

No. 22-555

IN THE
Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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**APPENDIX A — Complaint for Declaratory
and Injunctive Relief in the United States District
Court for the Western District of Texas, Austin
Division, Filed September 22, 2021**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NETCHOICE, LLC D/B/A NETCHOICE, A 501(C)(6)
DISTRICT OF COLUMBIA ORGANIZATION,

and

COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6) NON-
STOCK VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

Civil Action No. 1:21-CV-00840

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiffs are two trade associations whose members have First Amendment rights to engage in their own speech and to exercise editorial discretion over the speech published on their websites and applications. *Miami Herald*

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Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974); *see also*, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 575-76 (1995); *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 12 (1986) (plurality op.) (“*PG&E*”). Put simply, “the Government may not . . . tell Twitter or YouTube what videos to post; or tell Facebook or Google what content to favor.” *United States Telecom Association v. FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (“*USTA*”). *See also* *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019) (recognizing “private entities’ rights to exercise editorial control over speech and speakers on their properties or platforms”).

2. Yet that is precisely what Texas House Bill 20 (“H.B. 20,” enacted September 9, 2021)¹ does by prohibiting a targeted list of disfavored “social media platforms”² from exercising editorial discretion over content those platforms disseminate on their own privately owned websites and applications. Tex. Civ. Prac. & Rem. Code §§ 143A.001(1), 143A.002.³ At bottom, H.B. 20 imposes impermissible content- and viewpoint-based classifications to compel

1. H.B. 20’s enacted text is attached as Exhibit A and will be codified in relevant part at Tex. Bus. & Com. Code §§ 120.001-003, 120.051-053; 120.101-104, 120.151; Tex. Civ. Prac. & Rem. Code §§ 143A.001-008.

2. H.B. 20 covers “social media platforms,” so this Complaint will refer to “platforms.” But the plain text of the “social media platform” definition is vague and thus may include websites and applications not generally understood as “social media.”

3. H.B. 20’s provisions have not yet taken effect, but this Complaint cites H.B. 20’s provisions as they are codified.

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a select few platforms to publish speech and speakers that violate the platforms' policies—and to present that speech the same way the platforms present other speech that does not violate their policies. Furthermore, H.B. 20 prohibits the platforms from engaging in their own expression to label or comment on the expression they are now compelled to disseminate. And in light of the statute's vague operating provisions, every single editorial and operational choice platforms make could subject those companies to myriad lawsuits.

3. These restrictions—by striking at the heart of protected expression and editorial judgment—will prohibit platforms from taking action to protect themselves, their users, advertisers, and the public more generally from harmful and objectionable matter. At a minimum, H.B. 20 would unconstitutionally require platforms like YouTube and Facebook to disseminate, for example, pro-Nazi speech, terrorist propaganda, foreign government disinformation, and medical misinformation. In fact, legislators rejected amendments that would explicitly allow platforms to exclude vaccine misinformation, terrorist content, and Holocaust denial.

4. Additional H.B. 20 provisions will work to chill the exercise of platforms' First Amendment rights to exercise their own editorial discretion and to be free from state-compelled speech. H.B. 20 will impose operational mandates and disclosure requirements designed to prescriptively manage—and therefore interfere with and chill—platforms' exercise of editorial discretion. In a series of intrusive provisions, H.B. 20 requires “social media platforms” to publish how they intend to exercise

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their discretion, document in excruciating detail how they exercise their editorial discretion over potentially billions of pieces of content, and operate inherently burdensome and unworkable individualized complaint mechanisms—all of which together work to compel or otherwise challenge the platforms’ countless daily uses of editorial discretion.

5. To enforce these onerous anti-editorial-discretion prohibitions, operational mandates, and disclosure requirements, H.B. 20 threatens platforms with myriad lawsuits from their users and the Texas Attorney General. The hopeless indeterminacy of many of H.B. 20’s provisions will only invite arbitrary—and potentially discriminatory—enforcement by the Attorney General and by private plaintiffs.

6. The Northern District of Florida recently enjoined similar provisions of a Florida law based upon similar First Amendment infirmities. *NetChoice, LLC v. Moody*, No. 4:21cv220-RH-MAF, 2021 WL 2690876, *6, *12 (N.D. Fla. June 30, 2021). Though the laws differ in their specifics, Florida’s law and H.B. 20 here both infringe on the editorial discretion that the First Amendment protects, and the Texas Attorney General himself has called the two laws “similar.”⁴

7. The Northern District of Florida also concluded that the Florida law is partially preempted by 47 U.S.C. § 230 (“Section 230”). This Court should do the same here.

4. Brief of the State of Texas, et al., *NetChoice, LLC v. Attorney General, State of Florida*, No. 21-12355, 2021 WL 4237301, at *2 (11th Cir. Sept. 14, 2021); *see also infra* ¶ 31-32.

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Plaintiffs' members are protected by federal statute from state laws exposing them to liability for moderating users' content on their sites. Under Section 230(e)(3), a state law is expressly preempted insofar as it purports to restrict good faith editorial discretion. Accordingly, those portions of H.B. 20 that expose platforms to liability for their good faith content moderation decisions are expressly preempted by 47 U.S.C. § 230(e)(3).

8. Furthermore, the anti-editorial-discretion provisions, operational mandates, and disclosure requirements of H.B. 20 also violate the Commerce Clause, the Due Process Clause, the Full Faith and Credit Clause, and the Equal Protection Clause.

9. This civil action therefore seeks declaratory and injunctive relief on behalf of Plaintiffs and their respective members who are covered under H.B. 20 against H.B. 20's unconstitutional and federally preempted requirements.

10. Accordingly, Plaintiffs seek a declaration that Sections 2 and 7 of H.B. 20 are unconstitutional, unlawful, and unenforceable, and an injunction prohibiting the Attorney General from enforcing Sections 2 and 7 against Plaintiffs and their members.

