enough to manually review every post, Tweet, and video would be infeasible. Automatic filters and other technological measures are consistently prone to error and overcorrection. Most importantly, the statistics above ignore how moderation would look under HB 20's requirement to moderate based on "viewpoint". Websites would have to choose between excessive spending to hire and implementing technological measures to catch some more, but not all, of this speech or excessive spending to defend the ensuing litigation and compliance costs.

At the end of the day, no matter how much money they spent, these companies still would not be able to review and make decisions about every piece of content. The sheer volume of content produced on these websites has grown so large and so has the diversity of viewpoints

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[8] Rules Enforcement, Twitter https://transparency.twitter.com/en/reports/rules-enforcement.html#2021-jan-jun

[9] *Meta Q2 + Q3 2021Quarterly Update on the Oversight Board,* Meta

that attempting to censor by viewpoint becomes nonsensical. These platforms are already putting forth transparency reports and are continuing to add to them every year as they improve their content moderation practices. In short, the requirements of HB 20 are excessively burdensome and impossible to achieve at the scale of 50 million+ monthly active users.

100 billion dollars. In 2021, the creator/user-generated content economy was estimated to be worth at least 100 billion dollars.[10] "In fact, 43% of surveyed creators report making a livable wage from their content at $50k in annual income or higher." *Id.* In the modern economy, people make a living in a variety of ways, and many are reliant on the Internet to do so. People actively seek out these content creators' thoughts and viewpoints in the form of posts, photos, videos, blogs, and other mediums. If user-generated content becomes subject to HB 20, there will likely be a limitation of the number of creators that are sustainable over time and thus, a silencing of voices and an

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[10] Werner Geyser, *Creator Earnings: Benchmark Report 2021*, Influencer Marketing Hub (August 11, 2021) https://influencermarketinghub.com/creator-earnings-benchmark-report/#:~:text=content%20creation%20is%20their%20main,every%20other%20revenue%20source%20combined

elimination of content. If content creators can no longer create content, their primary or secondary source of income is immediately shut down. Additionally, the costs of compliance, litigation, and regulatory penalties that will ultimately result from HB 20 will force companies to make financial choices that will result in pulling revenue streams from content creators, destroying a means of income for many people.

HB 20 attempts to regulate using a vague metric, is impossible for companies to enforce, and any attempts to do so would result in crushing costs that would be felt on the company and users. HB 20 arbitrarily harms users and content creators who rely on this content for entertainment and an income and it would destroy a 100-billion-dollar industry. *Id.*

C. Investments in New Social Media Companies would Dwindle as Investors would Fear their Hopeful Return will be Lost Paying for Lawsuits and Regulatory Penalties.

In the past few years, Texas, especially Austin, has seen a surge in the emergence of new technology companies. This growth has brought significant investment and jobs to the area and shows no signs of slowing. Concurrently, Austin experienced record venture funding in 2019, with local startups raising $1.84 billion for the year, up 19.5%

compared to the $1.54 billion raised in 2018, and an impressive 87% compared to $983 million in 2017, according to Crunchbase data. CompTIA, an IT trade association, listed Austin and Dallas as their top two places to live for IT professionals, because of the creation of new companies, jobs, and competitive salaries that have resulted from the investment boom.[11]

The Bloom Institute of Technology ranked Austin and Dallas as 2 and 4 respectively in 2021 for the best cities for technology jobs, focusing on software developers.[12] The company Dice, a technology career hub, released a report after analyzing one million technology job postings in April-June 2021. The report stated, "Texas, which continued to rank second only to California for tech job listings, experienced strong growth in Austin, Dallas, Houston and Plano — "strengthening the narrative of its potential to rival the Golden State as a tech

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[11] 2020 Tech Town Index, CompTIA (2020) https://comptiacdn.azureedge.net/webcontent/docs/default-source/research-reports/08204-2020-us-tech-town-report-final.pdf

[12] Ariana Rees, *Top 10 Best Cities for Tech Jobs*, Bloom Institute of Technology, (2021) https://www.bloomtech.com/article/top-10-best-cities-for-tech-jobs

powerhouse," Dice said."[13] WalletHub recently ranked Texas as the best state for business using three key metrics: business environment, access to resources and business costs.[14]

It is clear that Texas aims to be competitive and a major player in the technology space. Whether it is from companies moving some or all their operations to Texas or creating a start-up friendly environment, Texas has positioned itself as one of the go-to places for technology. HB 20 would bring all this growth and success to a screeching halt.

