No. 21-A-720

In the Supreme Court of the United States

NETCHOICE, LLC D/B/A NETCHOICE; AND
COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION D/B/A CCIA,
Applicants,

V.

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

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

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR IMMEDIATE ADMINISTRATIVE RELIEF AND TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Christopher Cox, amicus curiae, is a former United States Representative (R-CA) who co-authored Section 230 of the Communications Decency Act, 47 U.S.C. §230. Mr. Cox moves the Court for leave to file his amicus brief in support of the Emergency Application for Immediate Administrative Relief and to Vacate Stay of Permanent Injunction Issued by the United States Court of Appeals for the Fifth Circuit ("Emergency Application") by Plaintiffs/Applicants NetChoice, LLC d/b/a NetChoice and Computer and Communications Industry Association d/b/a CCIA.[1]

Since Congress enacted §230, Mr. Cox has been a leading observer of developments in the case law and, at the request of the United States House of Representatives and the United States Senate, he has been a contributor to recent congressional deliberations about §230. As the chief drafter of the statute, Mr. Cox is able to speak authoritatively to the history and operation of §230, Congress's intent in passing, §230, and Texas' serious misinterpretation of §230 in its arguments in this case.

Mr. Cox's amicus brief addresses why HB20 is incompatible with both §230 and the First Amendment. The brief explains the history and purpose of §230, how §230 is consistent with the First Amendment, how HB20 is irreconcilable with §230, and why HB20 is preempted by §230. The brief will show that the District Court's injunction preserving the status quo – which is "an important consideration in

[1] Mr. Cox is required to submit a motion for leave to file this amicus curiae brief because it is in connection with an emergency application. Plaintiffs/Applicants NetChoice and CCIA, and Defendant/Respondent Ken Paxton have consented to Mr. Cox filing this amicus curiae brief.

granting a stay"[2] – should be maintained, as Applicants have made a strong showing that that: (1) they are likely to succeed on the merits of their appeal; (2) they will be irreparably injured if HB20 were to go into effect; (3) the injunction against HB20 will not substantially injure the State of Texas; and (4) the public interest lies in maintaining the status quo.

For these reasons, Mr. Cox respectfully asks the Court for leave to file his amicus curiae brief in support of the Emergency Application.

Dated: May 17, 2022

/s/ Arthur R. Kraatz
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[2] *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016); *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1348, 1349 (1978) (Rehnquist, J., in chambers).

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***AMICUS CURIAE* BRIEF OF CHRISTOPHER COX IN SUPPORT OF EMERGENCY APPLICATION FOR IMMEDIATE ADMINISTRATIVE RELIEF AND TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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Christopher Cox submits this amicus brief in support of the Emergency Application for Immediate Administrative Relief and to Vacate Stay of Permanent Injunction Issued by the United States Court of Appeals for the Fifth Circuit ("Emergency Application") by Plaintiffs/Applicants NetChoice, LLC d/b/a NetChoice and Computer and Communications Industry Association d/b/a CCIA.[1]

INTEREST OF THE AMICUS

Christopher Cox, amicus curiae, is a former United States Representative (R-CA) who co-authored Section 230 of the Communications Decency Act, 47 U.S.C. §230. Since Congress enacted §230, Mr. Cox has been a leading observer of developments in the case law and, at the request of the United States House of Representatives and the United States Senate, he has been a contributor to recent congressional deliberations about §230. As the chief drafter of the statute, Mr. Cox is able to speak authoritatively to the history and operation of §230, Congress's intent in passing, §230, and Texas' serious misinterpretation of §230 in its arguments in this case.

If HB20 is allowed to take effect during the pendency of this litigation, the important First Amendment issues the statute raises will be summarily resolved in favor of the State. Both Plaintiffs/Applicants and the public interest will be

[1] No party or party's counsel authored the brief in whole or in part or contributed money intended to fund preparing or submitting the brief. No person except amicus curiae or his counsel contributed money intended to fund preparing or submitting the brief. Mr. Cox is required to submit a motion for leave to file this amicus curiae brief because it is in connection with an emergency application. Plaintiffs/Applicants NetChoice and CCIA, and Defendant/Respondent Ken Paxton have consented to Mr. Cox filing this amicus curiae brief.

irreparably harmed, because of HB20's incompatibility with both the First Amendment and §230. This brief explains the history and purpose of §230, and the interrelationship of §230 and the First Amendment. It identifies the error that Texas has made in asserting that §230 supports its position that HB20 does not violate the First Amendment. It concludes by urging that the District Court's injunction preserving the status quo be maintained in order to ensure that, before this proposed State regulation of speech with dramatic and sweeping First Amendment implications is allowed to take effect, the fundamental and vitally important issues it raises are subjected to full appellate review.