PARTIES AND STANDING**Plaintiffs NetChoice and CCIA**

11. Plaintiff NetChoice, LLC is a non-profit entity organized under Section 501(c)(6) of the Internal Revenue Code created in, and existing under, the laws of the

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District of Columbia. A list of NetChoice’s members is publicly available at <https://bit.ly/389bD0V>. For over two decades, NetChoice has worked to promote online commerce and speech and to increase consumer access and options through the Internet, while minimizing burdens on businesses that are making the Internet more accessible and useful.

12. Plaintiff Computer & Communications Industry Association (“CCIA”) is a nonprofit entity organized under Section 501(c)(6) of the Internal Revenue Code incorporated in the Commonwealth of Virginia. A list of CCIA’s members is publicly available at <https://bit.ly/3D6S87G>. For almost fifty years, CCIA has promoted open markets, open systems, and open networks.

13. Plaintiffs have associational standing to bring this suit on behalf of their members. As described below, Plaintiffs’ members have standing to challenge the statute. H.B. 20 is fundamentally at odds with Plaintiffs’ policies and objectives, and challenging H.B. 20 is germane to Plaintiffs’ respective missions. The claims and relief sought do not require proof specific to particular members and, in any event, Plaintiffs are able to provide evidence about H.B. 20’s impact on the companies they represent. The members’ individual participation is thus not required.

14. Likewise, Plaintiffs have organizational standing. They have already incurred and will continue to incur significant organizational expenses because of the enactment of H.B. 20. Due to the passage of H.B. 20, Plaintiffs have already incurred costs and will continue to divert their finite resources—money, staff, and time

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and attention—away from other pressing issues facing their members to address compliance with and the implications of H.B. 20 for Internet companies. If the operative provisions in Sections 2 and 7 of H.B. 20 were declared unlawful and enjoined, then Plaintiffs would no longer divert those finite resources to address H.B. 20.

15. Plaintiffs’ members (1) are the direct targets of H.B. 20 as reflected in statements by state officials (*see infra* ¶¶ 34, 63-64, 66, 73-74), (2) exercise editorial judgments that are prohibited by H.B. 20, and (3) will face serious legal consequences from failing to comply with H.B. 20’s requirements.⁵

16. Many of Plaintiffs’ mutual members, including Facebook and Google (and its video platform YouTube), are directly subject to and regulated by H.B. 20 because they qualify as “social media platforms” within H.B. 20’s definition of the term. Plaintiffs’ members thus include companies that are the intended targets of regulation by the Texas Legislature.

17. For instance, Facebook and YouTube each far exceed H.B. 20’s threshold of 50 million monthly active users in the United States. As of July 28, 2021, Facebook has 2.9 billion monthly active users, more than 50 million

5. Members of one or both Plaintiff organizations include Airbnb, Alibaba.com, Amazon.com, AOL, DJI, DRN, eBay, Etsy, Expedia, Facebook, Fluidtruck, Google, HomeAway, Hotels.com, Lime, Nextdoor, Lyft, Oath, OfferUp, Orbitz, PayPal, Pinterest, StubHub, TikTok, Travelocity, TravelTech, Trivago, Turo, Twitter, Verisign, Vimeo, VRBO, Vigilant Solutions, VSBLTY, Waymo, Wing, and Yahoo!.

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of which are in the United States.⁶ YouTube also has over 2 billion monthly users, more than 50 million of which are in the United States.⁷

18. Most pertinently, Sections 2 and 7 of H.B. 20 injure the constitutional and statutory rights of Plaintiffs' members by restricting members' editorial judgment and freedom of speech. These sections also compel Plaintiffs' members to publish on their platforms and through their services third-party content that may violate their policies and otherwise be removed. At a minimum, such speech appearing on a platform has been interpreted to reflect that platform's tacit approval of that content being on the platform.⁸ In addition to direct prohibitions on members' editorial discretion and compelled-speech requirements, H.B. 20's highly burdensome disclosure and operational requirements will chill members' exercise of editorial judgment.

19. Furthermore, those portions of H.B. 20 that prohibit editorial discretion are expressly preempted by Section 230, which protects Plaintiffs' members from

6. *Facebook Reports Second Quarter 2021 Results*, Facebook Investor Relations (July 28, 2021), <https://bit.ly/3EzU21k>.

7. *YouTube for Press*, <https://bit.ly/3jTGqEP> (last visited Sept. 22, 2021).

8. *See, e.g.*, Steve Rathje, Jay Van Bavel, & Sander van der Linden, *Why Facebook really, really doesn't want to discourage extremism*, Wash. Post (July 13, 2021), <https://wapo.st/2XMV09C>; Becca Lewis, *I warned in 2018 YouTube was fueling far-right extremism. Here's what the platform should be doing*, The Guardian (Dec. 11, 2020), <https://bit.ly/3D7GWrd>.

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liability for restricting third-party content on their “platforms.”

20. Beyond the grave harms to their constitutional rights, Plaintiffs’ members will incur significant costs to comply with the provisions in Sections 2 and 7 of H.B. 20. The statute will force members to substantially modify the design and operation of their platforms. The necessary modifications will impose onerous burdens upon members’ respective platforms and services, interfering with their business models and making it more difficult for them to provide high quality services to their users. For example, members would have to stop offering parents the ability to choose products that protect young children from access to certain inappropriate content (known as “age gating”).

21. H.B. 20’s disclosure requirements will also force members to disclose highly sensitive, confidential business information and trade secrets, such as the “algorithms or procedures that determine results on the platform,” which include all the tools, practices, actions, and techniques used to enforce a platform’s policies. Tex. Bus. & Com. Code. § 120.051(a)(4). These disclosures will result in competitive harm, as covered platforms will have to disclose confidential information not only to other covered “platforms,” but also to other competitor websites and applications that are not covered by H.B. 20 and thus not required to disclose their own confidential information.

22. Moreover, providing detailed information about how members exercise their editorial discretion to police pornography, excessive violence, and other harmful

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and dangerous content will give bad actors—such as scammers (fake charities and supposed Nigerian princes), spammers (including peddlers of pornography), predators, and criminals—a roadmap for evading even the minimal editorial discretion permitted under the statute, making it more difficult and costly to keep harmful content off members’ platforms.