Liability protections for intermediaries affect intermediary start-ups, including social media start-ups. Stronger liability protections are associated with higher success rates and greater profitability for start-ups. "What we have found is that in regions where there is significant Internet investment, it appears that having stronger protections for intermediaries leads to a significant increase in startup investment in companies protected by those laws. Even in situations where there are some intermediary liability standards, the stronger those protections

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[13] Donna Goodison, *Best US Cities For Technology Job Growth: Dice Q2 Report*, CRN (September 21, 2021) https://www.crn.com/slide-shows/running-your-business/best-us-cities-for-technology-job-growth-dice-q2-report

[14] Adam McCann, *Best & Worst States to Start a Business*, WalletHub (July 20, 2021) https://wallethub.com/edu/best-states-to-start-a-business/36934

are for the intermediaries, the more investment and economic growth we see."[15] "Eliminating [intermediary liability] protections for competition would enhance the market power of today's largest incumbents. It would deter new competitors from entering the market, further concentrating revenue and users among a few large firms."[16]

In 2021, one of the biggest venture capital deals in Austin was for the company Outdoorsy for $100 million.[17] As of November 2021, the company has over 1 billion dollars in sales.[18] Outdoorsy is a website that allows people to list their RVs for rental, similar to an Airbnb model. The content posted is user-generated content and would fall under HB 20's definition of social media, "An Internet website or

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[15] Mike Masnick, *Malwarebytes Conclusion Shows Section 230's Best Feature: Killing Dumb Cases Before They Waste Everyone's Time And Money*, Techdirt (September 13, 2021) https://www.techdirt.com/articles/20210905/16335447510/malwarebytes-conclusion-shows-section-230s-best-feature-killing-dumb-cases-before-they-waste-everyones-time-money.shtml

[16] Jennifer Huddleston, *Competition and Content Moderation*, Cato Institute (January 31, 2022) https://www.cato.org/policy-analysis/competition-content-moderation#introduction

[17] Mike Cronin, *Outdoorsy raises $120M, launches insurtech division*, Austin Business Journal (June 25, 2021).

[18] Michael Tobin, *RV Rental Company Outdoorsy Is in Talks with Rivian, Ford for EV Order*, Bloomberg, (November 22, 2021) https://www.bloomberg.com/news/articles/2021-11-22/rv-marketplace-outdoorsy-in-talks-with-rivian-ford-for-ev-order

application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images."[19]

If Outdoorsy meets HB 20's size threshold, it would be subject to all of the compliance requirements, disclosure provisions, and everything else required under the law. Outdoorsy would have to choose between growth and setting aside capital in anticipation of future compliance costs or curbing growth so they do not risk hitting the size threshold. This is not a good way to encourage investment and grow business.[20]

In regions where there are more protections and immunities for Internet intermediaries, there is more investment, because investors have more confidence that their hopeful return will not be completely lost in litigation costs. Additionally, as companies will not be able to comply with HB 20, they will be crushed by regulatory penalties that

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[19] Tex. Bus. & Com. Code § 120.001 (LexisNexis, Lexis Advance through the 2021 Regular Session of the 87th legislature, 2021 1st Called Session, 2021 2nd Called Session, 2021 ballot propositions, and the 2022 ballot proposition contingencies)
[20] Nicole Cobler, *Austin's big year for VC funding*, Axios (January 14, 2022) https://www.axios.com/local/austin/2022/01/14/austin-venture-capital-funding-startups

raise the costs of business for start-ups. HB 20 dis-incentivizes this investment and will discourage the investment that the state has seen in recent years, motivating companies to take their business elsewhere.

