

IN THE  
SUPREME COURT OF THE UNITED STATES

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No. 21A720

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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.*

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**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE  
AND BRIEF OF AMICI CENTER FOR DEMOCRACY & TECHNOLOGY,  
ELECTRONIC FRONTIER FOUNDATION, NATIONAL COALITION  
AGAINST CENSORSHIP, R STREET INSTITUTE, WIKIMEDIA  
FOUNDATION, AND WOODHULL FREEDOM FOUNDATION IN  
SUPPORT OF APPLICANTS' 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

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**MOTION FOR LEAVE TO FILE  
BRIEF AMICI CURIAE<sup>1</sup>**

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, the undersigned respectfully moves for leave to file as amici curiae the accompanying Brief of Amici Curiae the Center for Democracy & Technology, Electronic Frontier Foundation, the National Coalition Against Censorship, R Street Institute, the Wikimedia Foundation, and the Woodhull Freedom Foundation in Support of Applicants NetChoice, LLC 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. In addition, amici request leave to file the accompanying Brief on 8 ½ by 11 paper.

Amici are organizations that support internet users’ free expression and other human rights. Amici represent internet users and the public, who have a significant interest—unique from that of the Applicants or Respondent—in the outcome of this Emergency Application and the ultimate determination of the constitutionality of Texas House Bill 20 (“HB20” or the “Act”).

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<sup>1</sup> Applicants’ and Respondent’s counsel consented to the filing of the Brief. No counsel for any party authored this brief in whole or in part. The amici and their counsel authored this brief in its entirety. No person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

HB20 prohibits covered social media platforms from applying viewpoint-based content moderation policies to publish, remove, amplify, or otherwise manage user-generated content. Tex. Civ. Prac. & Rem. Code §§ 143A.001(1), 143A.002. This Court should vacate the Fifth Circuit's stay of the district court's preliminary injunction against HB20 because the public interest lies in maintaining the injunction and Texas is unlikely to succeed on the merits. *See Nken v. Holder*, 556 U.S. 418, 426 (2009) (setting forth the four-factor test for determining whether to grant a stay).

If the Fifth Circuit's stay, allowing HB20 to go into immediate effect, is permitted to stand, it will greatly harm internet users and the public by upending how social media platforms and the internet moderate content. As representatives of internet users and the public, amici write to emphasize three ways in which the stay harms the public interest. First, platforms will have to end or alter beneficial content moderation practices that can be construed as viewpoint-based. HB20 likely prohibits common platform practices of removing, for example, content promoting suicide and self-harm, hate speech, content praising or supporting terrorism, content promoting animal abuse, and inappropriate content aimed at children. Second, the threat of litigation will discourage some platforms from engaging in any content moderation, even under ostensibly viewpoint-neutral policies. Third, other platforms may remove even more speech to appear more consistent in the enforcement of their content policies, with the result that users will have less freedom of expression, particularly on controversial subjects.

In addition, Texas has not made a strong showing that it is likely to succeed on the merits. Every court that has considered the issue has found that social media platforms have a First Amendment right to edit and curate the content they publish on their sites. As practiced by social media platforms—including the large platforms that HB20 regulates—content moderation is the exercise of editorial judgment. This Court’s precedent in an analogous context, *Miami Herald Co. v. Tornillo*, 418 U.S. 241 (1974), controls this case.

Because amici bring to the Court’s attention the public’s interest in the outcome of this Application—a relevant matter not already presented by the parties that will be of considerable help to the Court—amici respectfully request leave of the Court to file the accompanying Brief, and to file it on 8 ½ by 11 paper.

Respectfully submitted,

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## INTEREST OF AMICI CURIAE

Amici curiae are the Center for Democracy & Technology (CDT), Electronic Frontier Foundation (EFF), the National Coalition Against Censorship (NCAC), R Street Institute, the Wikimedia Foundation, and the Woodhull Freedom Foundation. Amici write to represent the public interest in the outcome of this case, which could have extraordinary impacts on how social media platforms and the internet operate. As organizations that support internet users' free expression and other human rights, amici have a strong interest in ensuring that social media platforms and other hosts of user-generated content can exercise their First Amendment right to moderate content in ways that protect and promote the interests of their users. If the order of the United States Court of Appeals for the Fifth Circuit is permitted to stand, it will harm internet users and the public.

For more than twenty-five years, CDT has represented the public's interest in an open, decentralized internet and worked to ensure that the constitutional and democratic values of free expression and privacy are protected in the digital age. CDT regularly advocates in support of the First Amendment and protections for online speech before legislatures, regulatory agencies, and courts.

EFF has worked for more than 30 years to protect the rights of users to transmit and receive information online. On behalf of its more than 38,000 dues-paying members, EFF ensures that users' interests are presented to courts considering crucial online free speech issues.

NCAC is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united

in their commitment to freedom of expression. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

The R Street Institute is a nonprofit, nonpartisan public-policy research organization. R Street's mission is to engage in policy research and outreach that promotes free markets as well as limited yet effective government.