23. Compounding the costs of complying with H.B. 20, advertisers will not permit their products and services to be displayed in an editorial context of harmful or offensive content. And the proliferation of such objectionable content will cause many users to use the platforms less, or stop using them entirely. All of this will injure the businesses of Plaintiffs’ members, irreparably damage their brands and goodwill, and weaken their business models and competitiveness.

24. In addition, because of sovereign immunity, Plaintiffs’ members may not be able to recover the resulting financial losses as monetary damages from either Defendant or from the State of Texas. If Sections 2 and 7 of H.B. 20 were declared unlawful and its enforcement enjoined against Plaintiffs’ members before H.B. 20’s effective date, then Plaintiffs’ members would not have to incur those costs.

25. The enforcement provisions in H.B. 20 also expose Plaintiffs’ members to civil litigation by Defendant (including lawsuits for *potential* violations of Section 7), thus threatening attorneys’ fees and other litigation-related costs. The threat of enforcement and significant

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costs will chill Plaintiffs' members from the exercise of their First Amendment rights to speak, publish, edit, and associate. A declaratory ruling that H.B. 20 violates the First Amendment and an injunction of its enforcement against Plaintiffs' members would remedy those constitutional violations.

26. H.B. 20 also injures the constitutional rights of Plaintiffs' members under the Commerce Clause and the Fourteenth Amendment by regulating conduct occurring outside Texas, discriminating against out-of-state companies engaged in interstate and foreign commerce, and compelling such companies to engage in commerce with Texans. H.B. 20 at a minimum has the practical effect of regulating conduct beyond Texas's borders and threatens Plaintiffs' members with inconsistent regulations from other States.

27. H.B. 20 further harms Plaintiffs' members by putting them to the choice of either complying with state law preempted by Section 230 or otherwise facing potentially huge liability under H.B. 20.

28. For all these reasons, Plaintiffs and their members also will suffer irreparable harm if the challenged portions of H.B. 20 are not enjoined before they take effect and are enforced.

Defendant Ken Paxton, Attorney General of Texas

29. Defendant Ken Paxton is the Attorney General of Texas. He is a resident of Texas. Attorney General Paxton

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is sued only in his official capacity. The Attorney General is responsible for enforcement of H.B. 20. Tex. Bus. & Com. Code § 120.151; Tex. Civ. Prac. & Rem. Code § 143A.008.

30. Defendant Paxton poses a “credible threat of enforc[ing]” H.B. 20. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014). Defendant Paxton has given every indication that he intends to use all legally available enforcement tools against Plaintiffs’ members.

31. Indeed, Texas (and a group of other States) filed an amicus brief in support of Florida’s “similar” law restricting Plaintiffs’ members’ constitutional and statutory rights.⁹ Texas submitted that amicus brief because the “legal theories [the district court] endorsed” to enjoin Florida’s unconstitutional and (partially) preempted law “could be adopted by other courts around the country and imperil similar laws such as Texas’s H.B. 20[.]”¹⁰

32. In a press release touting the amicus brief (and linked on Twitter), Defendant Paxton declared, “I will defend the First Amendment and ensure that conservative voices have the right to be heard. Big Tech does not have the authority to police the expressions of people whose political viewpoint they simply disagree with,” and the press release noted that he has authority under H.B. 20

9. Brief of the State of Texas, et al., *NetChoice, LLC v. Attorney General, State of Florida*, No. 21-12355, 2021 WL 4237301, at *2 (11th Cir. Sept. 14, 2021).

10. *Id.* at *3.

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“to sue on behalf of a Texas resident or residents that were banned or blocked by a platform due to discrimination based on their political views.”¹¹

33. Furthermore, in a video later retweeted on his Twitter account, Defendant Paxton said that “we are going to continue the fight to make sure that these companies are not using their super algorithms and their artificial intelligence to manipulate your . . . political activities.”¹²

34. In a January 9, 2021, tweet criticizing Twitter, Facebook, and Google for allegedly targeting “conservative” speech, Defendant Paxton vowed, “As AG, I will fight them with all I’ve got.”¹³

35. As a result, there is an actual controversy of sufficient immediacy and concreteness relating to the legal rights and duties of Plaintiffs and their members to warrant relief. The harm to Plaintiffs and their members as a direct result of the actions and threatened actions of Defendant is sufficiently real and imminent to warrant the issuance of a conclusive declaratory judgment and prospective injunctive relief.

11. Texas Attorney General (@TXAG), Twitter (Sept. 20, 2021, 3:10 PM), <https://bit.ly/2ZdAzmN>; Press Release, Attorney General Paxton Joins 10-State Coalition to Regulate Big Tech Censorship (Sept. 20, 2021), <https://bit.ly/3u1Njs3>.

12. YAF (@YAF), Twitter (Sept. 2, 2021, 12:30 PM), <https://bit.ly/3BAJm0b>.

13. Attorney General Ken Paxton (@KenPaxtonTX), Twitter (Jan. 9, 2021, 2:58 PM), <https://bit.ly/3nXriJY>.

*Appendix A***JURISDICTION AND VENUE**

36. This Court has subject-matter jurisdiction over this federal action under 28 U.S.C. §§ 1331 and 1343(a) because Plaintiffs' claims arise under the U.S. Constitution and federal law. Plaintiffs' claims arise under the First and Fourteenth Amendments, the Commerce Clause, and the Civil Rights Act, 42 U.S.C. § 1983. Plaintiffs also seek relief because certain provisions of H.B. 20 are preempted by 47 U.S.C. § 230.

37. This Court has authority to grant legal and equitable relief under the Civil Rights Act, 28 U.S.C. § 1343(a); 42 U.S.C. § 1983. In enforcing, administering, and adhering to H.B. 20, Defendant Paxton and those subject to his supervision, direction, or control will at all relevant times act under color of state law. And H.B. 20 violates the constitutional rights of Plaintiffs' members under the First and Fourteenth Amendments, the Commerce Clause of Article I, Section 8 of the Constitution, and the Supremacy Clause of the Constitution.

38. In addition, this Court has subject-matter jurisdiction under 28 U.S.C. § 1331 because the enforcement of H.B. 20 by the Defendant would violate the Supremacy Clause, and thus may be enjoined under established principles of federal equity. *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015).