SUMMARY OF THE ARGUMENT

The First Amendment interests threatened by HB20 are paramount. This brief exposes the fallacious reasoning behind Texas' conclusion that §230 strips platforms of their rights under the First Amendment.

The brief further explains why HB20 is in irreconcilable conflict with §230, how Applicants' members will be irreparably harmed as a result, and why the statute's express preemption is mandated by the Supremacy Clause. The brief concludes by explaining why Applicants' request for relief satisfies the standards for ruling on a stay request, especially the "important consideration" of maintaining the status quo.

ARGUMENT

1. THE CONSTITUTION PROTECTS THE FREE SPEECH RIGHTS OF PLATFORMS.

A. §230 Does Not Require Platforms to Forfeit Their Free Speech Rights by Becoming "Mere Conduits."

Texas fails to see a conflict between the First Amendment and a law, HB20, that forces private parties such as Applicants to publish speech they find objectionable. Texas advances the unfounded theory that §230 protection is irreconcilable with the idea that platforms should "enjoy the same First Amendment rights as newspapers, who are legally responsible for the content they publish."[2] Texas stakes its theory on its unfounded claim that platforms assert their protection under §230 because they are mere conduits for the speech of others. But the claim is wrong as a matter of fact and as a matter of law. To the contrary, Congress enacted §230 for the express purpose of *overturning* a state court ruling that required platforms to be mere conduits to avoid liability for user posts.

In 1995, a New York court held that only a platform that was a passive conduit could avoid liability for tortious content authored by its users.[3] The court held that a platform *was* liable for a user's posts because the platform was *not* a mere conduit. Instead, it removed users' posts if they were "harmful to maintaining a harmonious online community."[4] An earlier New York case had held that another

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[2] Statements regarding Texas' arguments refer to Texas' arguments in its briefing before the Fifth Circuit.

[3] *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

[4] *Id.*, at *4-5.

platform was not liable for user posts because it did *not* moderate content.[5] The perverse incentive established was clear: for platforms to avoid liability for user-created content, they could not remove objectionable content from their sites.

Even twenty-five years ago, the volume of content created by users of the leading internet platforms – there were millions of users at the time; it is billions today – made it clear that platforms could not be expected to monitor all of the enormous quantities of material their users posted. Yet it was equally clear that the law should not punish the attempt to do so. Congress therefore decided it was unreasonable for states to hold platforms liable for user content simply because they attempted, however imperfectly, to moderate some content. Subjecting platforms to liability for their user's content because they engaged in content moderation would interfere with the internet's basic functioning.

Congress adopted §230 to protect platforms that display user-created content from being treated as if they were "the publisher or speaker of any information" that was actually "provided by another." §230(c)(1). For this protection to apply, the platform must not be "responsible, in whole or in part, for the creation or development" of the content at issue. §230(f)(3). When a platform even partially plays that creative or developmental role, §230 does not protect the platform from liability.

Section 230 does not classify platforms as "publishers" or "not publishers." It simply states that a platform will not be deemed a publisher in certain

[5] *Cubby, Inc. v. CompuServe Inc.*, 776 F.Supp. 135, 140, n. 1 (S.D.N.Y. 1991).

circumstances. Texas mistakenly insists that a platform must be classified for all purposes as *either* a publisher *or* a conduit. But §230 does not require classification of a platform as either one or the other for good reason. Most platforms share some features in common with traditional publishers. The two forms of media differ, however, in that platforms host millions or even billions of pieces of content each day that become available online in real time. Almost all platforms perform content moderation – they are not mere conduits – but their content moderation efforts cannot approach those of a newspaper whose editors can read and understand all of its contents before they are published. Section 230 is premised on this multi-faceted reality. The statute provides that a platform *will* be treated as a publisher when it is involved in the creation or development of particular content, but it *will not* be treated as a publisher otherwise.

