IN THE
SUPREME COURT OF THE UNITED STATES

No. 21A720

NETCHOICE, LLC AND COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION,
Applicants,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF FLOOR64, INC. D/B/A/ THE COPIA INSTITUTE IN SUPPORT OF APPLICANTS NETCHOICE AND COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION'S 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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May 17, 2022

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*[1]

TO THE HONORABLE SAMUEL A. ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Pursuant to Supreme Court Rules 22 and 37.2(b), the undersigned respectfully moves for leave to file as amicus curiae the accompanying Brief of the Copia Institute in Support of Applicants NetChoice, LLC and the Computer and Communications Industry Association's Emergency Application for Immediate Administrative Relief and to Vacate the Stay of Preliminary Injunction Issued by the United States Court of Appeals for the Fifth Circuit.

The issues implicated by this Emergency Application are hardly theoretical for amicus Copia Institute. Particularly through its Techdirt.com website the Copia Institute provides the very sort of platform services that the underlying statute at issue, Texas House Bill 20 ("HB20"), demands to regulate. As a result, the Copia Institute understands with intimate familiarity how such a law directly attacks the First Amendment rights of platforms, as well as the statutory rights all Internet platforms, including those of amicus Copia Institute, depend on to provide platform services to their communities of users and to further online expression.

Amicus Copia Institute therefore hereby moves to file the accompanying Brief because the underlying order from the Court of Appeals for the Fifth Circuit staying

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[1] All parties have consented to the filing of the Brief. No counsel for any party authored this brief in whole or in part. Amicus and its counsel authored this brief in its entirety. No person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

the injunction of HB20 in order to allow it to come into effect is an extraordinary action of extraordinary consequence, whose extraordinary impact will be felt by so many, including platforms such as amicus Copia Institute. Because the universe of Internet platforms affected by this law extends far beyond those represented by Applicants to include those like amicus Copia Institute, as just one of myriad others, its experience providing platform services can help illustrate how the terms of the Texas statute interfere with expressive freedoms and thus are anathema to the Constitution. Consequently, allowing such a law to remain in force is not something that this Court can tolerate being allowed to continue.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Amicus Copia Institute is the think tank arm of Floor64, Inc., the privately-held small business behind Techdirt.com ("Techdirt"), an online publication that has chronicled technology law and policy for nearly 25 years. In this time Techdirt has published more than 70,000 articles regarding subjects such as freedom of expression, platform liability, copyright, trademark, patents, privacy, innovation policy, and more. The site often receives more than a million page views per month, and its articles have attracted nearly two million reader comments, which itself is user expression that advances discovery and discussion around these topics.

As a think tank the Copia Institute also produces evidence-driven white papers examining the underpinnings of tech policy. Then, armed with its insight, it regularly files regulatory comments, amicus briefs, and other advocacy instruments on these subjects to help educate lawmakers, courts, and other regulators—as well as innovators, entrepreneurs, and the public—with the goal of influencing good policy that promotes and sustains innovation and expression. Many such filings have implicated the exact same issues as those at the fore of this litigation.

The Copia Institute also itself depends on the First Amendment and the platform liability protection afforded by 47 U.S.C. § 230 ("Section 230") – subjects directly implicated by this case – to both enable the robust public discourse found on its Techdirt website and for its own expression to reach its audiences throughout the Internet and beyond. The Copia Institute therefore submits this brief amicus curiae wearing two hats: as a longtime commenter on the issues raised by the

underlying Texas statute at issue, and as a small business whose constitutional and statutory rights are themselves threatened by this law.

SUMMARY OF THE ARGUMENT

The single line by the Court of Appeals for the Fifth Circuit in its order staying the injunction and allowing Texas law HB20 to go into effect has invited irreparable harm to the First Amendment rights of platforms and all who expect the First Amendment to reliably prevent state action pre-emptively suppressing those rights. Although the naked order lacks any indication of what rationale might have motivated it, it would seem to suggest an erroneous understanding by the panel majority of how HB20 violates the First Amendment, the vast reach of its violating effect, and the unprecedented and unprincipled nature of this violation. It further reflects an erroneous understanding of how Section 230 works and why, and why it precludes state laws like these from undermining online expression.[2] This Court should therefore vacate the order and ensure HB20 remains enjoined.

ARGUMENT

I. To the extent that the order by the Court of Appeals staying the injunction assumes there is no Constitutional injury, it reflects an erroneous understanding of how the First Amendment applies to Internet platforms

A. It reflects an erroneous understanding of HB20's reach

HB20 may be styled as a law designed to further online expression, but in reality it takes aim at the entire Internet ecosystem and its ability to facilitate any

[2] Although the district court ruled primarily on First Amendment grounds, Section 230 would provide alternate grounds for enjoining HB20.

online expression at all. For expression to occur online it needs systems and services to help it in a way that offline speech does not necessarily. We call these helpers many things ("service providers,"[3] "intermediaries," or, as used in this litigation, "platforms"), and they come in many shapes and sizes, providing all sorts of intermediating services, from network connectivity to messaging to content hosting, and more. All of them need to feel legally safe to provide that help, or else they won't be able to offer it. And that includes the software-driven services we might recognize as "social media platforms" as HB20 targets. Yet HB20 puts them all in jeopardy.