39. This Court also has authority to issue injunctive relief under the All Writs Act, 28 U.S.C. § 1651.

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40. This Court similarly has the power under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), to “declare the rights and other legal relations of any interested party seeking such declaration.”

41. This Court’s jurisdiction is properly exercised over Defendant Paxton in his official capacity, *Ex parte Young*, 209 U.S. 123 (1908), as Plaintiffs are seeking declaratory and injunctive relief against enforcement of H.B. 20.

42. This Court has personal jurisdiction over Defendant Paxton, in his official capacity, because he resides within the Western District of Texas and performs his official duties within this District.

43. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) because the only Defendant, the Attorney General of Texas, resides in Austin, Texas. Venue is also proper in this District and Division under § 1391(b)(2) because the events giving rise to this civil action occurred in Austin, Texas.

**INTERNET SPEECH AND EDITORIAL
DISCRETION**

The Need for Editorial Discretion

44. With billions of users, the platforms operated by Plaintiffs’ members host, curate, and generate an enormous amount and variety of user-submitted content, including text, videos, audio recordings, and photographs. The content that users submit to those platforms comes from all over the world and is incredibly diverse. It often

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reflects the best of human thought: material that is endlessly creative, humorous, intellectually stimulating, educational, inspirational, and politically engaging.

45. Social media facilitates immensely valuable expression. Facebook, for instance, provides a platform for staying in touch with family and friends, building community, and for discussing local, state, and national events. YouTube provides a platform for creating, sharing, viewing, and discussing videos, on a wide array of topics including educational, instructional and hobby videos, children's entertainment, news, comedy, and much more.

46. Despite this valuable expression, the Internet also attracts some of the worst aspects of humanity. Any online service that allows users to easily upload material will find that some users attempt to post highly offensive, dangerous, illegal, or otherwise objectionable content, such as: medical misinformation, hardcore and illegal "revenge" pornography, depictions of child sexual abuse, terrorist propaganda (like pro-Taliban expression), efforts by foreign adversaries to foment violence and manipulate American elections, efforts to spread white supremacist and anti-Semitic conspiracy theories, disinformation disseminated by bot networks, fraudulent schemes, malicious efforts to spread computer viruses or steal people's personal information, spam, virulent racist or sexist attacks, death threats, attempts to encourage suicide and self-harm, efforts to sell illegal weapons and drugs, pirated material that violates intellectual property rights, and false and defamatory statements.

47. Without serious and sustained effort by Plaintiffs, their members, and other online services to stop, limit,

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and exercise editorial discretion over such content—and the people or entities who seek to disseminate harmful content—these services could be flooded with abusive and objectionable material, drowning out valuable content and making their services far less enjoyable, useful, and safe.¹⁴

48. That is why the social media platforms operated by Plaintiffs’ members—and nearly every online service hosting user-submitted content—have rules and policies providing what content and activities are, and are not, permitted on their platforms.¹⁵ And it is why those platforms devote enormous amounts of time, resources, personnel, and effort to engaging in editorial discretion through content moderation. And as new kinds of harmful conduct arise, Plaintiffs’ members must continually evaluate their policies and update them when appropriate.

49. As is clear from the above discussion of their moderation (*i.e.*, editorial) practices, Plaintiffs’ members do not host content indiscriminately. Instead, they are private speech forums operated by private companies that “exercise editorial control over speech and speakers on

14. *See, e.g.*, Mark Scott & Tina Nguyen, *Jihadists flood pro-Trump social network with propaganda*, Politico (Aug. 2, 2021), <https://politi.co/3j5ivTu>; Natalia Colarossi, *Trump-Friendly Gettr App Marred by Porn, Hacked Accounts and Sonic the Hedgehog Upon Launch*, Newsweek (July 4, 2021), <https://bit.ly/3D6OzhO>.

15. *See, e.g.*, Texas Attorney General, Site Policies, <https://bit.ly/3nHBwxX> (last visited Sept. 22, 2021) (“Members of the public should not post or share information on an OAG social media page if that information is personal, sensitive, obscene, threatening, harassing, discriminatory, or would otherwise compromise public safety or incite violence or illegal activities.”).

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their properties or platforms.” *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1932.

50. Content moderation can take many different forms, involving both human review and algorithmic or other automated editorial tools.

51. Algorithmic curation of content allows websites and applications to create an individualized and (often) non-linear “feed” of content according to what those platforms’ users will find most useful and relevant based upon their activities and demonstrated preferences on the platforms. The algorithms encode the websites’ and applications’ editorial judgment and enable them to apply those judgments at scale. Editorial discretion and content curation often involves nuanced decisions about how to arrange and display content, what content to recommend to users based on their interests, and how easy or difficult it should be to find or search for certain kinds of content.

52. Platforms sometimes exercise editorial discretion through “zoning” or “age gating,” whereby certain content is made accessible to adults but not minors, or to teenagers but not younger children. In other instances, platforms choose to empower users with tools so they can decide for themselves what content to avoid, such as by blocking or muting others, making certain content inaccessible to their children, or opting into special sections of an online service that exclude material likely to offend or upset certain users (such as content depicting violence).

53. Platforms also exercise editorial discretion through warning labels, disclaimers, or commentary appended to certain user-submitted material. For example, an online

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service provider might inform users that the relevant content was posted by a state-controlled media entity (including those from hostile foreign governments), that it has not been verified by official sources, that the information has been found to be false, or that it contains sensitive or potentially upsetting imagery that may not be appropriate for everyone. It would then be up to the user to decide whether to review the content.

54. Platforms exercise editorial discretion over even the most basic online functions that users may take for granted, such as searching for local businesses, movie showtimes, or weather reports based on what they predict is likely to be most relevant and useful.

55. Without organizing and curating the unfathomable volume of online content, online services would have no way to identify and deliver to users the content that they want—or may critically need—to see.