The Wikimedia Foundation, the non-profit that hosts Wikipedia and several other free knowledge projects, protects the values and policies that allow free knowledge to thrive and supports the communities of volunteers around the world who edit, improve, and add knowledge across Wikimedia projects. The Foundation is concerned that a law prohibiting content moderation on the basis of viewpoint risks forcing a platform like Wikipedia to abandon its commitment to accurate and well-sourced information. This outcome would be antithetical to the principle of neutrality on which Wikipedia relies and could undermine the reliability of its projects.

The Woodhull Freedom Foundation is a non-profit organization that works to advance the recognition of sexual freedom, gender equality, and free expression. Woodhull believes that if this Court upholds the constitutionality of the challenged law, other jurisdictions will be incentivized to pass similar statutes threatening the ability of its members to effectively advocate for sexual freedom and communicate about sexually oriented topics online.

## SUMMARY OF THE ARGUMENT

The Fifth Circuit's stay of the district court's preliminary injunction enjoining Texas House Bill 20 ("HB20" or the "Act") should be vacated because the public interest lies in maintaining the injunction and Applicants, not the Respondent, are likely to succeed on the merits.

The stay harms the public interest by upending the longstanding status quo of content moderation by social media platforms, which is fundamental to free speech online and has largely been to the public's benefit. Internet users benefit from the availability of social media services that engage in a range of content moderation approaches, from those that significantly moderate content to those that take a more hands-off approach. Users also benefit from platforms' ability to bar, for example, content promoting suicide and self-harm, hate speech, content praising terrorism, content promoting animal abuse, and inappropriate content aimed at children. Barring such content can be construed as viewpoint-based and thus prohibited by HB20.

Permitting the stay to stand, with HB20 going into immediate effect, will harm the public interest in at least three ways, each of which weighs strongly against the stay: First, platforms will have to end or alter their content moderation practices that can be construed as viewpoint-based. Second, the risk of litigation will discourage some platforms from engaging in any content moderation, even under policies they believe are viewpoint-neutral, leaving users to wade through large amounts of unwanted content. Third, other platforms may instead remove even more user speech in an effort to appear more consistent in the enforcement of

their content policies, with the result that users will have less freedom of expression, particularly on controversial subjects.

Established law also supports the status quo. Every court that has considered the issue has found that social media platforms have a First Amendment right to edit and curate the content they publish on their sites. This Court's precedent in an analogous context, *Miami Herald Co. v. Tornillo*, remains controlling here.

### ARGUMENT

In at least two respects, the Fifth Circuit's order was "demonstrably wrong in its application of accepted standards in deciding to issue the stay." *See W. Airlines, Inc. v. Int'l Broth. Of Teamsters & Air Transp. Emps.*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304, 847 (1976) (Rehnquist, J., in chambers)). First, the public interest lies in maintaining the preliminary injunction enjoining HB20. Second, Texas has not made a strong showing that it is likely to succeed on the merits. *See Nken v. Holder*, 556 U.S. 418, 426 (2009) (setting forth the four-factor test for determining whether to grant a stay).

#### **I. The public interest and the interests of social media users favor maintaining the status quo and rejecting the stay.**

The Fifth Circuit erred by issuing the stay despite the public interest strongly weighing in favor of enjoining HB20 pending appeal. *See Nken*, 556 U.S. at 426 (including "where the public interest lies" as one of the factors a court must consider before staying a lower court's order).

Chief among its provisions that harm the public interest is HB20's prohibition on covered social media platforms "censor[ing] a user, a user's expression, or a user's ability to receive the expression of another person" based on viewpoint or the user's location in Texas. Tex. Civ. Prac. & Rem. Code § 143A.002(a). What HB20 defines as censorship are common and well-established content moderation practices designed to serve users' interests, including to "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." *Id.* § 143A.001(1).

**A. Social media platforms have long engaged in content moderation, a complex and error-prone practice.**

Online services, at least from their point of mass adoption, have rarely published all legal speech submitted to their sites. Instead, online services—including most services falling within HB20's definition of "social media platforms"—engage in content moderation: the use of policies, systems, and tools to decide what user-generated content or accounts to publish, remove, amplify, or manage. See Hannah Bloch-Wehba, *Automation in Moderation*, 53 Cornell Int'l L.J. 41, 42, 48 (2020). Large-scale, outsourced content moderation first emerged in the early 2000s. Jillian C. York & David Greene, *How to Put COVID-19 Content Moderation Into Context*, Brookings's TechStream (May 21, 2020).<sup>1</sup>

Social media platforms' content policies commonly prohibit users from posting speech that a platform believes is detrimental to its users and the public, its

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<sup>1</sup> <https://www.brookings.edu/techstream/how-to-put-covid-19-content-moderationinto-context/>.

business interests, or both, even if that speech is legal. For example, many platforms ban legal, non-obscene sexual content, *see, e.g. Adult Nudity and Sexual Activity*, Facebook (last visited May 14, 2022),<sup>2</sup> even though such speech enjoys First Amendment protection, *see Miller v. California*, 413 U.S. 15 (1973).