Content moderation, by its very nature, requires that platforms exercise editorial discretion. The early New York cases would have subjected platforms to liability for exercising this discretion. To avoid this disincentive to removing objectionable content, Congress created a limited "Good Samaritan" exception to the general rule in §230 that participation in content creation or development gives rise to liability. This safe harbor prohibits holding platforms liable for restricting content the platform or its user community considers "objectionable," as defined in §230(c)(2)(A). Thus, §230 does not protect platforms only when they act as mere conduits. This misrepresentation of §230 is key to Texas' baseless argument.

Of course, because content moderation is a form of editorial speech, the First Amendment fully protects it well beyond the specific safeguards enumerated in §230. Properly understood, §230 complements the First Amendment and is entirely consistent with it. The claim that §230 requires platforms to operate as "mere conduits" is patently false.

B. Platforms Do Not Lose Their First Amendment Rights Because of Section 230.

In enjoining the statute, the District Court applied the fundamental First Amendment principle "that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 573 (1995). Contrary to Texas' distortion of the District Court's decision, the application of this bedrock principle is not dependent on the speaker being a newspaper (*Tornillo*),[6] a parade (*Hurley*), an electric utility (*PG&E*),[7] or even a registered sex offender (*McLendon v. Long*).[8] The First Amendment protects all persons from government-compelled speech.

The prohibition against compelled speech is well-established. As Chief Justice Roberts has observed, "some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights,* 547 U.S. 47, 61 (2006).

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[6] *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

[7] *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n*, 475 U.S. 1, 20-21 (1986).

[8] 22 F.4th 1330 (11th Cir. 2022).

Texas contends that it may deny platforms the freedom from government-coerced speech and that *because of §230* platforms cannot be treated like other speakers, as the speech they host is not their own. But content moderation – the enforcement of community standards unique to each platform – *is* a platform's own speech, and §230's protection for moderating user-created content does not depend on a platform being a mere conduit. In fact, moderating content is the opposite of being a mere conduit. Congress designed §230 to encourage platforms to moderate content, and the protection of content moderation is the very *raison d'etre* of §230.

Platforms are responsible for user content they even partially create or develop. §230(c)(1), (f)(3). Platforms are only protected from this liability if they fall within the safe harbor of §230(c)(2). In all cases, whether a particular exercise of discretion in content moderation falls within the safe harbor of §230 or it does not, it retains its character as the platform's own speech. In all cases it is entitled to the same First Amendment rights enjoyed by newspapers, parades, electric utilities, registered sex offenders, and everyone else.

Texas is wrong to claim that platforms would be ineligible for §230 protection if they exercised editorial discretion as newspapers do. In moderating content, platforms *do* exercise editorial discretion, and *for that very reason*, §230 *does* protect them.

There is nothing in §230 that requires abridging the free speech rights of platforms to exercise the editorial discretion inherent in content moderation.

C. Texas' Conflation of Speech and Conduct Is Meritless.

Because the First Amendment prohibits the government from telling people what they must say, Texas is hard pressed to argue that HB20, which it admits *requires* platforms "to host another person's speech," is consistent with the Constitution. Texas is forced to argue that HB20 regulates only "conduct."

Texas' misguided view of §230 rests on the following fallacious syllogism:

Major Premise: Because their speech is their own, newspapers are exempt from a supposed rule that persons may be forced to host speech they disagree with.

Minor Premise: Content moderation by platforms is *not* their own speech because §230 is based on platforms being mere conduits of others' speech.

Conclusion: Because content moderation cannot be the platforms' speech, it must be mere conduct; perforce, HB20 regulates mere conduct, not speech.

Texas' erroneous legal premises must be flagged. The principle that "freedom of speech prohibits the government from telling people what they must say" is the rule, not an exception. And protection from liability under §230 does not require platforms to be mere conduits; their content moderation is their own speech.

The most egregious flaw in Texas' syllogism is the fallacy in its conclusion, which erases all meaningful distinction between speech and unexpressive conduct. Recharacterizing the editorial discretion in content moderation as mere conduct is a leap unsupported by law or evidence. Content moderation standards express a platform's values. They define the online communities that converge on each platform. They establish an editorial context that appeals to certain kinds of advertisers on which the platforms and their communities depend.