56. Editorial discretion, in these myriad forms, serves many significant functions. Most importantly, it is the means by which the online service expresses itself. Just as a newspaper or magazine’s decision about what to publish and what to leave out conveys a message about the newspaper’s editorial judgments, a platform’s decision about what content to host and what to exclude is intended to convey a message about the type of community that the platform hopes to foster.¹⁶ Requiring a platform to host

16. *See, e.g.*, Facebook, Facebook Community Standards, <https://bit.ly/3nI35av> (last visited Sept. 22, 2021) (“Our commitment to expression is paramount, but we recognize the

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speech that it does not want to host forces the platform to alter the content of that expression. *See, e.g., Miami Herald Publ'g Co.*, 418 U.S. at 258; *Hurley*, 515 U.S. at 575-76; *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988). A platform that is typically family friendly would be a very different platform if forced to host graphic or viscerally offensive posts.

Exercise of Editorial Discretion by Plaintiffs' Members

57. In furtherance of their varying community standards and terms of service, Plaintiffs' members prohibit all sorts of speech that they deem harmful or objectionable or against their policies, including medical misinformation, hate speech and slurs (spanning the spectrum from race and religion to veteran status), glorification of violence and animal abuse, and impersonation, lies, and misinformation more broadly.

58. These policies are embodied in the members' terms of service and community standards. Users must agree to those terms to use the service. Nor are all users welcome as a general matter. Many covered members' terms of service require that all users be at least 13 years old before creating accounts on their platforms.

internet creates new and increased opportunities for abuse. For these reasons, when we limit expression, we do it in service of one or more of the following values"); YouTube, Community Guidelines <https://bit.ly/3CbToFY> (last visited Sept. 22, 2021) ("Our policies aim to make YouTube a safer community while still giving creators the freedom to share a broad range of experiences and perspectives.").

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59. Plaintiffs’ members have exercised editorial discretion over user content and access from the very start. Their platforms have experienced dramatic growth with their editorial policies in place—and have grown as those policies have evolved over time. Plaintiffs’ members have *never* purported to be forums for any and all types of content.

60. Because editorial discretion is necessary to maintain a social media platform, other social media platforms not covered by H.B. 20 by virtue of their size—including Parler, Gettr, and Rumble—all exercise varying degrees of editorial discretion over their platforms.¹⁷ In fact, as referenced *supra* ¶ 48 n.15, the Texas Attorney General himself purports to restrict some types of content from his social media sites.

**TEXAS’S LAW RESTRICTING AND BURDENING
EDITORIAL DISCRETION**

61. On March 4, 2021, Texas State Senator Bryan Hughes first introduced Senate Bill 12, which Sen. Hughes tweeted would “allow Texans to participate on the virtual public square free from Silicon Valley censorship.”¹⁸

17. *Terms of Service*, Parler (Aug. 25, 2021), <https://bit.ly/3hW3QZL>; *Elaboration on Guidelines*, Parler, <https://bit.ly/2TBKrnW>; *Terms of Use*, GETTR (June 30, 2021), <https://bit.ly/3tGXrGK>; *Terms of Service*, Rumble, <https://bit.ly/3m5cLuX/>.

18. Senator Bryan Hughes (@SenBryanHughes), Twitter (Mar. 5, 2021, 11:48 PM), <https://bit.ly/3zb2eSK>.

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62. In parallel, a group of State Representatives introduced House Bill 2587 on March 2, which included similar provisions restricting covered platforms' exercise of editorial discretion.¹⁹

63. On March 4, Texas Governor Greg Abbott announced his support for Senator Hughes' bill, which the Governor helped develop: "I am joining @SenBryanHughes to announce a bill prohibiting social media companies from censoring viewpoints. Too many social media sites silence conservative speech and ideas and trample free speech. It's un-American, Un-Texan, & soon to be illegal."²⁰ The Governor decried a "dangerous movement" to "silence conservative ideas."²¹ And the Governor's tweets indicate he had been working with Senator Hughes since at least February on H.B. 20: "We are working with Sen. Hughes on legislation to prevent social media providers like Facebook & Twitter from cancelling conservative speech."²²

64. On March 5, the Governor again voiced his support for Senator Hughes' bill after a press conference with Sen.

19. H.B. 2587, 87th Leg., Reg. Sess. (Tex. 2021), <https://bit.ly/3zzls4w>. This was one of a handful of proposed bills in the House.

20. Greg Abbott (@GregAbbott_TX), Twitter (Mar. 4, 2021, 11:52 PM), <https://bit.ly/3jqSwWP>.

21. Shawn Mulcahy, *Gov. Greg Abbott backs bill to stop social media companies from banning Texans for political views*, Texas Tribune (Mar. 5, 2021), <https://bit.ly/3zI9dCV>.

22. Greg Abbott (@GregAbbott_TX), Twitter (Feb. 7, 2021, 4:35 PM), <https://bit.ly/3t0aeU0>.

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Hughes, calling Senate Bill 12 a way to “protect Texans from being wrongfully censored on social media for voicing their political or religious viewpoints.”²³ On Twitter that same day, Governor Abbott again tweeted, “Silencing conservative views is un-American, it’s un-Texan, and it’s about to be illegal in Texas.”²⁴

65. On August 5—after the Legislature failed to pass the Senate Bill (or its successor, “Senate Bill 5,” or any House companion bills) in the regular legislative session and in a first special legislative session—the Governor called a second special legislative session, directing the Legislature to “consider and act upon . . . [l]egislation safeguarding the freedom of speech by protecting social-media and email users from being censored based on the user’s expressed viewpoints, including by providing a legal remedy for those wrongfully excluded from a platform.”²⁵

66. When introducing his bill (Senate Bill 5) anew in the second special session, Senator Hughes tweeted: “Texans must be able to speak without being censored by West Coast oligarchs.”²⁶

23. Office of the Texas Governor, Press Release: Governor Abbott Supports Bill Protecting Texans From Wrongful Social Media Censorship (Mar. 5, 2021), <https://bit.ly/2UY3Gc3>.