It does so regardless of whether HB20 is a law of narrow applicability, in which case it will reach few platforms but be additionally unconstitutional for singling out an arbitrary population of platforms to penalize, or if its criteria for enforcement is so broad that it impinges the rights of nearly every platform. In the case of the Copia Institute, or another similarly situated platform operator, both may be the case. Because while today the law may not directly reach an entity like the Copia Institute, tomorrow it might, and it is bad for the Copia Institute either way.

While the Texas statute purports to apply only to platforms with "more than 50 million active users in the United States in a calendar month," TEX. BUS. & COM. CODE § 120.002(b); TEX. CIV. PRAC. & REM. CODE § 143A.004(c), per this criteria, as of

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[3] Section 230 defines them as Interactive Computer Service providers, which are "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2).

today, the Copia Institute might be beyond its reach. But even small sites like Techdirt can attract large audiences.[4] Indeed, the very point of the Copia Institute enterprise is to reach and influence people. Every platform aspires to grow, yet laws like HB20 create policy pressure stifling growth. It can put platform operators like the Copia Institute and others with relatively small revenue streams, but potentially large userbases, on a collision course with the law as they grow more popular and suddenly find themselves taking on more and more regulatory obligations dictating how they may continue to engage with their readership—but without necessarily a commensurate increase in resources necessary to comply with these rules, or cope with the consequences if they don't. Because a platform like Techdirt would seem to meet the law's other criteria, enforcement remains a danger. For instance, HB20's definition of the artificial construct "social media platform" is certainly broad enough to encompass Techdirt. TEX. BUS. & COM. CODE § 120.001(1); TEX. CIV. PRAC. & REM. CODE § 143A.001(4). After all, it is "an Internet website or 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."

But the specifics of the Texas law are not alone dispositive as to the infirmities of the law. The danger to all platforms, including the Copia Institute, is that even if

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[4] For instance, in 2005 Copia Institute founder and Techdirt editor Michael Masnick coined the term, "the Streisand Effect," as part of his commentary. It is a term that has had significant staying power, remaining in common parlance as a term for discussing the unwanted attention ill-considered attempts at censorship might unleash. *See* https://en.wikipedia.org/wiki/Streisand_effect.

by its terms this particular law does not reach them,[5] if such a law could be permitted then any other state could issue their own, with their own arbitrary enforcement criteria, creating chilling doubt and confusion about the expressive rights of a platform until the courts had a chance to weigh in to determine whether the specific regulatory language should be allowed. Thus the only way to effectively preserve the Constitutional and statutory rights of platforms is to not let any law get anywhere near them, as this law proudly does.

B. It reflects an erroneous understanding of how HB20 attacks the expressive and associative First Amendment rights of platforms.

Even if HB20 does not currently reach amicus Copia Institute, the way its terms would affect it, should it reach it, is illustrative of the serious Constitutional and statutory defects of the legislation. For instance, the Copia Institute, whose parent business dates back almost to the statutory birth of Section 230,[6] depends on the First Amendment and Section 230 in numerous ways. One prominent way is with the Techdirt.com site, which publishes articles and commentary while also allowing reader comments on its articles, thus itself acting as a platform helping to facilitate

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[5] It is also not clear that the exceptions to the "social media platform" definition mean HB20 would not apply to Techdirt. TEX. BUS. & COM. CODE § 120.001(1); TEX. CIV. PRAC. & REM. CODE § 143A.001(4). While Techdirt is a "website" that consists primarily of "news" "preselected by the provider," only some of the community-generated expression it allows to be published on its site exists as comments on posts. In any case, even if Techdirt might be covered by an exception today, it strangles its growth if it cannot grow and change as its expressive needs warrant if doing so might put it in the crosshairs of the Texas law.

[6] See https://www.techdirt.com/1997/08/23/august-17-23-1997/ for the first publication in 1997, and https://www.techdirt.com/1999/03/12/who-cares-about-sec-rules-when-youve-got-the-internet/ for its first article in its current blog publication form from 1999.

others' user expression. These comments add to the richness of the discourse found on its pages, and by hosting this user expression the Copia Institute can build a dialog around its ideas. The comments also often help the Copia Institute's own expression be more valuable, with story tips, error checking, and other meaningful feedback provided by the reader community.[7]

To keep the discussion in the comments meaningful, the Copia Institute uses a system of moderation. It is a community-driven system, where the reader community can affect what appears on Techdirt's pages in several ways. One way is through "boosting" comments, and one source of revenue for the Copia Institute is derived from people purchasing credits to be put towards this boosting. Meanwhile all readers can rate comments as insightful or funny, and for many years Techdirt has published weekly summaries highlighting the most insightful or humorous comments that appeared on its stories for the previous week.[8] Crucially, readers can also designate comments as abusive or spam to help remove them from view.[9]

But while the Copia Institute's moderation practices can be described in broad strokes, they cannot be articulated with the specificity that HB20 would require. For instance the law requires that platforms disclose their moderation standards. *See*,

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[7] In fact, so productive is the Techdirt comment section that the Copia Institute has even hired onto staff someone who had previously been a regular contributor to the discussion there.