The District Court recognized that applying editorial discretion is expressive speech, holding that platforms "have a First Amendment right to moderate content" on their platforms. *NetChoice v. Paxton*, --- F.Supp.3d ---, 2021 WL 5755120 at * 7.

Disallowing platforms from moderating content requires platforms to "alter the expressive content of their [message]." *Id.* at *9, quoting *Hurley*, 515 U.S. at 572-73.

Rumsfeld,[9] which Texas attempts to rely on, actually illustrates the point. *Rumsfeld* addressed the government's power to require federally-funded universities to allow military recruiters on campus. What it did *not* do, as HB20 does, is strip the universities of their right to maintain speech-related community standards that would apply to military recruiters as well as anyone else on campus. If a campus recruiter violated school polices by flinging "F-bombs" or racial epithets at students, the courts would not dismiss these policies as mere "conduct" beyond the protection of the First Amendment. *Rumsfeld* was about conduct, not speech. HB20 is about State regulation of speech, not conduct.

D. Under §230, Platforms Are Liable for Their Own Speech.

Texas concedes that platforms remain liable for their own speech under §230 whenever a platform has even a partial role in the "creation or development" of another's speech. While content moderation always involves editorial discretion, and that exercise of discretion is always the platform's own speech, some forms of content moderation can also involve the "creation or development" of the user's

[9] *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006).

speech – for example, appending a further explication of the subject that is authored by the platform. In other cases, content moderation can consist entirely of the platform's own speech. The liability protections of Section 230 may be applicable in either situation. Yet Texas argues wrongly that content moderation cannot constitute the platforms' *own* speech, because §230 absolves platforms only of liability for *others'* speech. Not only is this a *non sequitur*, but it reflects a serious misunderstanding of §230.

Section 230 provides that if a platform does not partially create or develop content, it is protected from liability for that content. Congress constructed §230 this way because, in light of the huge volume of content crossing most platforms, it would be unreasonable for the law to presume that a platform could screen it all. Congress also understood that if a platform did review and actually edit specific content, then it *would* be fair to hold it liable for that content. As a general rule, therefore, §230 makes a platform liable in these circumstances. §230(c)(1), (f)(3).

But not wanting to expose platforms to liability for good faith efforts at content moderation, Congress included a Good Samaritan exception to the general rule. This safe harbor protects a platform from liability for "any action voluntarily taken in good faith to restrict access to or availability of material" that it or its user community considers "objectionable" as defined in §230(c)(2)(A).

Falling within the safe harbor of §230 does not convert the speech a platform expresses through content moderation into speech that is not its own. Though immunized, content moderation remains the platform's speech. At the same time,

creating new content or developing users' content, such as by adding commentary to a user's post, falls outside the protection of §230. In such instances, a platform is liable, like any other person, for its own speech.

Texas' discussion of §230 and the First Amendment inaccurately depicts the statute. On its face §230 is clear that it does not rob platforms of their free speech rights. Content moderation is by its very nature each platform's "own speech," whether or not it is immunized. And platforms' First Amendment rights include all of their speech, whether protected from liability by §230 or not.

E. Platforms Are Not Common Carriers And Do Not Accept "All Comers."

Texas' declaration that platforms are common carriers is aimed at limiting their First Amendment rights. But its argument that platforms are common carriers is circular: the State claims that because platforms take all comers, the State may force them to take all comers.

Beyond the circularity of its argument, Texas is simply wrong in asserting that platforms accept all comers. Every platform that exercises content moderation, including every one of Applicants' members who would be covered by HB20, does *not* take all comers. Only persons who agree in advance to the platforms' community guidelines are allowed on the platform, and violations can result in removal. Indeed, Congress enacted §230 for the very purpose of ensuring that platforms could enforce community guidelines, which underscores this point.

Texas attempts to analogize internet platforms to telecommunications common carriers, but the two are fundamentally different. Telecommunications

utilities facilitate intimate and private communications, while platforms publish users' speech to a global audience. The public has no reason to believe that Verizon or AT&T endorses the opinions expressed in its customers' private telephone conversations. Indeed, the public has no way of learning what those private opinions are. In contrast, speech that is published on an internet platform is immediately widely known, and the platform hosting it cannot avoid being associated with it.