24. Greg Abbott (@GregAbbott_TX), Twitter (Mar. 5, 2021, 9:35 PM), <https://bit.ly/3mndV5e>.

25. Proclamation by the Governor of the State of Texas (Aug. 5, 2021), <https://bit.ly/37uTuuw>.

26. Senator Bryan Hughes (@SenBryanHughes), Twitter (Aug. 9, 2021, 5:34 PM), <https://bit.ly/3lQTpJY>.

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67. On August 11, 2021, the Texas Senate passed Senate Bill 5 by a 17-12 vote. In parallel, Rep. Briscoe Cain introduced H.B. 20, which was substantially similar to Senator Hughes' proposed legislation, but Rep. Cain's H.B. 20 included, among other things, (1) an expanded definition of prohibited editorial actions, expressly encompassing even platforms' own direct speech; and (2) certain prohibitions on email providers. H.B. 20 was entitled, "AN ACT relating to censorship of or certain other interference with digital expression, including expression on social media platforms or through electronic mail messages."

68. The House passed H.B. 20 on August 30, 2021, by a 77-49 vote.

69. While the House considered H.B. 20, Rep. Alex Dominguez introduced an amendment that would have created a state-run public forum for speech at "Publicforum.Texas.gov."²⁷ Instead of voting to create a true public square subject to the First Amendment's robust protections for objectionable content, the House rejected the amendment in favor of encumbering private platforms with objectionable speech.

70. The Senate then passed an amended version of H.B. 20 on August 31, 2021, by a 17 to 14 vote.

71. After the House concurred in the Senate's amendment, both Houses signed H.B. 20 on September 2, 2021.

27. Tex. H.R. Journal, 87th Leg., 2d Spec. Sess. at 217-18 (2021), <https://bit.ly/3t2JgLw>.

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72. The enrolled bill was presented to Governor Abbott, and he signed H.B. 20 into law on September 9, 2021. H.B. 20 is set to take effect “the 91st day after the last day of the legislative session”—or, December 2, 2021.

73. Representative Matt Shaheen—one of H.B. 20’s joint authors—posted on Facebook on September 1: “Liberal Democrats want to suppress speech they don’t like. That’s why I fought for House Bill 20, to protect your digital expression on social media.”²⁸

74. After signing H.B. 20 into law, Governor Abbott declared, “[T]here is a dangerous movement by social media companies to silence conservative viewpoints and ideas. That is wrong, and we will not allow it in Texas.”²⁹ During H.B. 20’s signing ceremony, Governor Abbott explained, “It is now law that conservative viewpoints in Texas cannot be banned on social media.”³⁰

75. As enacted, H.B. 20 states the findings of the Legislature, which include “social media platforms function as common carriers, are affected with a public interest, are central public forums for public debate, and

28. Matt Shaheen, Facebook (Sept. 1, 2021, 8:36 AM), <https://bit.ly/3Avlyuu>.

29. Office of the Texas Governor, Press Release: Governor Abbott Signs Law Protecting Texans From Wrongful Social Media Censorship (Sept. 9, 2021), <https://bit.ly/38ZEKxQ>.

30. Office of the Governor Greg Abbott, Facebook, WATCH: Signing House Bill 20 into Law—Relating to censorship on social media platforms (Sept. 9, 2021), <https://bit.ly/3z0Ysub>.

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have enjoyed governmental support in the United States” and “social media platforms with the largest number of users are common carriers by virtue of their market dominance.”

76. H.B. 20 contains two sets of provisions that stem from the flawed premise that “social media companies” are “common carriers.” Section 7’s anti-editorial-discretion provisions impose unprecedented burdens on the exercise of editorial judgment by “social media platforms.” And Section 2 imposes numerous speech-chilling disclosure and operational obligations upon those platforms.

77. Both of H.B. 20’s operative provisions share the same definitions of “social media platform” and “user.”

78. A “social media platform” is an “Internet website or application” that “functionally has more than 50 million active users in the United States in a calendar month” that is “open to the public” and that “allows a user to create an account” to “communicate with other users for the primary purpose of posting information, comments, messages, or images.” Tex. Bus. & Com. Code § 120.001(1); Tex. Civ. Prac. & Rem. Code § 143A.003(c).

79. Notably, this arbitrary 50-million-user threshold is unsupported by any real legislative findings and was amended at various points in the legislative process without much consideration. In the regular legislative session, the Senate approved a bill that applied to

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platforms with 100 million monthly users *worldwide*.³¹ In that regular session, State Senator Roland Gutierrez moved to amend the bill to cover platforms with 25 million monthly users, in an effort to include “websites such as Parler and Gab, which are popular among conservatives.”³² Sen. Gutierrez’s amendment failed.³³ Later, during the first special legislative session, Senate Bill 5 as introduced in the Senate included a 65-million-user threshold.³⁴ When the Senate Committee on State Affairs adopted the 50-million-user threshold in the first special session, it did so with no substantive discussion or consideration of the kinds of websites and applications the new threshold would include. That 50-million-user threshold carried over to the versions introduced in the second special legislative session. In all events, though the cut-offs are largely arbitrary in the platforms they exclude, they have always been designed to include platforms like Facebook and YouTube. This definition of “social media platform” expressly includes content- and speaker-based exceptions that apply categorically to Internet service providers and electronic mail. H.B. 20 further excludes from the definition of “social media platform” all websites

31. See S.B. 12, 87th Leg., Reg. Sess. (Tex. 2021), <https://bit.ly/3kkO7W0>.

32. Shawn Mulcahy, *Texas Senate approves bill to stop social media companies from banning Texans for political views*, Texas Tribune (updated April 1, 2021), <https://bit.ly/3nU2ceV>.

33. *Id.*; Tex. H.R. Journal, 87th Leg. at 499 (2021), <https://bit.ly/3Cq663o>.

34. See S.B. 5, 87th Leg., 1st Spec. Sess. (Tex. 2021), <https://bit.ly/37x8asX>.

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or applications that “consist[] primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider,” so long as user chats and comments are “incidental to” the “preselected” content. Tex. Bus. & Com. Code § 120.001(1)(A)-(C).