HB 20 will chill free speech, crush companies with endless litigation and unmanageable compliance costs, and diminish the upswing in technological investment that has recently benefitted Texas. These harmful impacts will be felt within Texas, the United States, and internationally.

III. HB 20 IMPACTS WILL BE FELT BEYOND TEXAS AND BEARS INTERNATIONAL CONSEQUENCES.

A. The International Impact of State Bills like HB 20 is Detrimental to Global Freedom of Speech and Innovation.

Because of the global nature of the Internet, state bills like HB 20 and Florida's SB 72 create a form of imperialism over other countries' users to access and share information. If HB 20 and SB 72 become enforceable, Internet users in other countries will also be subjected to these US state laws and experience restrictions on their ability to access and exchange information, violating foreign users' freedom of expression rights. Internet users in other countries will have lost the

ability to govern themselves because they would find themselves in an online ecosystem governed by the most restrictive US states.

HB 20 proclaims to protect the free exchange of ideas in the State of Texas. The Bill in reality requires that social media platforms comply with a strict regularly scheme over the sharing of information, severely chilling speech. The Bill mandates that companies host unwanted and inappropriate content and broadcast content that individual users do not wish to see and that platforms do not wish to carry. These speech restrictions coming from a foreign authority effectively create digital colonies in other countries, intruding on national sovereignty rights abroad.

US state-initiated media censorship laws also establish dangerous precedents for other countries to follow around regulating Internet speech via burdening Internet platforms. Social media platform regulation becomes a powerful tool of censorship for governments that do not value freedom of expression rights.

a. HB 20 and Other Social Media Censorship Bills Create International Internet Balkanization That Harms Users.

HB 20 and SB 72 create jurisdictional fragmentation that imposes US censorship over international Internet users. Many countries already have already enacted laws that are modeled after Florida's and Texas' to establish their own media censorship regime. Currently, Russia, Turkey, Vietnam, India and Indonesia have social media censorship laws installed in the name of protecting speech that are similar to HB 20. For example, recently, Singapore's supposed fake news and misinformation legislation, the Protection of Online Falsehoods and Manipulation Bill (POFMA), became an abusive governmental tool used to target critics and political opponents. International companies that do business in Singapore are forced to comply with the law. Similarly, HB 20 will be misused at home and abroad to control speech by dictating what users can see regardless of what users wish to see.

The difficulty in complying with HB 20's Disclosure Requirement also exacerbates Internet fragmentation and balkanization. Users will ultimately bear the cost of HB 20 compliance. The Disclosure Requirement also creates antitrust concerns as smaller businesses lack

the resources to comply and will be driven out of business altogether, restricting consumer choice even further.

The targeting of social media platforms that have more than 50 million active users each month is misleading. Many social media companies that have over 50 million users do not have market dominance. The number of users does not correlate directly with market power. HB 20 creates hurdles for newly rising social media companies, and companies that fit Texas' definition of social media who lack the resources to comply. The Disclosure requirement worsens antitrust concerns and reinforces the monopolization of larger social media companies at the expense of small business and the growing Internet economy, which relies heavily on third-party content.

b. Defining Internet Intermediaries as Common Carriers Gives Rise to Centralized Governmental Control Over the Internet Globally.

Platforms are not common carriers in the traditional sense of the term. HB 20's labeling of platforms as common carriers creates a slippery slope not only for the US but for the rest of the world to subject private companies to restrictive speech regulations. Even if platforms were to be categorized as common carriers, private common carriers

still retain a certain level of editorial discretion. In *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, the Court recognized that the cable operators generally maintain editorial freedom to pick and choose programs. *518 U.S. at 738*. Common carriers have First Amendment rights. *Id.* The *Turner Broad Sys, Inc.* Court allows cable operators to carry a certain minimum number of broadcast stations. The operators retain a minimal editorial discretion in choosing what stations they will maintain, rather than having to adhere to all channels irrespective of content. These precedents show that even common carriers retain a minimal level of editorial control and enjoy self-established industry standards that government actors cannot reach. Stripping common carriers of all rights to editorial discretion, in conjunction with enforcing potentially abusive social media regulation imperils Internet freedom globally.

c. Platform Self-Regulation Has Value for Promoting Peace, and Innovation in the International Community.