[8] *See*, *e.g.*, Leigh Beadon, *Funniest/Most Insightful Comments Of The Week At Techdirt*, TECHDIRT (May. 15, 2022), https://www.techdirt.com/2022/05/15/funniest-most-insightful-comments-of-the-week-at-techdirt-10/.

[9] Being removed from view generally leaves comments hidden but available to readers to see with an extra click. But such comments may also be deleted from the system entirely by site operators.

e.g., TEX. BUS. & COM. CODE § 120.051. And it also puts limits on how platforms can do this moderation. *See*, *e.g.*, TEX. CIV. PRAC. & REM. CODE § 143A.002 (banning certain moderation decisions, including those based on the "viewpoint" of the user expression being moderated). But even if the Copia Institute wanted to comply with the Texas law, it could not. For instance, it could not disclose its moderation policy because its moderation system is primarily community-driven and subject to the community's whims and values of the moment. Which also means that it could not guarantee that moderation always comported with a pre-announced "Acceptable Use Policy," which HB20 also requires. TEX. BUS. & COM. CODE § 120.052.[10] It would also be infeasible to meet any of the Texas law's additional burdensome demands, including to provide notice to any affected user, TEX. BUS. & COM. CODE § 120.103, a complaint system, TEX. BUS. & COM. CODE § 120.101,[11] and a process for appeal, TEX. BUS. & COM. CODE § 120.103, which the Copia Institute does not have the resources or infrastructure to support.[12] In other words, the Texas law sets up a situation where if the Copia Institute cannot host user-provided content exactly the way Texas

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[10] As the Copia Institute has also long chronicled, content moderation at scale is always impossible to deliver consistently. *See* Michael Masnick, *Masnick's Impossibility Theorem: Content Moderation At Scale Is Impossible To Do Well*, TECHDIRT (Nov. 20, 2019), https://www.techdirt.com/articles/20191111/23032743367/masnicks-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well.shtml; https://www.techdirt.com/blog/contentmoderation/ (collecting case studies of moderation challenges).

[11] Requiring a turn-around time of 48 hours. TEX. BUS. & COM. CODE § 120.102.

[12] There is also the additional consideration that the more that laws like HB20 create legal risk for platforms, the more likely platforms will remove content on the advice of counsel, which should be a reason privileged from disclosure, and thus not be something that can be subject to an appeal.

demands, it effectively does not get to host any user-provided content at all. Or, potentially even worse, it would leave Techdirt in the position of having to host odious content, including content threatening to it, its staff, or others in its reader community, in order to satisfy HB20's moderation requirements.[13]

The effects of this regulation are thus injurious to the Copia Institute's expressive freedom. The Copia Institute chooses to host user comments, and moderate them in the way it does, because doing so fulfills its own expressive objectives.[14] It should be able to just as easily choose not to host them, or to moderate them with a different system prioritizing different factors.[15] The First Amendment

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[13] *See*, *e.g.*, Mike Masnick (@mmasnick), Twitter (May 12, 2022, 9:14 AM), https://twitter.com/mmasnick/status/1524785192442863626 (displaying a Techdirt comment promising his personal imprisonment for his expression).

[14] Many publications have opted to not host their own comments, which is obviously a choice they are entitled to make. However, studies have noted that by not doing so, they lose engagement with their readership. Elizabeth Djinis, *Don't read the comments? For news sites, it might be worth the effort.*, POYNTER., (Nov. 4, 2021), available at https://www.poynter.org/ethics-trust/2021/dont-read-the-comments-for-news-sites-it-might-be-worth-the-effort/. The irony is that, without comment sections, what reader engagement there is tends to go to the larger social media sites that have attracted the Texas legislature's ire. *Id.* ("[W]hether or not news outlets choose to play the commenting game, that game will still go on without them. Conversations on Twitter, Facebook and Instagram won't stop.").

[15] The decision to close comment sections has frequently been driven by concerns over their moderation. Djinis ("The language in these announcements was sometimes similar, portraying a small group of people taking over a forum meant for the public. They used words like 'hijack' and 'anarchy.'"). Because moderating ability is so critical to whether a publication can self-host user engagement, it is critical that moderation decisions remain legally protected so that these sites can discover the most effective way of moderating that best serves them and their users.

ensures that it can make these editorial and associative choices as most appropriate for its own expressive priorities at that moment.[16]

But the whole pretense behind this law is to all such freedom, because even if any platform moderation were to be driven by bias, the existence of expressive bias is not something for regulation to correct; it is something for regulation to *protect*. Bias is evidence of expressive freedom, that we could be at liberty to have preferences, which we can then express. This law targets that freedom by denying platform operators the ability to express those preferences.[17] While it may be good policy to encourage a diversity of ideas online, or even just certain ideas, the government cannot conscript platforms to achieve that end, which this law openly aims to do.[18]

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[16] The First Amendment also ensures that these expressive choices can't be chilled by mandatory disclosures. *See* Eric Goldman, The Constitutionality of Mandating Editorial Transparency, HASTINGS LAW JOURNAL, Vol. 73, 2022 (forthcoming) at 9-12, available at SSRN: https://ssrn.com/abstract=4005647. While moderation transparency can be a positive value, mandatory transparency is a censorial one that effectively strips the moderator of their discretion by chilling it. The First Amendment therefore stands against it, because it would have such a chilling effect on any platform's own expressive rights.