Platforms' content moderation decisions are sometimes inconsistent or contrary to their own policies. Some of that is inevitable. Given the staggering amounts of content posted on platforms every day and the subjective judgment calls that some content moderation decisions require, platforms make mistakes in either moderating or failing to moderate content. *See* Mike Masnick, *Content Moderation At Scale Is Impossible: Recent Examples Of Misunderstanding Context*, TechDirt (Feb. 26, 2021)<sup>3</sup> (documenting instances of content moderation errors).

Beyond just mistakes, platforms have often aggressively removed content that is not prohibited by their content policies, especially when attempting to minimize legal or reputational risks arising from government regulation or criticism. For example, many platforms responded to the enactment of the Allow States and Victims to Fight Online Sex Trafficking Act/Stop Enabling Sex Traffickers Act, Pub. L. 115-164, 132 Stat. 1253 (2018) ("FOSTA"), by removing or otherwise making less available most or all content by sex workers and sex worker advocates, even content that is not prohibited by FOSTA. *See* Danielle Blunt et al.,

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<sup>2</sup> <https://transparency.fb.com/policies/community-standards/adult-nudity-sexual-activity/>.

<sup>3</sup> <https://www.techdirt.com/2021/02/26/content-moderation-scale-is-impossible-recent-examples-misunderstanding-context/>.



*Posting Into The Void, Hacking//Hustling* (Oct. 2020).<sup>4</sup> Government pressure to remove terrorist content from platforms has also led to over-removals of speech. For instance, in 2021, Instagram removed posts about one of Islam’s holiest mosques, Al Aqsa, because its name is contained within the name of an organization the company had designated as a terrorist group. Ryan Mac, *Instagram Censored Posts About One of Islam’s Holiest Mosques, Drawing Employee Ire*, BuzzFeed News (May 12, 2021).<sup>5</sup>

**B. Internet users benefit from a range of content moderation practices.**

In practice, content moderation differs from platform to platform. *Compare Community Guidelines*, Instagram (last visited May 14, 2022)<sup>6</sup> (prohibiting nudity) with *Sensitive Media Policy*, Twitter (Jan. 2022)<sup>7</sup> (permitting “consensually produced adult content”). Some platforms detect potentially violating content only after it is posted; others screen some or all content ex ante. Kate Klonick, *The New Governors: The People, Rules, And Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1635 (2018). Platforms make different judgment calls about whether particular content violates their content policies, even if those policies are similar. See Hannah Denham, *Another Fake Video of Pelosi Goes Viral on Facebook*, Wash. Post (Aug. 3, 2020)<sup>8</sup> (reporting that TikTok, Twitter and YouTube removed a

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<sup>4</sup> <https://hackinghustling.org/wp-content/uploads/2020/09/Posting-Into-the-Void.pdf>.

<sup>5</sup> <https://www.buzzfeednews.com/article/ryanmac/instagram-facebook-censored-al-aqsa-mosque>.

<sup>6</sup> <https://help.instagram.com/477434105621119>.

<sup>7</sup> <https://help.twitter.com/en/rules-and-policies/media-policy>.

<sup>8</sup> <https://www.washingtonpost.com/technology/2020/08/03/nancy-pelosi-fake-video-facebook/>.

doctored video of Rep. Nancy Pelosi, while Facebook allowed it to remain with a label). They use different methods to enforce their content policies, such as labeling content, placing interstitial warnings over it, or removing the ability to make money from it. Eric Goldman, *Content Moderation Remedies*, 28 Mich. Tech. L. Rev. 1, 23–39 (2021). Some platforms allow users to appeal content moderation decisions, while others do not. Klonick, *supra*, at 1648.

Many users choose to use moderated platforms because they prefer them and see benefits from moderation. Users may want to find or create affinity and niche communities dedicated to certain subject matters or viewpoints and exclude others. They may prefer environments that shield them from certain kinds of legal speech, including pornography, hateful rhetoric and harassment, or simply speech that is off-topic or irrelevant. *See, e.g., Reducing Hate And Disinformation Online, Change the Terms* (last visited May 15, 2022) (campaign demanding improved content moderation against hate speech and disinformation).<sup>9</sup> And all users want services to filter out junk content or “spam.”

Many platforms use content moderation to create environments that they believe are more user-friendly, prohibiting content that the platforms deem unsuitable for their purposes. For example, Pinterest, a site with 86 million active monthly users in the U.S. designed to visually inspire creative projects, has “community guidelines” that “outline what we do and don’t allow on Pinterest.”