Industry self-regulation promotes peace by facilitating access to and sharing of truthful information. Truth possesses an inherent value and people want to be exposed to it. Content moderation by platforms

combats misinformation and disinformation and it strengthens a shared understanding and cooperation across countries, enabling peace and diplomacy. Providing information from a variety of viewpoints according to the users' choice creates a background for peaceful conversations where people feel safe to engage with each other. In establishing industry standards, companies are better suited than the state to foster the kind of communities users want to interact with when they log on to social media.

In the current ongoing Ukrainian-Russia conflict, platforms play a vital role in responding to crises by content moderating misinformation and government propaganda. Meta took down 40 accounts in Ukraine and Russia for spreading misinformation, disrupting the network *before* they could amass a large audience.[21] Platforms do have a self-interest in facilitating access to truthful information and in moderating misinformation.

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[21] Brian Fung, *Meta says it's shut down a pro-Russian disinformation network, warns of a social media hacking operation*, CNN (February 28, 2022) https://www.cnn.com/2022/02/28/tech/meta-russia-ukraine-disinformation-network/index.html

The industry is best positioned to moderate content by timely evaluation of the accuracy of the statement, the source, and the likely impact on users. With the amount of content already on the Internet and the added task of moderating content surrounding a major international conflict, swift action is often warranted. If this responsibility fell to government, the response would be too slow, ineffective, and riddled with error.

Rapidly evolving geopolitical conflicts, the dynamic of the global pandemic, and climate emergencies all require fast decision making and thorough assessment for the user communities. The rigidity of state-initiated Internet regulation is ill equipped to respond to the ever-changing digital discourses.

HB 20 is not the answer to any of the problems presented. Companies and users alike enjoy First Amendment protections, protections that are the backbone of our democracy. HB 20 is out of line with the First Amendment, goes against decades of precedent, and would have severe economic and international impacts.

IV. CONCLUSION

HB 20 seeks to undo decades of First Amendment precedent and will have a severely chilling effect on speech on the Internet. Social media websites, as private entities, are entitled to editorial discretion over the content they carry on their websites. Just like any business, they cater to their customers. If users do not like the experience they are having, they will leave, so these companies are incentivized to provide the experience that users are seeking. The legislation claims to be "against censorship", however the State of Texas is imposing censorship by telling private entities how to regulate speech. That is censorship at its core. Social media platforms are akin to newspapers and print media that are protected by the First Amendment, and these websites should enjoy that protection too. Moderating social media websites is not a traditional government function nor anything remotely similar to what the government has done in the past in any media. But HB 20 strictly regulates Internet speech, which the First Amendment wisely prohibits.

HB 20 will harm a critical sector of the US economy and crush innovation as companies will be stuck in endless litigation and forced to

utilize their resources just for compliance. It is impossible to regulate by "viewpoint" the millions of pieces of user-generated content that are posted. Smaller and startup social media websites will be unable to compete and will be forced to shut down, limiting consumer choice further. Investments in startups that have previously been able to rely on intermediary immunities will dwindle and there will be an exodus of well-paying jobs and businesses out of Texas.

HB 20's impacts will be felt internationally as well. The legislation would impact international users negatively by shifting the compliance cost to users, hindering innovation, and potentially putting the Internet's fate in the hands of politicians. Treating social media websites as common carriers empowers centralized governmental control over what ideas users do and do not see. The Internet then becomes contorted by what each country or state wants it to be. Lastly, a platform's incentive to self-regulate provides value for promoting peace as moderators continually take down misinformation, including information on tense international conflicts.

For all the aforementioned reasons, the Fifth Circuit should affirm the District Court for the Western District of Texas.

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Respectfully Submitted,

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Dated: 04/07/2022

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on 10 April 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: 04/10/2022

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