[17] Ironically, to the extent that this bill was driven by animus towards Facebook, Techdirt has articulated its own displeasure towards the company's practices. *See*, *e.g.*, Michael Masnick, *Facebook Banning & Threatening People For Making Facebook Better Is Everything That's Wrong With Facebook*, TECHDIRT (Oct. 12, 2021), https://www.techdirt.com/2021/10/12/facebook-banning-threatening-people-making-facebook-better-is-everything-thats-wrong-with-facebook/. But this law is about more than Facebook; it is about the entire ecosystem of online platforms that this law threatens to devastate.

[18] Restricting moderation freedom would also likely be counterproductive if the goal is to get more expression. Michael Masnick, *Why Moderating Content Actually Does More To Support The Principles Of Free Speech*, TECHDIRT (Mar. 30, 2022), https://www.techdirt.com/2022/03/30/why-moderating-content-actually-does-more-to-support-the-principles-of-free-speech/.

C. It presumes with no basis that the First Amendment rights of platforms can be extinguished if they meet the arbitrary criteria Texas has defined

If, on a personal Facebook page, someone posts a comment insulting the page owner, it would seem intuitive that, under the First Amendment, there could be no law requiring that individual page owner to leave up this comment for others to see. Nor would it seem possible for there to be a law requiring the page owner to take down a comment that complimented him. In this example the page owner is providing a platform, with his personal Facebook page, for others to post their expression. And the freedom to make these choices of what third-party content to facilitate, and which to moderate away, is what First Amendment-protected editorial discretion looks like, albeit on a small, personal scale.

But perhaps instead of a Facebook page someone (like amicus Copia Institute) operates a blog that allows reader comments. There's nothing about a blog as a platform that is fundamentally different from a Facebook page—it is still a software-driven service performing a platform function to facilitate others' expression—so the same editorial discretion the First Amendment guarantees for how a platform operator may handle comments on their Facebook page should apply just as much to comments on their blogs.

And that same editorial discretion should be constitutionally protected even if (again, as in the case of amicus Copia Institute) the platform is operated by a company, rather than an individual, because there is nothing about operating a platform as a business that somehow waives the First Amendment rights an

operator would have as an individual. *Citizens United v. Federal Election Com'n*, 130 S.Ct. 876, 899 (2010).

Texas asserts that at a certain arbitrary size those rights may nevertheless be lost by being deemed a common carrier, with obligations to then facilitate the expression of all comers, but such cannot possibly be the rule. The loss of First Amendment rights is something that can only happen in the most exceptional circumstances, which are not present in the case of the platforms HB20 targets. For principles of common carriage to validly supplant the First Amendment there has to be something else about the communications service to warrant such an exception to the Constitution beyond size, or monetization practices, or even popularity.[19] Before the curtailment of First Amendment rights can even begin to be justified there needs to be some sort of special limitation associated, like spectrum scarcity, *see Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997), or perhaps a natural monopoly, where there can be few options for users to choose from.

But such is hardly the case of the platforms whose characteristics HB20 targets. They are simply software-driven services enabling user expression to exist on the Internet. And there is nothing limited or scarce about such software-driven platform services; on the contrary, it is possible to get infinitely more software-driven services who could do the same thing as the platforms Texas doesn't like. In

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[19] Must-carry rules for common carriers also tend to involve transient communications, rather than indefinite hosting obligations. *See* Michael Masnick, *Why It Makes No Sense To Call Websites Common Carriers*, TECHDIRT (Feb. 25, 2022) https://www.techdirt.com/2022/02/25/why-it-makes-no-sense-to-call-websites-common-carriers/.

fact, that there are already so many platforms targeted by HB20 is itself indicative that the extraordinary legal remedy of removing their discretion is neither warranted nor constitutionally supportable here.

II. To the extent that the order by the Court of Appeals assumes that Section 230 is no bar to HB20, it reflects an erroneous understanding of the operation of Section 230 and its legislative purpose.

A. HB20 contravenes the pro-expression policy values Section 230 is intended to advance

Ostensibly HB20 is intended to encourage online expression. In reality it will do anything but, by deterring the platforms needed to help there be online expression, which is exactly what Congress sought not to do when it passed Section 230. Congress had recognized that for the Internet to fulfill its promise of providing "a variety of political, educational, cultural, and entertainment services," 47 U.S.C. § 230(a)(5), enabling "a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 U.S.C. § 230(a)(3), it was going to need to make it safe for the platform services needed to be in the business of helping that online world flourish. *See* 47 U.S.C. § 230(b)(2). At the same time, however, Congress was also concerned about the hygiene of the online world. *See* 47 U.S.C. § 230(b)(4).