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<sup>9</sup> <https://www.changetheterms.org/>

*Community Guidelines*, Pinterest (last visited Mar. 29, 2022).<sup>10</sup> *Number of Pinterest users in the United States from 2017 to 2022*, Statista (last visited May 14, 2022).<sup>11</sup>

Under these guidelines, Pinterest reserves the right to remove several categories of speech, such as “Adult content,” “Hateful activities,” “Harassment and criticism,” and “Self-injury and harmful behavior.” *Community Guidelines*, Pinterest, (last visited March 29, 2022).<sup>12</sup> Picsart, another site for creators with more than 150 million monthly users, has a similar policy. *Design the Now*, Picsart (last visited May 14, 2022)<sup>13</sup>; *Community Guidelines*, Picsart, (last visited March 30, 2022).<sup>14</sup>

Content moderation also helps users avoid spam and scams. For instance, employment websites that allow employers to post job openings use spam and scam policies to combat, among other things, a growing trend of scammers using employment websites to steal applicants’ identities in order to commit unemployment benefit fraud. See Cezary Podkul, *Scammers Are Using Fake Job Ads to Steal People’s Identities*, ProPublica (Oct. 26, 2021).<sup>15</sup>

**C. Internet users benefit from content moderation policies that may be prohibited under HB20 as viewpoint-based.**

Many content policies of popular social media platforms can be construed as viewpoint-based and prohibited by HB20. HB20 prohibits these platforms not only from removing content under these policies, but also from taking essentially any

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<sup>10</sup> <https://policy.pinterest.com/en/communityguidelines>

<sup>11</sup> <https://www.statista.com/statistics/408974/number-of-us-pinterest-users/>

<sup>12</sup> <https://policy.pinterest.com/en/communityguidelines>.

<sup>13</sup> <https://picsart.com/about-us>.

<sup>14</sup> <https://picsart.com/community-guidelines>.

<sup>15</sup> <https://www.propublica.org/article/scammers-are-using-fake-job-ads-to-steal-peoples-identities>.

content moderation action, including demonetizing or labeling.<sup>16</sup> See Tex. Civ. Prac. & Rem. Code § 143A.001(1). These policies are often designed to prohibit content that users do not want or that is dangerous and can result in physical harm, even if the content itself is legal.

For example, some platforms prohibit content that promotes suicide and self-harm. The social media platform TikTok does not allow content “depicting, promoting, normalizing, or glorifying activities that could lead to suicide, self-harm, or disordered eating.” *Community Guidelines, Suicide, Self-harm, and Disordered Eating*, TikTok (last visited May 14, 2022).<sup>17</sup> However, TikTok does allow users to “shar[e] their personal experiences with these issues in a safe way to raise awareness and find community support.” *Id.* They thus make distinctions based on viewpoint, prohibiting, for example, a post that encourages teens to kill themselves while allowing a post encouraging suicidal teens to seek help. Suicide and self-harm content policies are especially important for platforms used by large numbers of young people, like TikTok, because of concerns that use of these platforms harms

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<sup>16</sup> HB20 permits covered platforms to engage in viewpoint-based moderation of “unlawful expression” and three other categories of expression: expression that a covered platform “is specifically authorized to censor by federal law”; expression flagged by organizations with the purpose of “preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment and expression”; and expression that “directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge.” Tex. Civ. Prac. & Rem. Code § 143A.006(a)(1)-(4). None of the policies discussed below fall into these exceptions.

<sup>17</sup> <https://www.tiktok.com/community-guidelines?lang=en#33>.

teens' mental health. See Mitchell Clark, *TikTok Faces Investigation Into Its Impact On Young People's Mental Health*, Verge (Mar. 2, 2022).<sup>18</sup>

Many platforms also prohibit hate speech based on race, ethnicity, religion, and other characteristics. These kinds of rules are common, even on platforms that emphasize their commitment to free speech. For example, social media platform Gettr explains that it “holds freedom of speech as its core value and does not wish to censor your opinions,” while at the same time reserving the right to “address” content that attacks any religion or race. See, e.g., *Gettr – Terms of Use*, Gettr (Jan. 12, 2022).<sup>19</sup> Reddit’s content policy prohibits content that promotes “hate based on identity or vulnerability,” including race, religion, and national origin. *Promoting Hate Based on Identity or Vulnerability*, Reddit (last visited May 14, 2022).<sup>20</sup> Some platforms bar specific ideologies or ideas that discriminate on the basis of race, religion, and other protected categories, such as YouTube’s policy prohibiting promotion or glorification of Nazi ideology or Holocaust denial. The YouTube Team, *Our Ongoing Work to Tackle Hate*, YouTube (June 5, 2019).<sup>21</sup> These policies can be construed as viewpoint-based because they prohibit negative speech about certain protected classes or specific ideologies but permit neutral or positive descriptions of those classes or condemnation of racist or other hateful ideologies. See *R.A.V. v. St. Paul*, 505 U.S. 377, 391-92 (1992).

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<sup>18</sup> <https://www.theverge.com/2022/3/2/22958900/tiktok-state-ag-investigation-teens-kids-mental-physical-health>.

<sup>19</sup> <https://gettr.com/terms>.

<sup>20</sup> <https://www.reddithelp.com/hc/en-us/articles/360045715951>.

<sup>21</sup> <https://blog.youtube/news-and-events/our-ongoing-work-to-tackle-hate/>.