Texas argues that the *PruneYard* case,[10] permitting political speech by shopping mall patrons, buttresses its argument because, "like the mall," platforms "are open to all comers." But platforms are not "open to all comers." From the beginning, all of Applicants' members who would be subject to HB20 have always maintained community standards governing user-created content.

PruneYard involved a large shopping complex open to the public. Analogizing an internet platform to a shopping mall is as inapposite as comparing it to a phone company. Unlike shopping malls, which actually are open to all comers, internet platforms deny admission to individual users unless they first agree to the published community standards. A platform's users and the public alike are well aware of this. Adherence to community guidelines is not only a condition of admission but also an ever-present condition for continued use of the platform. Texas must concede this point, or the entire rationale of HB20 – its complaint of "de-platforming" users – collapses. Manifestly, platforms are not open to "all

[10] *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

comers."

It is precisely for this reason that, in further contrast to *PruneYard*, the public *does* associate platforms with the kinds of speech and speakers they do allow, and those they do not. When a platform suspends a speaker or deletes content, users who agree with the decision hail it, and those who disagree criticize it. Platforms differ from one another in the way they exercise editorial discretion, agreeing to publish certain viewpoints and rejecting others. The public notices the differences.

And in response to what they notice, not only users but advertisers who are needed to support the platform "vote with their feet." Individuals and advertisers alike choose to patronize certain platforms and abandon others based on the online environment. Advertisers are sensitive to featuring their products and services alongside content their own customers will find objectionable. Users, whose sensibilities run the gamut of opinion and taste, will seek out platforms where they are most comfortable and avoid platforms they find offensive.

Texas is not content to allow the marketplace of ideas to sort out these matters, as the First Amendment envisages. Instead, HB20 uses the heavy hand of the State to require platforms to "take all comers."

Far from the "variety" of internet services that §230(a)(3) envisions as the best route to a "true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," HB20 means that online communities are no longer able to set and enforce their own standards.

2. HB 20 IS INCONSISTENT WITH §230 AND THEREFORE PREEMPTED UNDER THE SUPREMACY CLAUSE.

The likelihood of Applicants' success on the merits is especially strong because, in addition to the First Amendment infirmities that render HB20 unconstitutional, the law is fundamentally inconsistent with §230.

Section 230(e)(3) unambiguously preempts "any State or local law that is inconsistent with this section." This plain language establishes that Congress intended to preempt not only state laws in direct conflict, but also all state laws that are inconsistent – the broadest basis for expressly asserting federal priority. The Supremacy Clause, U.S. CONST., art. VI, §2, provides that federal law in such cases reigns supreme, notwithstanding the laws of any state to the contrary.

HB20 is inconsistent with §230 in several ways, as outlined below. Unless the status quo is maintained, HB20's implementation will irreparably harm Applicants' members in each of these ways, as follows:

A. HB20 Prohibits Platforms from Enforcing Community Standards.

HB20 prohibits platforms from performing content moderation. Using the pejorative term "censor" to lump together various actions, HB20 prohibits a platform from revoking a user's privileges even when the user flagrantly violates community standards, so long as the content violating the platform's policies expresses a "viewpoint." Tex. Civ. Prac. & Rem. Code §§143A.002(a)(1).

Under HB20, denying service to bad actors or removing offending content makes the platform liable for penalties, attorneys' fees, and investigation costs. Tex.

Bus. & Com. Code §§143A.007-008. These harsh penalties conflict with §230's protection of a platform taking actions in good faith to restrict access to offensive content. §230(c)(2).

If a platform bans racist viewpoints, for example, it is subject to penalties. HB20 allows a platform to "censor" user content that invidiously targets race but *only if* such hate speech "directly incites criminal activity or consists of specific threats of violence." That narrow exception denies platforms their First Amendment right to exclude lawful-but-awful speech from their sites.

Under HB20, not only must a platform host offensive content, it must give it the same prominence it gives all other content. In §143A.001(1), HB20 defines "censor" to include denying "equal access or visibility." With billions of posts without any kind of curation, a platform would quickly descend into chaos.

Inherent in organizing material is that some must come before others, even when content is randomly sorted. Content shown first and content shown last do not have "equal visibility," especially in the long line that constitutes any user's feed. Sorting is impossible to avoid. Because HB20 gives Texas the power to enforce this unworkable "equal visibility" yardstick, platforms' work to arrange the volumes of content they host would be second-guessed by Texas officials, who easily could abuse their authority to influence the platforms' content moderation policies.