Congress thus had two parallel and complementary goals: maximize the most positive content online and minimize the most negative. The First Amendment forbade Congress from forcing platforms to do either, *see* discussion *supra* Section I, but it also recognized that it would be ineffective to try to bludgeon platforms with prescriptive demands backed by fear of sanction, because such efforts were never

going to produce good results.[20] Rather, these policy goals were best achieved by a carrot-based approach aligning the platforms' interests with what Congress wanted to achieve, instead of a stick-based approach that tried to threaten platforms into doing Congress's bidding.

The result was Section 230, which made it legally safe for platforms to do the best they could on both fronts: facilitate the most positive user content and to minimize the most negative. It means that platforms can afford to be available to facilitate the most content possible (including the most beneficial content) because they don't have to worry about crippling liability if something ends up on their systems that is problematic. And they can also afford to take steps to remove the most undesirable content, because they don't have to worry about crippling liability if they happen to remove more user expression than may be ideal.

The importance of Section 230 cannot be overstated, but not because it did for platforms much more than what the First Amendment already did. By way of analogy, Section 230 stands for the proposition people who throw parties do not need to worry about getting in trouble for what their guests say at their parties. And this is because Congress was, metaphorically, interested in getting people to throw parties. Yet none of this statutory protection comes at the cost of people hosting parties losing their constitutionally-protected associative freedom to decide whom to

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[20] The *Stratton Oakmont v. Prodigy* case, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), where a platform found itself vulnerable to liability because it had tried to moderate content, taught Congress that the fear of legal sanction was instead likely to deter platforms from doing what it wanted them to do, which pointedly included moderating user expression. 47 U.S.C. § 230(c)(2).

invite, to exercise the algorithmic judgment over where to seat them, or to kick out any unruly guests ruining the party for everyone else—and, indeed, Section 230 expressly protects party throwers from litigation arising from their exercising that sort of associative judgment as well.[21]

What Section 230 did was to make those First Amendment rights practically meaningful. Liability is a serious concern, especially for smaller entities like the Copia Institute. Civil litigation is notoriously expensive. The cost of defending even one frivolous claim can easily exceed a startup's valuation.[22] Simply responding to demand letters can cost companies thousands of dollars in lawyer fees, not to mention any obligations to preserve documents demand letters might trigger, which themselves impose non-trivial costs, especially for smaller companies without the infrastructure larger companies may have to manage them. And if these cases somehow manage to go forward, the costs threaten to be even more ruinous. A motion

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[2121] Of course, this party analogy is in some ways too flippant, because when we speak of online platforms we are not necessarily talking about something as light-hearted as a festive social gathering (although, indeed, in some instances we very well may be) but rather the full universe of all sorts of online services that provide vehicles and forums for people to convene and exchange ideas and information. Yet none of that seriousness obviates this general statutory rule protecting platforms from liability arising from how they facilitate others' expression or moderate. Nor does the "public square" language from this Court's decision in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). In that case the only issue before this Court was whether, in light of the importance of online forums to modern life, the state could ban individuals from using online services (or, to return to the analogy, whether the state could bar individuals from ever attending any parties). But nothing in *Packingham* implicated the Constitutional or statutory rights of hosts to choose whom to associate with, whether at their parties or on own their platforms.

[22] *See* Engine, Primer: Value of Section 230 (Jan. 31, 2019), https://www.engine.is/news/primer/section230costs.

to dismiss can easily cost in the tens of thousands of dollars. But at least if the company can get out of the case at that stage they will be spared the even more exorbitant costs of discovery, or, worse, trial.

Nor are such legal challenges an idle concern. As this litigation illustrates, technology policy can be contentious subject, and Techdirt's trenchant (and First Amendment-protected) commentary can ruffle feathers. Those who are ruffled can be tempted to threaten litigation,[23] but thanks to the First Amendment and Section 230, which exists to make First Amendment protections for platforms a practical reality, those threats are ordinarily little more than toothless bluster. But on the occasion that a threat from an unhappy reader slipped through and turned into a live lawsuit, the results were devastating to the Copia Institute and its entire enterprise. The price of defending the speech in question, which included a related user comment, was lost time and money, lost sleep for the company's principal and editor, lost opportunity to further develop the company's business, and a general chilling of the company's expressive activities.[24] And that was just the damage caused by one lawsuit, which still resulted in protected expression remaining online.[25]

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[23] *See*, *e.g.*, Michael Masnick, *Hey North Face! Our Story About You Flipping Out Over 'Hey Fuck Face' Is Not Trademark Infringement*, TECHDIRT (Nov. 15, 2021), https://www.techdirt.com/articles/20211112/14074147927/hey-north-face-our-story-about-you-flipping-out-over-hey-fuck-face-is-not-trademark-infringement.shtml

[24] *See* Michael Masnick, *The Chilling Effects Of A SLAPP Suit: My Story*, TECHDIRT (Jun. 15, 2017), https://www.techdirt.com/articles/20170613/21220237581/chilling-effects-slapp-suit-my-story.shtml.