Policies prohibiting promotion or glorification of terrorist groups are inherently viewpoint-based—prohibiting, for example, a post praising the Taliban but allowing a post condemning them. *See, e.g.,* Sam Shead, *Facebook, TikTok won't lift ban on posts that promote Taliban after the fall of Afghanistan* (Aug. 17, 2021).<sup>22</sup> But many platforms prohibit content that praises or supports terrorism or other acts of violence. For example, Roblox, a rapidly growing online gaming platform with nearly 50 million daily active users, prohibits the “support, or glorification of war crimes or human rights violations, including torture.” *Roblox Community Standards*, Roblox (last visited May 14, 2022);<sup>23</sup> *Roblox Reports November 2021 Key Metrics*, Roblox (Dec. 15, 2021).<sup>24</sup> Again, even platforms that tout their commitment to free speech often prohibit this content. For example, Rumble, a video sharing alternative to YouTube that boasted 32 million monthly users in the first quarter of 2021, bars content that “Promotes, supports or incites individuals and/or groups which engage in violence or unlawful acts, including but not limited to Antifa groups and persons affiliated with Antifa, the KKK and white supremacist groups and or persons affiliated with these groups.” *Website Terms and Conditions of Use and Agency Agreement*, Rumble (Jan. 3, 2022).<sup>25</sup>

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<sup>22</sup> <https://www.cnbc.com/2021/08/17/taliban-content-banned-on-facebook-instagram-whatsapp.html>

<sup>23</sup> <https://en.help.roblox.com/hc/en-us/articles/203313410-Roblox-Community-Standards>

<sup>24</sup> <https://ir.roblox.com/news/news-details/2021/Roblox-Reports-November-2021-Key-Metrics/default.aspx>

<sup>25</sup> <https://rumble.com/s/terms>

A few platforms also specifically ban content that supports or promotes harming animals, another inherently viewpoint-based standard. Facebook prohibits “statements of intent, calls to action, representing, supporting or advocating for, or depicting, admitting to or promoting” acts of “physical harm against animals.”

*Coordinating Harm and Promoting Crime*, Facebook (last visited May 14, 2022).<sup>26</sup>

Such policies prohibit, for example, posts that advocate to legalize dog fighting,<sup>27</sup> while permitting posts that condemn dog fighting.<sup>28</sup>

Finally, some platforms also bar violent, sexual, or otherwise “inappropriate” content aimed at minors, policies that require viewpoint-based judgments about what content is “adult or age-inappropriate.” For example, YouTube’s child safety policy prohibits, among other things, “[f]amily friendly cartoons that target young minors and contain adult or age-inappropriate themes such as violence, sex, death, drugs and more.” *Child Safety Policy*, YouTube (last visited May 14, 2022).<sup>29</sup> It also prohibits “encouraging minors to do dangerous activities.” *Id.*

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<sup>26</sup> <https://transparency.fb.com/policies/community-standards/coordinating-harm-publicizing-crime/>.

<sup>27</sup> See, e.g., Mark Scieszinski, *FACEBOOK: Ban pages and groups endorsing dog fighting*, Change.org (last visited May 14, 2022), <https://www.change.org/p/facebook-ban-pages-and-groups-endorsing-dog-fighting> (petition urging Facebook to remove a group endorsing dog fighting).

<sup>28</sup> See, e.g., Anti-DogFighting Campaign Worldwide Organization, Facebook (last visited May 14, 2022), <https://www.facebook.com/ADFC.Worldwide.Org/>.

<sup>29</sup> [https://support.google.com/youtube/answer/2801999?hl=en&ref\\_topic=9282679](https://support.google.com/youtube/answer/2801999?hl=en&ref_topic=9282679)

**D. Allowing HB20 to go into effect will cause social media platforms to alter their content moderation practices in ways that will harm the public interest.**

Allowing HB20 to go into effect will upend the status quo—under which platforms have long engaged in often extensive content moderation, *see supra* Section I.A.—and will harm users, and the public interest, in three ways. First, platforms will have to end or alter their viewpoint-based content moderation practices. Second, the risk of litigation posed by HB20 will discourage some platforms from engaging in any content moderation, even under ostensibly viewpoint-neutral policies. Third, other platforms may begin to remove even more speech in an effort to appear evenhanded and more consistent in the enforcement of their content policies.

If HB20 goes into effect, providers will be forced to rescind or not enforce their viewpoint-based content policies. The effect will be the unchecked proliferation of content that, for example, seeks to persuade teenagers to commit suicide; demeans Christians, Jews, Muslims and people of other religious faiths;<sup>30</sup> urges people to support the Islamic State and other terrorist groups; encourages people to harm animals; or targets children with disturbing images. *See supra* Section I.C.

Alternatively, some platforms may prohibit *all* content on controversial topics to avoid allegations of viewpoint discrimination. For example, prohibiting all posts

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<sup>30</sup> “According to the UN Special Rapporteur on minority issues, at least 70% of the victims of hate and incitement to violence and discrimination online are minorities, including many members of religious minority communities.” United States Comm’n on International Religious Freedom, *Factsheet: Protecting Religious Freedom Online* (Dec. 2021), <https://www.uscirf.gov/sites/default/files/2021-12/2021%20Factsheet%20-%20Protecting%20Religious%20Freedom%20Online.pdf>.



mentioning suicide or self-harm would mean that a platform's users lose access to content educating them about the signs of a suicidal person or urging them to seek help if they are suicidal or contemplating self-harm. Barring all discussions of terrorist groups would prevent news outlets and users from linking to journalism about terrorist attacks or even posts by government entities warning of potential terrorist activity.