B. HB20's Savings Clause Is Ineffectual.

In a nod to §230's express preemption of inconsistent state laws, HB20 provides that it does not forbid "censorship" that a platform "is specifically authorized to censor by federal law." Tex. Bus. & Com. Code §143A.006(1). But §230

does not by its terms "authorize" any content moderation, much less "censorship"; §230 is a protection from liability, not a grant of power. The First Amendment, not §230, is the source of platforms' authority to exercise editorial discretion over the content they host.

Were HB20's speech regulation allowed to stand by virtue of this provision, the State could interpose its interpretation of what is, and what is not, allowable "censorship" under §230. The Attorney General and the courts of Texas would be free, in the first instance, to interpret the words "authorized to censor by federal law" by their own lights, as a matter of Texas statutory interpretation. The result would be the creation of a competitive canon that, consistent with the aims of HB20 itself, would undermine federal policy. Congress chose to preempt inconsistent state laws because a uniform federal policy, applicable across the internet, is necessary to avoids results such as the New York state court decision that exposed websites to liability for content moderation.

The internet is the quintessential vehicle of interstate, and indeed international, commerce. Its packet-switched architecture makes it uniquely susceptible to multiple sources of conflicting state and local regulation, since even a message from one person to a neighbor on the same block can be broken up into pieces and routed via servers in different states. Were every state free to adopt its own policy concerning when an internet platform will be liable for moderating or not moderating content created by others, not only would compliance become

oppressive, but the federal policy itself could quickly be undone. Section 230 would then become a nullity.

C. HB20 Prohibits Platforms from Relying on Their Own Judgment to Restrict Objectionable Content.

Under HB20, Texas' determination of whether particular user content is objectionable, whether it should be removed, or how the speaker should be restricted, is controlling. Under HB20, platforms are not free to make their own judgments about what content breaches their community standards. The law's enforcers are empowered to challenge those judgments. Tex. Bus. & Com. Code §§143A.001-002. Most troubling, in the hands of the State this all-purpose device to second-guess a platform's judgments becomes a weapon to control platforms' editorial decisions.

No court would uphold as consistent with the First Amendment a law that required newspapers to yield to the State's judgment on what letters to publish, parade organizers to defer to the State regarding how to pick marchers, or book publishers to submit guidelines for selecting novelists to the State for approval.

Consumer disclosure laws are easily distinguished because the commercial speech doctrine allows the government to mandate the publication of information such as warning labels and SEC disclosures.

Mandating disclosure by platforms of editorial processes infringes expressive speech. Overriding platforms' editorial judgments conflicts with both the First Amendment and §230. In particular, §230(c)(2)(A) provides that a platform is protected in using its *own* judgment in restricting access to objectionable material.

Congress's decision that platforms, not the government, should use their own judgment in determining standards for their online communities aligns with the First Amendment: "It is the policy of the United States" that the internet shall be "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). HB20's imposition of extensive state regulation on platforms contradicts this federal policy.

D. HB20 Imposes a Duty to Monitor That Is Inconsistent with §230.

HB20 gives platforms a mere 48 hours to "make a good faith effort" to determine the legality of content that is the subject of a complaint. Tex. Bus. & Com. Code §120.102. Given billions of pieces of content, this remarkably short deadline will be impossible to meet in every instance. Failing to meet this unreasonable goal will expose platforms to suit. Tex. Bus. & Com. Code §120.151.

HB20 even imposes the 48-hour deadline on internally-generated alerts. Tex. Bus. & Com. Code §§120.053(a)(1) and (b)(2). Rather than encouraging platforms to weed out harmful content, as Congress intended in §230, HB20 discourages platforms from generating internal flags, as doing so exposes them to liability under the onerous 48-hour rule.

The 48-hour rule basically imposes a duty to constantly scrutinize user-generated content. While Congress wanted to encourage content moderation, §230 is premised on it being unreasonable to demand that platforms flawlessly examine

the vast amount of content posted continuously – let alone to investigate its lawfulness, and then to deal on an individualized basis with millions of users.[11]

A key reason §230 protects platforms from liability is that it is unreasonable to require monitoring of billions of posts every day. A state law forcing platforms to constantly monitor user content is fundamentally inconsistent with §230.