[25] Michael Masnick, *Our Legal Dispute With Shiva Ayyadurai Is Now Over*, TECHDIRT (May 17, 2019), https://www.techdirt.com/articles/20190516/22284042229/our-legal-dispute-with-shiva-ayyadurai-is-now-over.shtml.

If platforms cannot avoid lawsuits over how they provide platform services to users, or at get out of them relatively inexpensively, then they face a "death by ten thousand duck-bites." *Fair Housing Coun. Of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1174 (9th Cir. 2008).[26] But laws like HB20 would invite swarms of ducks by both nullifying platforms' Section 230 protection and by outright encouraging more litigation against them for how they've exercised their First Amendment rights. TEX. CIV. PRAC. & REM. CODE § 143A.007. Moreover, if all that legal danger weren't deterring enough to platforms, HB20 also threatens state attorney general enforcement against the exercise of expressive discretion, should the way platforms choose to exercise theirs be out of step with the state's current politically-driven policy preferences. TEX. BUS. & COM. CODE § 120.151.

In every respect HB20 exposes platforms to enormous and unmanageable legal risk, which is exactly what Congress had sought to avoid when it passed Section 230, and on matters that the First Amendment was supposed to obviate. HB20 will therefore not do anything to enhance online speech, as Texas claims is the goal of the law. Instead it will only pressure platforms to either refuse their users' expression,

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[2626] It is also not just a damage award that can be fatal to these small companies. *See UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F. 3d 1006 (9th Cir. 2013) (finding the already bankrupted platform ultimately immune from liability pursuant to the weaker statutory protection of the Digital Millennium Copyright Act, 17 U.S.C. § 512).[26] See also Peter Kafka, *Veoh finally calls it quits: layoffs yesterday, bankruptcy filing soon*, C|NET (Feb. 11, 2010), http://www.cnet.com/news/veoh-finally-calls-it-quits-layoffs-yesterday-bankruptcy-filing-soon/ (describing how the *Shelter Capital* litigation dried up the startup platform's funding and forced it out of business while it was litigating the lawsuit it eventually won).

just as Congress hoped to avoid with Section 230, *see Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) ("Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted."), cease to moderate and cultivate user communities, or disappear altogether as increased and more expensive litigation, as well as potential damage awards, threaten to deplete bank accounts and scaring off needed investment – including investment for activities that would have ultimately fostered online expression.[27]

And simply not being in the immediate crosshairs of the law won't help. As in the case of amicus Copia Institute, laws like HB20 that chill platforms won't just hurt it as a platform; the Copia Institute will also be hurt as a user of *other* platforms it depends on for its own expression to be facilitated, just as it will hurt every other user of these now-chilled platforms. Indeed it would be of little comfort or utility to the Copia Institute if the Texas law spared it as a platform but drove offline any of the other platforms it currently uses to support its own expressive activities.[28]

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[27] *See* Michael Masnick, Don't Shoot The Message Board, June 2019, https://copia.is/library/dont-shoot-the-message-board/ (documenting how weakening legal protections for platforms deters investment in technology and online services).

[28] For instance, the Copia Institute needs other platforms to help it deliver its expression to audiences. Sometimes these are backend platforms, like web hosts and domain registrars. Other times they are specialized platforms that host other forms of content the Copia Institute produces, such as SoundCloud and the AppleStore, which serve its podcasts to listeners. The Copia Institute has also used ad platforms to monetize its Techdirt articles, and in general its monetization activities themselves require the support of payment providers and other platforms like Patreon that help facilitate the monetization of expression in innovative ways. As an example, one way the Copia Institute makes money is by allowing readers to become "Insiders" in exchange for certain perks, including being part of an exclusive

The upshot is that Section 230 has worked as designed: by aligning platforms' interests with its own with promises of immunity, rather than keeping them in tension with threats of liability, platforms, and the expression they enable, have been able to proliferate, just as Congress had hoped, because platforms have not had to fear being crushed by threats of liability if they did not either facilitate or moderate user expression exactly as everyone else might want them to—assuming everyone could even agree. What laws like HB20 themselves remind is that such agreement can rarely be presumed. When it comes to expression, views will often diverge—in fact, this law was passed because the views of certain platforms and of the Texas legislature were apparently in opposition. But the First Amendment exists because such disagreement is inevitable, and so it prohibits the government from taking sides and creating sanction for views that it disfavors. And it is this resulting freedom of expression that is what allows diversity of discourse in America to thrive overall.

B. If laws like HB20 are not pre-empted by Section 230, as Congress intended, then other states will pass their own with arbitrary criteria and potentially conflicting terms impossible for Internet platforms to comply with.