Allowing HB20 to go into effect will also make it legally riskier for platforms to apply even ostensibly viewpoint-neutral content moderation policies. Because mistakes are inevitable when platforms engage in content moderation at scale, *see supra* Section I.A, many users whose content is moderated will be able to point to inconsistencies in how a platform has moderated similar or even identical content. These users may use evidence of inconsistency to claim that the moderation decision in their case was viewpoint-based. And, even if the platform's moderation action is not obviously viewpoint-based, a user could still claim it is based on the expression of his or her off-platform views, since HB20 also provides that its prohibition on viewpoint-based moderation applies "regardless of whether the viewpoint is expressed on a social media platform or through any other medium." Tex. Civ. Prac. & Rem. Code § 143A.002(b).

The result is that platforms will face a potential flood of lawsuits under HB20 brought by users who allege that platforms moderated their content because they disagreed with the users' viewpoints, even if the policies the platforms applied are viewpoint-neutral. Even if an individual suit is ultimately rejected, the costs

and other burdens facing platforms because of discovery and potentially even a trial will be significant. *See Henry v. Lake Charles Amer. Press, LLC*, 566 F.3d 164 (5th Cir. 2009) (recognizing the “chilling cost and burden of defending” tort claims based on the exercise of First Amendment rights).

Faced with the prospect of many such suits under HB20, platforms may decide that they face less legal risk if they decline to moderate *any* content, since HB20 penalizes only “censor[ing]” content, Tex. Civ. Prac. & Rem. Code § 143A.002, thus denying users the benefits of being able to select among platforms that engage in content moderation. *See supra* Section I.B.

Alternatively, platforms may respond to HB20 in the opposite manner, by enforcing their content policies even more aggressively and censoring any content that even arguably implicates those policies, in an effort to maximize the appearance of consistency and reduce the risk of successful claims that they are engaged in viewpoint-based moderation. As a result, platforms may remove even *more* user-generated content, decreasing users’ ability to express themselves and receive information online.

In particular, some platforms may rely more on automated content moderation tools, both to detect and remove more content and in order to claim that these tools are more consistent and viewpoint-neutral than human moderators. This, too, would harm internet users. Automated content moderation tools have known problems and limitations, including their tendency to perpetuate real-world biases and inability to understand context. Shenkman et

al., *Do You See What I See? Capabilities and Limits of Automated Multimedia Content Analysis*, Ctr. for Democracy & Tech. 22–34 (May 2021).<sup>31</sup> Use of these tools often results in more speech being flagged and removed, particularly speech by members of marginalized groups. *Id.*; Spandana Singh, *Everything in Moderation*, Open Tech. Inst. (July 22, 2019).<sup>32</sup>

All of these outcomes harm users and the public interest. Allowing HB20 to go into effect would upend the status quo of content moderation that users rely on to ensure they can speak and seek information in online forums that fit their interests and needs. Prohibiting platforms from engaging in viewpoint-based content moderation will bar many popular, commonsense content moderation policies that apply across a wide variety of platforms. It will either make platforms reluctant to engage in any content moderation or spur them to go overboard in removing user-generated content.

- II. Applicants are likely to succeed on the merits because courts have without exception recognized online intermediaries’ First Amendment rights to curate the content they host.**
- A. The First Amendment protects the right to speak by curating the speech of others.**

Every court that has considered the issue has rightfully found that private entities that operate online platforms for user speech enjoy a First Amendment

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<sup>31</sup> <https://cdt.org/wp-content/uploads/2021/05/2021-05-18-Do-You-See-What-I-See-Capabilities-Limits-of-Automated-Multimedia-Content-Analysis-Full-Report-2033-FINAL.pdf>

<sup>32</sup> <https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/>.

right to curate that speech, regardless of whether they curate a lot, a little, or not at all.

The Supreme Court has long held that private publishers have a First Amendment right to control the content of their publications, and specifically whether and how to publish things written by others. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-55 (1974). *Cf. Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (reaffirming that “when a private entity provides a forum for speech,” “[t]he private entity may . . . exercise editorial discretion over the speech and speakers in the forum”). *See also Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (recognizing cable television providers’ First Amendment right to “exercis[e] editorial discretion over which stations or programs to include in its repertoire”).

The parallels between *Tornillo* and the present case are strong.

Both concern state laws that require private companies to publish viewpoints they otherwise would not publish. In *Tornillo*, the right to reply law required newspapers that endorsed a candidate for elected office to publish a response from the endorsed candidate’s opponents. 418 U.S. at 243-45. HB20 is far broader—by prohibiting editorial decisions based on anybody’s viewpoint, it effectively provides a universal, unlimited right to reply to anyone who uses a large online platform.