80. In legislative remarks ordered printed into the legislative record, Senator Hughes said that H.B. 20 was not intended to include “websites or apps whose primary purpose is the sale of good[s] or services.”³⁵ He asserted that the “primary purpose” clause applied to the entire website or application—not the communication features the website enables, as the plain text would indicate. *Cf.* Tex. Bus. & Com. Code § 120.001(1) (“enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images”). He also asserted the carve-out for websites that “consist[] primarily” of “information or content that is not user generated but is preselected by the provider” would exclude commercial websites. *Id.*

81. H.B. 20’s expansive definition of “social media platform” includes many digital services popular with consumers, some of which are members of one or both Plaintiffs: Facebook, Instagram, LinkedIn, Pinterest, Quora, Reddit, Snapchat, TikTok, Tumblr, Twitter, Vimeo, WeChat, WhatsApp, and YouTube. The statute’s vague definition, however, may sweep in other sites such

35. Tex. H.R. Journal, 87th Leg., 2d Spec. Sess. at 220 (2021), <https://bit.ly/3yEIZzH>.

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as eBay, which is not popularly understood as a social media platform, but which provides users the opportunity to create accounts to communicate *and* is full of user-submitted products and product listings. Or Etsy, which does not yet reach the 50-million-user threshold in H.B. 20, but which has been growing rapidly and may be inadvertently swept into H.B. 20’s regulatory scheme as it grows more successful. H.B. 20’s definition also excludes other sites like Parler, Gettr, Gab, and Rumble based on their currently smaller user bases, notwithstanding that these social media companies claim to be alternatives to the covered platforms. Similarly, social media platforms like “Cowboys Zone”—a forum dedicated to Dallas Cowboys football—would (ostensibly) also be excluded based on size.³⁶

82. A “user” is a person who “posts, uploads, transmits, shares, or otherwise publishes or receives content through a social media platform.” Tex. Bus. & Com. Code § 120.001(2). This includes “a person who has a social media platform account that the social media platform has disabled or locked.” *Id.* Users who live in the state of Texas, do business in Texas, or “share[] or receive[] content on a social media platform” in Texas are covered by H.B. 20—but because users “receive” content posted by users located all over the globe, H.B. 20 effectively applies worldwide. *Id.* § 120.002(a)(3); Tex. Civ. Prac. & Rem. Code § 143A.003(a)-(b).

36. See Cowboys Zone, <https://bit.ly/3hIretM> (last visited Sept. 22, 2021).

*Appendix A***Section 7’s Restrictions on Exercising Editorial Judgment**

83. Section 7 of H.B. 20 makes it unlawful for a “social media platform” to “censor a user, a user’s expression, or a user’s ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user’s expression; or (3) a user’s geographic location in this state or any part of this state.” Tex. Civ. Prac. & Rem. Code § 143A.002(a)(1)-(3).

84. H.B. 20 does not define “viewpoint,” and left undefined, it is vague enough to encompass all expression—because all expression will convey at least some viewpoint. For instance, the Taliban’s statement that they had to “enter Kabul to stop . . . criminals and abusers” expresses a viewpoint about how Afghanistan’s government should operate.³⁷

85. H.B. 20 defines “censor” to encompass potentially every editorial tool available to the covered platforms: “to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.” Tex. Civ. Prac. & Rem. Code § 143A.001(1).

86. It does not provide any further guidance as to what any of these component parts of the “censor”

37. *Transcript of Taliban’s first news conference in Kabul*, Al Jazeera (Aug. 17, 2021), <https://bit.ly/390E7KZ>.

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definition mean. Thus, it is unclear what it means to (for example) “deboost,” or “deny equal access or visibility to, or otherwise discriminate against expression.” *Id.*

87. Like the other terms in the definition, both “deboost” and “deny equal access or visibility to” encompass content-prioritization decisions that platforms make as a matter of editorial judgment.

88. And the definition of “censor” reaches broadly enough to include the platforms’ direct speech. A court could hold that a platform “discriminates against” expression when the platform appends disclaimers or notices to user-submitted content, especially if the platform does not append its own speech to another user’s expression. For example, platforms may label certain user-submitted expression as medical misinformation.

89. H.B. 20 authorizes lawsuits not only by any user who “resides in this state,” but also anyone who “does business in this state” or “shares or receives expression in this state.” *Id.* §§ 143A.002(a), 143A.004(a), 143A.007. H.B. 20 does not define “doing business in Texas,” but according to the Texas Secretary of State, while “Texas statutes do not specifically define ‘transacting business’ . . . a foreign [out-of-state] entity *is* transacting business in Texas” if it is “pursuing one of its purposes in Texas.”³⁸ Given the global reach of the Internet, any person operating a

38. Texas Secretary of State, Foreign or Out-of-State Entities FAQs, <https://bit.ly/39bvKvW> (last visited Sept. 22, 2021) (emphasis in original).

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commercial website outside of Texas could be deemed to be “doing business in Texas,” thus greatly expanding the universe of persons authorized to sue and enforce H.B. 20’s chilling effect on the exercise of editorial judgment by “social media platforms.” Likewise, granting a right to sue to any person who (wherever she or he actually resides) “receives expression” from a “social media platform” while “in this state,” Tex. Civ. Prac. & Rem. Code §§ 143A.001(6), 143A.004(b); extends the right to sue even to transients using their smartphones while passing through Texas.

90. Combined, the extraordinary breadth of H.B. 20’s provisions will directly forbid platforms from exercising almost any editorial discretion over their private websites and applications. Furthermore, that extraordinary breadth will further chill the editorial discretion that H.B. 20 does not directly forbid.

91. The Texas Legislature has, however, chosen to include two content-based exceptions to the statute’s general prohibition on editorial discretion that, as explained *infra* ¶¶ 117, 120, subject the law to strict scrutiny. *First*, H.B. 20 does not apply to platforms exercising editorial discretion over content “that is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment.” Tex. Civ. Prac. & Rem. Code § 143A.006(a)(2). *Second*, the prohibition does not apply to platforms exercising editorial discretion over “expression that directly incites criminal activity or consists of specific threats of violence targeted against a person or group

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because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge.” *Id.* § 143A.006(a)(3).