Importantly, Section 230 contains an explicit pre-emption provision. 47 U.S.C. §230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). HB20 is itself a salient example of why Congress included it, because here Texas is pointedly trying to

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reader community, and the Copia Institute is currently using the Discord platform to provide that community a forum to interact. But none of these platforms could exist to support the Copia Institute's expressive business were it not for the First Amendment and Section 230 enabling them to provide these services. Affecting their protection will inevitably affect the Copia Institute as well.

regulate interstate communications for the nation, when that prerogative belongs with Congress.[29] Even if Texas were correct to be concerned about national Internet policy it would still be a problem for it or any other state to superimpose its own policy choices on it. Because Texas is not the only one that is trying to: in fact, at least 30 state legislatures have recently proposed some sort of content moderation bill or other bills designed to give states regulatory oversight over the Internet.[30] It is enough of a problem when any one state wants to take on this authority but an even bigger problem when the provisions of these bills are often at odds with each other.[31]

While the tendency for states to attempt this sort of legislation is alarming, it is not at all surprising. The liability Section 230 insulates platforms from is often rooted in state law, and states can be tempted to change their laws to make sure

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[29] Texas keyed its law to platforms with more than 50 million users. TEX. BUS. & COM. CODE § 120.002(b); TEX. CIV. PRAC. & REM. CODE § 143A.004(c). But there are only 29 million people in Texas, including infants, toddlers, and non-Internet using adults. *See* United States Census Bureau, Quickfacts: Texas (last accessed Apr. 7, 2022), https://www.census.gov/quickfacts/TX. Thus the only platforms that Texas is overtly seeking to regulate are those whose userbases inherently cross state lines.

[30] Jennifer Huddleston & Liam Fulling, *Examining State Tech Policy Actions in 2021*, AM. ACTION FORUM (Jul. 21, 2021), https://www.americanactionforum.org/insight/examining-state-tech-policy-actions-in-2021/. ("[S]tates risk creating a disruptive patchwork that deters innovation and limits what consumers can access. Because of the interstate nature of the internet and many other technologies, state laws regulating the internet can have a national impact. […] Without uniform regulation on many issues, however, tech companies may face a patchwork of regulation and have to repeatedly engage in costly compliance, with the ultimate result that consumers may be denied access to beneficial features available in other jurisdictions.").

[31] Michael Masnick, *State Legislators Are Demanding Websites Moderate Less AND Moderate More; Federal Law Prohibits Both*, TECHDIRT (Apr. 8, 2022), https://www.techdirt.com/2022/04/08/state-legislators-are-demanding-websites-moderate-less-and-moderate-more-federal-law-prohibits-both/.

liability can still attach to platforms. But recognizing that temptation, and the unlimited legal risk it presented to platforms, is why Congress included a broad pre-emption provision to get states out of the business of regulating them. Because the Internet inherently transcends state boundaries, without Section 230 immunity platforms could be exposed to regulators in every jurisdiction they reach, which is inherently all of them. But if each state and local jurisdiction could meddle with the operation of Section 230, then Section 230 couldn't work to protect platforms at all.[32]

If it is possible for a law like Texas's to reach any platforms, then it is possible for any other state, or even any local jurisdiction, to reach them as well, regardless of (1) how well or how poorly that state might choose to regulate them, or (2) what sort of challenges platforms would face in complying with their laws, or (3) whether the requirements among all these regulations were even consistent, even with their own laws, let alone with other states'. Pre-emption is therefore also important because not every jurisdiction will agree on what the best policy should be for imposing liability on platforms.[33] Even if it were practical for platforms to comply with the rules of one state, they could easily find themselves with the impossible task of having to please multiple states, or face existential legal risk if they could not, as is likely to be the case. Which means that some states would effectively get to set Internet policy

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[32] Attempted state regulation was not an idle concern to Congress, given that *Stratton Oakmont* itself was a case where a state court, interpreting state law, had created an enormous risk of platform liability based solely on local law. *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003).

[33] *See* Huddleston ("[T]he interstate nature of most user interactions on platforms raises concerns about the extra-territorial implications of these policies.").

for all other states, regardless of whether the states agreed with that policy or thought it served their own citizens' expressive needs, because there is often simply no practical or cost-effective way for a platform to cabin compliance with a specific jurisdiction's rules, much less the potentially countless specific rules of potentially countless jurisdictions, and not have these compliance efforts impact their services for users in other areas. Platforms would instead have to try to adjust their platforms and monitoring practices to accommodate the most restrictive rules, particularly the ones with the most frightening regulatory teeth. Thus, if one jurisdiction can effectively chill certain types of speech facilitation with the threat of potential liability, it will often chill it for every jurisdiction everywhere, even in places where that speech may be perfectly lawful or even desirable.[34]

But even if these state laws were not so ill-advised, so contrary to Congress's expressed intent in passing the law, or so unconstitutional, and instead better policy, it is not for states to take it upon themselves to rewrite the statute for Congress, especially in light of the pre-emption provision Congress also consciously chose to include in its legislation. *See Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731,

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[34] This fear is particularly acute when platform rules are keyed to viewpoint, as they are with HB20. There are clearly some very strong and differently-held political opinions held by various state majorities. If one state could set the viewpoint-based rules as it chose, it would be choosing the viewpoints allowed in other states, where they are not necessarily reflective of the local political will. Ironically such a situation could end up disadvantaging the very viewpoints Texas might like to favor with its law, should HB20 be allowed to negate the effect of Section 230 to preclude other such state interference. *See*, *e.g.*, *Daniel v. Armslist*, LLC, 926 NW 2d 710 (Wis. Sup. Ct. 2019) (finding Section 230 barred a liability claim against a website brokering gun sales, following briefing and argument from the parties and amici, including the Copia Institute, in support of this holding).