And both laws were justified by similar policy concerns, that dominant mass media not manipulate public discourse. In *Tornillo*, the Supreme Court rejected “vigorous” arguments that “the government has an obligation to ensure that a wide

variety of views reach the public.” 418 U.S at 247-48. In *Tornillo*, Florida cited a “concentration of control of outlets to inform the public,” that had “become big business,” “noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events.” *Id.* at 248-49.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. . . . The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires.

*Id.* at 250-51.

The *Tornillo* Court did not dispute the validity of these concerns, but nevertheless found that governmental interference with editorial discretion was per se violative of the First Amendment. *Id.* at 254. *See also Assocs. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 134 (9th Cir. 1971) (rejecting argument that the *Los Angeles Times*’ “semimonopoly and quasi-public position” justified order compelling the newspaper to publish certain advertisements); *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1092 (N.D. Fla. 2021), appeal docketed, 11th Cir. No. 21-12355 (11th Cir. July 13, 2021) (“The State’s announced purpose of balancing the discussion—reining in the ideology of the large social-media providers—is precisely the kind of state action held unconstitutional in *Tornillo*. . .”).

*Tornillo* is not limited to only newspapers or publishers that actively select the content they publish, or to media entities. This Court has applied it to a variety of entities that speak by curating the speech of others, including thrice in the 2018 term. *See Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018); *Nat’l Inst. of Family & Life Advocates v.*

*Becerra*, 138 S. Ct. 2361, 2371 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring).

Attorney General Paxton has in other cases recognized the importance of prohibitions of compelled speech by association. Paxton submitted three separate amicus briefs in *McDonald v. Longley* in support of lawyer-plaintiffs who claimed that the State Bar of Texas’ mandatory membership dues violated their First Amendment rights by forcing them to associate with political and ideological activities they opposed. *See McDonald v. Longley*, 4 F.4th 229, 237 (5th Cir. 2021), cert. denied (April 4, 2022). Paxton argued that “[c]ompelling individuals to mouth support for views they find objectionable violate[d] [the] cardinal constitutional command against compelled speech.”<sup>33</sup>

This is not to say that governments have no regulatory authority over online services. Regulatory measures that do not target the editorial process or are not enacted in retaliation against disfavored editorial policies and decisions may be acceptable. For example, governments can promote user choice and control by encouraging competition<sup>34</sup> and platform interoperability.<sup>35</sup>

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<sup>33</sup> Brief for the State of Texas as Amicus Curiae in Support of Appellants at 1-2, *McDonald v. Longley*, 4 F.4th 229, 237 (5th Cir. 2021) (quotations omitted).

<sup>34</sup> *Comment on Evaluating the Competitive Effects of Corporate Acquisitions and Mergers*, EFF (August 20, 2018), <https://www.eff.org/document/eff-comments-ftc-competition-0>.

<sup>35</sup> Bennett Cyphers, Cory Doctorow, *The New ACCESS Act Is a Good Start. Here’s How to Make Sure It Delivers*, EFF (June 21, 2021), <https://www.eff.org/deeplinks/2021/06/new-access-act-good-start-heres-howmake-sure-it-delivers>.

**B. Content moderation is a protected editorial process.**

*Tornillo* applies well beyond traditional editorial processes; it thus clearly applies to content moderation, which bears many of the hallmarks of a typical editorial process.

Platforms practice content moderation in phases: they define permissible and impermissible content; detect content that may violate their policies or the law; evaluate that content to determine whether it in fact violates their policies or the law; take an enforcement action against violative content; allow users to appeal or otherwise seek review of content moderation decisions that they believe are erroneous; and educate users about content moderation policies and their enforcement. Seny Kamara et al., *Outside Looking In: Approaches to Content Moderation in End-to-End Encrypted Systems*, Ctr. for Democracy & Tech. 9–11 (2021).<sup>36</sup> Platforms, such as amicus Wikimedia Foundation, may also decide to structure their services so that some content moderation decisions are made by a broader community of users, who themselves implement these phases.<sup>37</sup> In each phase, platforms make editorial judgments about what content they wish to allow or forbid on their services, or how to display or arrange it.

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<sup>36</sup> <https://cdt.org/wp-content/uploads/2021/08/CDT-Outside-Looking-In-Approaches-to-Content-Moderation-in-End-to-End-Encrypted-Systems-updated-20220113.pdf>

<sup>37</sup> See, e.g., *Moderator Guidelines*, Reddit, <https://www.redditinc.com/policies/moderator-guidelines> (effective Apr. 17, 2017); *Moderating on Discord*, Discord, <https://discord.com/moderation> (last visited March 30, 2022); *Terms of Use*, Wikimedia, [https://meta.wikimedia.org/wiki/Terms\\_of\\_use](https://meta.wikimedia.org/wiki/Terms_of_use) (last visited May 16, 2022).

For example, during the definitional phase, some platforms develop a content policy, *i.e.*, a set of rules about what content is and is not allowed on their platforms. Kamara et al., *supra*, at 9. Platforms may engage in significant internal discussion and debate, conduct internal and external research, and write multiple drafts before determining their content policies. *See* Klonick, *supra*, at 1631–35.