Congress understood that liability-driven content monitoring would slow internet communications, discourage development of new platforms, and chill opportunities for users. HB20 rejects this cornerstone policy choice of §230. As such, it is an inconsistent state law, which §230(e)(3) expressly preempts.

E. HB20's Mandated Individualized Attention to User Posts Is Inconsistent with §230.

Another inconsistency with §230 is HB20's requirement that platforms provide individualized explanations to users when content is removed. Tex. Bus. & Com. Code §120.102. A platform is required to again review the material, reevaluate its decision, take remedial action, and provide notice of each step – within 14 days. Tex. Bus. & Com. Code §120.104.

Like the 48-hour rule, Texas enforces HB20's complaint provisions, exposing platforms to substantial liability. e enormous volume of user content, HB20 imposes an extraordinary burden that threatens the viability of content moderation. The result is a powerful incentive *not* to remove posts, no matter how objectionable.

[11] As Rep. White observed during debate on §230: "There is no way that any of those entities, like Prodigy, can take the responsibility [for all of the] information that is going to be coming into them from all manner of sources." 141 CONG. REC. H8471; *id.* (statement of Rep. Goodlatte) (emphasizing importance of not requiring platforms to review users' content, calling that imposition "wrong").

Given the history of HB20, the disincentive to moderate content may be the law's intended result. But such a purpose flies in the face of §230, which Congress enacted to encourage platforms to monitor content by protecting them from liability.

3. GRANTING APPLICANTS RELIEF WILL SATISFY THE STANDARDS FOR RULING ON A STAY REQUEST, ESPECIALLY THE "IMPORTANT CONSIDERATION" OF MAINTAINING THE STATUS QUO.

An emergency application to a single justice of this Court may be granted:

> where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay.

Coleman v. Paccar, Inc., 424 U.S. 1301, 1304 (Rehnquist, J., in chambers, staying Court of Appeal Order), citing *Meredith v. Fair*, 83 S.Ct., 9 L.Ed.2d 43 (1962) (Black, J., in chambers, staying Order of Court of Appeals Judge); *Western Airlines, Inc. v. Int'l Broth. Of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (same, citation omitted).

More generally, courts ruling on stays consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S.

770, 776 (1987);[12] *E.T. v. Paxton*, 19 F.4th 760, 763 (5th Cir.2021) (granting stay where applicant "has demonstrated a strong likelihood of success on the merits and the prospect of irreparable injury absent a stay; has shown that maintaining the *status quo ante* pending appeal will not risk substantial injury to the plaintiffs; and, finally, that the public interest favors a stay").

The "maintenance of the status quo is an important consideration in granting a stay." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016), quoting *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978) (Rehnquist, J., in chambers). In *Dayton*, Justice Rehnquist expressed his approval of Justice Stewart's denying a stay in a school desegregation case in Ohio, although Justice Rehnquist had granted a stay in another Ohio school desegregation case, *Columbus Bd. of Educ. v. Penick*, 439 U.S. 1348, 1349 (1978): "In *Columbus* the status quo was preserved by granting a stay; here it can be preserved only by denying one."

Applicants have met these standards. Applicants' strong likelihood of success on the merits is demonstrated by the serious First Amendment defects of HB20, its fundamental inconsistency with preemptive federal law, and the substantial injury that enforcement of HB20 would inflict on Applicants. Moreover, HB20 would irreparably damage the public interest, and the interests of millions of Texans and other Americans, in having an effective working internet that is free of vile content.

[12] *Hilton* discusses the standards for granting a stay. Here, the request to vacate is essentially a request to stay the Fifth Circuit's order that in turn stayed the District Court's preliminary injunction.

Finally, maintaining the *status quo ante* pending resolution of the appeal risks no substantial injury to the Respondent State of Texas.

The stay order requested will protect the public interest and prevent the damaging effects of the unconstitutional First Amendment violations that implementation of HB 20 would authorize. By mandating that all "viewpoints" be treated the same, HB 20 would expose platforms to liability for moderating such loathsome content as racist diatribes, Nazi screeds, holocaust-denial misinformation, and foreign government propaganda.

CONCLUSION

For the foregoing reasons, this Court should preserve the status quo and vacate the Fifth Circuit's stay of the district court injunction.

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