1753 (2020) ("The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress."). Congress is fully capable of rewriting its statutes itself, if it so believes good policy – particularly to foster expression – calls for it.

As a result, when it comes to platform liability, the only policy that is supposed to be favored is the one Congress originally chose "to promote the continued development of the Internet and other interactive computer services," 47 U.S.C. §230(b)(1), and all the expression these services offer nationwide. And the only way to give that policy the effect Congress intended is to ensure local regulatory efforts such as HB20 are unequivocally pre-empted so they cannot distort the careful balance Congress codified to achieve it.

III. By staying the injunction the Court of Appeals invited irreparable harm to occur to platforms' First Amendment rights

Long-standing principles against prior restraint make it incumbent on courts not to shoot first and ask questions later, pre-emptively impinging on the exercise of expression before it has been shown that such restraint is Constitutionally permissible. *See*, *e.g.*, *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976). *See also Citizens United*, 130 S.Ct. at 895-896 (observing that these principles apply broadly). Restraining the exercise of expressive rights in advance of that finding itself offends the Constitution because of the great danger to those rights if it turns out that the restraint had been invalid because a prior restraint will have already wrongfully silenced a speaker. *Nebraska Press Assn.*, 427 U.S. at 559 ("If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."). Even if it is later found that this

silencing was unconstitutional, no un-ringing of that bell will be possible. Rights of free expression will have been lost forever, and there is no way to retroactively make whole the speaker whose rights had been lost and spare them the potentially severe and non-compensable consequences of that loss. *See id.* at 560-61.

Here the Court of Appeals has not taken such care, despite the degree to which First Amendment rights are attacked by HB20, and the dire consequences rapidly accruing if this Court does not provide immediate relief to protect these rights from Texas's attack on them.[35] *Bantam Books, Inc. v. Sullivan*, 372 US 58, 70 (1963) ("We have tolerated [prior restraint] only where it […] assured an almost immediate judicial determination of the validity of the restraint."). As it stands, with HB20 now in effect, no platform can be confident that the exercise of its expressive rights to moderate content won't invite devastating legal consequences. They may do it anyway, as necessity and sense dictate,[36] and hope for the best, but with this wild beast of a law now unleashed such hope is hardly an adequate defense for a now-chilled freedom. *See Citizens United*, 130 S.Ct. at 876 ("[R]ather

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[35] In one case, a Texas court has already ruled against a platform even while the law was enjoined. Clarity from this Court as to its constitutionality will help prevent any similar miscarriages of justice. Michael Masnick, *Court Ignores That Texas Social Media Censorship Law Was Blocked As Unconstitutional: Orders Meta To Reinstate Account*, TECHDIRT (Mar. 4, 2022) https://www.techdirt.com/2022/03/04/stupid-texas-social-media-censorship-law-gets-stupid-texas-governor-hopefuls-stupid-facebook-account-unsuspended/.

[36] In one ripped-from-the-headlines example, the Twitch platform turned off the live stream of the gunman in Buffalo, but it is not at all clear that doing so did not violate HB20. Michael Masnick, *Did Twitch Violate Texas' Social Media Law By Removing Mass Murderer's Live Stream Of His Killing Spree?*, TECHDIRT (May 16, 2022), https://www.techdirt.com/2022/05/16/did-twitch-violate-texas-social-media-law-by-removing-mass-murderers-live-stream-of-his-killing-spree/

than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, [many] will choose simply to abstain from protected speech — harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.") (internal cites omitted).

And it was chilled before any sort of adjudicative finding that such chilling was constitutionally appropriate. Because although the matter was briefed and heard before the Court of Appeals, the single one-line order it issued does not an adequate adjudication make. While the panel majority may have some internal sense of how they see the matter—which would seem to be quite different to how the district court saw it in its detailed decision enjoining HB20—the world does not, and cannot, in the absence of any language revealing any inkling about their findings or rationale.

Even if the Court of Appeals were ultimately to formally find that HB20 poses no Constitutional injury, and somehow be correct, the absence of any reasoning here to support such a conclusion is hardly a negligible oversight. One reason principles of prior restraint preclude pre-adjudicative consequences is that, with adjudication, if an error has been made in imposing consequences on speech, then the error will be apparent and able to be challenged. *See New York Times Co. v. United States*, 403 US 713, 727 (1971) (Brennan, J., concurring) (finding that "[i]n no event may mere conclusions be sufficient" for, if the government seeks to prevent the exercise of rights of free expression, "it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary" to "afford the courts an

opportunity to examine the claim more thoroughly" before those rights can be restrained.). Whereas here, with the Court of Appeals order, those consequences have arrived, yet there is nothing to challenge. Instead the single one-line order itself acts as its own form of restraint, imposing chilling consequences on the exercise of speech rights without showing that such consequences are Constitutionally permitted—and, indeed, in the face of a detailed district court decision showing convincingly that they are not.

CONCLUSION

The relief sought by Applicants should be granted.

Respectfully submitted,

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