Once a platform has decided during the evaluation phase that particular content violates its policies, which may involve deliberation and debate, the platform must decide what action to take in the enforcement phase. That may involve not just a binary decision of whether to take down content or allow it to remain on a service, but also whether to change the manner or place in which content is displayed or add the platform’s own affirmative speech. *See* Goldman, *supra*, at 23–39 (2021) (describing enforcement actions such as fact-checks or a warning before users may access the content; decreasing the availability of some or all of a user’s posts; or choosing not to recommend the content).

It is well established that the First Amendment right of editorial freedom extends beyond the publication of one’s own speech to the curation of others’ speech. Even the typical newspaper is a mix of original writing and content created by others, including syndicated and wire service articles, advertisements, wedding, engagement, and birth announcements, and comics. Opinion pages, the specific forum targeted by the regulation that *Tornillo* struck down, typically publish a lot of content created by others: opinion pieces, letters to the editor, syndicated



editorial cartoons and columns.<sup>38</sup> This Court’s most powerful pronouncement of freedom of the press, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), centered on *The Times* publishing someone else’s unsolicited content, a paid advertisement. This Court found that *The Times*’ role as a host for the speech of others was critical to its decision: newspapers are “an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.” *Id.* at 266.

*Tornillo*, and the First Amendment more broadly, applies regardless of how selectively a platform publishes speech submitted to it.<sup>39</sup> Social media, like most other forums for speech, operates along a continuum of selectivity, rather than a simple dichotomy. *See supra* Section I.B. Print news media operates along the same continuum. Pennysavers, for example, local newspapers either entirely or primarily

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<sup>38</sup> See Jack Shafer, *The Op-Ed Page’s Back Pages: A Press Scholar Explains How the New York Times Op-Ed Page Got Started*, Slate (Sept. 27, 2010), <https://slate.com/news-and-politics/2010/09/a-press-scholar-explains-how-the-new-york-times-op-ed-page-got-started.html> (describing how the pages opposite newspapers’ editorial pages became a forum for outside contributors to express views different from those expressed by the paper’s editorial board); Michael J. Socolow, *A Profitable Public Sphere: The Creation of the New York Times Op-Ed Page*, Comm’n & Journalism Fac. Scholarship (2010), <https://digitalcommons.library.umaine.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1001&context=cmjfacpub>; *Op-Ed*, Wikipedia, <https://en.wikipedia.org/wiki/Op-ed> (last visited Oct. 7, 2021).

<sup>39</sup> As discussed above, the major social media sites have actively curated the user content on their sites since at least 2007. For example, the Internet users represented by amicus curiae Woodhull Freedom Foundation understand that the perception of such services as “unmoderated” or non-selective typically disregards the very active removal and moderation of constitutionally protected sexual expression. *See supra* Section I.A (discussing platform responses to FOSTA).

composed of classified advertisements, coupons, life milestone announcements, congratulatory messages, recipes, public notices, and the like, have a long and storied history as a relatively non-selective publications.<sup>40</sup> The curators, theater directors, and booksellers whose artistic freedom amicus curiae National Coalition Against Censorship defends curate art, select plays to produce, and books to publish or sell along a similar continuum; their First Amendment rights do not depend upon falling on the proper side of a constitutionally arbitrary selectivity line.

Given this, it is not surprising that numerous courts have applied *Tornillo* to social media platforms that primarily, if not exclusively, publish user-generated content.<sup>41</sup> And courts have consistently upheld platforms' right to curate against claims that they discriminated against users and content creators based on their LGBTQ+ viewpoints, *Divino Grp. LLC v. Google LLC*, No. 19-CV-04749-VKD, 2021 WL 51715, at \*2 (N.D. Cal. Jan. 6, 2021); their African American, Mexican, or Puerto Rican descent and viewpoints, *Newman, et al., v. Google, et al.*, No. 20-CV-04011-LHK, 2021 WL 2633423, at \*1 (N.D. Cal. June 25, 2021); or their viewpoints on vaccines for COVID-19, *Children's Health Def. v. Facebook Inc.*, 546 F. Supp. 3d 909, 923 (N.D. Cal. 2021).

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<sup>40</sup> <https://en.wikipedia.org/wiki/Pennysaver> (last visited March 30, 2022)

<sup>41</sup> See, e.g., *Huber v. Biden*, No. 21-CV-06580-EMC, 2022 WL 827248, at \*6 (N.D. Cal. Mar. 18, 2022); *O'Handley v. Padilla*, No. 21-CV-07063- CRB, 2022 WL 93625, at \*14 (N.D. Cal. Jan. 10, 2022); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017); *Amer. Freedom Defense Initiative v. Lynch*, 217 F. Supp. 3d 100, 106 (D.D.C. 2016); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 436-37 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007); *e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-CV-646-FTMPAM-CM, 2017 WL 2210029, at \*4 (M.D. Fla. Feb. 8, 2017).

## CONCLUSION

For the foregoing reasons, amici respectfully request that the Court grant Applicants' emergency application and vacate the order of the Fifth Circuit granting the stay.

May 17, 2022

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