92. H.B. 20’s anti-editorial-discretion requirements—which purport to cover only users that reside in Texas, do business in Texas, or otherwise “share[] or receive[] . . . expression” in Texas, *id.* § 143A.004(b)—explicitly regulate conduct wholly outside Texas in at least four ways.

93. *First*, they restrict platforms from exercising editorial discretion over content posted by persons from locations outside of Texas, including (1) almost any person operating a commercial website; (2) transient persons who reside outside of Texas but have visited the state using their smartphones; and (3) Texas residents using the Internet from outside the state. *See id.* So, if a Texas resident travels to and posts social media from New York, H.B. 20 purports to travel with her. Likewise, if a company outside of Texas “does business” in Texas by virtue of a commercial website and posts to social media from its location outside of Texas—even about matters having nothing to do with Texas or its residents—these anti-editorial-discretion provisions will restrict platforms from exercising editorial discretion over such out-of-state posts.

94. *Second*, they compel platforms to publish content posted by covered users to *all* social media users worldwide. *See id.* §§ 143A.001, 143A.002. The restrictions on editorial discretion do not merely regulate how Texans send and receive social media posts in Texas. On the

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contrary, they regulate how social media platforms display content on their platforms everywhere.

95. *Third*, they explicitly restrict platforms from exercising editorial discretion over content posted by non-Texans outside of Texas. This is because H.B. 20 covers both any user that “shares *or receives* content on a social media platform in [Texas]” and all “expression that is shared *or received* in [Texas].” *Id.* § 143A.004(a)(3)-(b) (emphases added). For such users and expression, H.B. 20 prohibits editorial discretion based on the views of the expression or “viewpoint” of “another person,” a term that—unlike covered “users”—has no geographic limit and thus includes anyone worldwide. *Id.* § 143A.002(a)(1). By the Internet’s very nature, nearly all information available online is capable of being “received” in Texas, so H.B. 20’s purported geographic limits are really no limits at all.

96. *Fourth*, they prohibit platforms from discriminating based on “a user’s geographic location in [Texas] or any part of [Texas].” *Id.* § 143A.002(a)(3). In other words, H.B. 20 reaches beyond Texas’s borders and effectively mandates that out-of-state social media companies enter Texas to engage in commerce in the State.

97. The Legislature appeared to acknowledge the constitutional and federal preemption obstacles to H.B. 20, and provided that H.B. 20 “does not subject a social media platform to damages or other legal remedies to the extent the social media platform is protected from those remedies under federal law.” *Id.* § 143A.005. Similarly, H.B. 20 provides that it should not be construed to prohibit

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a social media platform from “censoring expression” that it “is specifically authorized to censor by federal law.” *Id.* § 143A.006(a)(1). But rather than save H.B. 20 from challenge, these provisions serve merely to highlight its irreparable defects.

98. The anti-editorial-discretion provisions of H.B. 20 are enforceable by both private lawsuits brought by users for declaratory and injunctive relief, *id.* § 143A.007; and by the Attorney General for injunctive relief, *id.* § 143A.008. Notably, the Attorney General may “bring an action to *enjoin* a violation *or potential violation.*” *Id.* § 143A.008(b) (emphases added). Both private plaintiffs and the Attorney General may recover reasonable costs and attorneys’ fees. *Id.* §§ 143A.007(b)(1), 143A.008(b). Though H.B. 20 does not expressly provide for monetary penalties, H.B. 20 permits courts to hold covered platforms in civil contempt—including unspecified daily penalties—in the event a platform does not “promptly” comply with a court order. *Id.* § 143A.007(c).

Section 2’s Disclosure And Operational Obligations

99. To complement its direct infringements on editorial discretion, H.B. 20 adds various burdensome and vague disclosure and operational requirements designed to chill the exercise of editorial discretion.

100. *First*, H.B. 20 requires platforms to explain their editorial criteria. Specifically, a covered platform must “publicly disclose accurate information regarding its content management, data management, and business practices, including specific information regarding how the social media platform: (i) curates and targets content

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to users; (ii) places and promotes content, services, and products, including its own content, services, and products; (iii) moderates content; (iv) uses search, ranking, or other algorithms or procedures that determine results on the platform; and (v) provides users' performance data on the use of the platform and its products and services." Tex. Bus. & Com. Code. § 120.051(a).

101. These disclosures must be "sufficient to enable users to make an informed choice regarding the purchase of or use of access to or services from the platform." *Id.* § 120.051(b). And they must be published on a website that is "easily accessible by the public." *Id.* § 120.051(c). H.B. 20 does not define what "sufficient" means or what is "easily accessible" to the public.

102. *Second*, and similarly, H.B. 20 requires each "social media platform" to publish "acceptable use policies" "in a location that is easily accessible to a user." *Id.* § 120.052(a). These policies must: "[r]easonably inform users about the types of content allowed on the social media platform"; "[e]xplain the steps the social media platform will take to ensure content complies with the policy"; and "[e]xplain the means by which users can notify the social media platform of content that potentially violates the acceptable use policy, illegal content, or illegal activity." *Id.* § 120.052(b).

103. In addition, a "social media platform" must inform users of ways to notify the platform of purported content violations, including an "e-mail address or relevant complaint intake mechanism," and a complaint and appeal system (described below). *Id.* § 120.052(b)(3).

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104. *Third*, as part of H.B. 20’s mandate for an acceptable use policy, each “social media platform” must also publish a “biannual transparency report” “outlining actions taken to enforce the policy.” *Id.* § 120.052(b)(4). This voluminous report must include in detail the number of instances in which the platform “was alerted to illegal content, illegal activity, or potentially policy-violating content,” as well as the number of instances in which the platform “took action with respect to illegal content, illegal activity, or potentially policy-violating content.” *Id.* § 120.053. These actions include things like “content removal,” “content demonetization,” “content deprioritization,” “account suspension,” and “account removal,” among others. *Id.* The biannual transparency report must also include information on numerous other matters, including the “number of coordinated campaigns” (a term that is not defined), the number of appeals by users, the percentage of successful appeals, and more. *Id.* § 120.053(3)-(7).

105. In short, this report must include detailed information about potentially billions of editorial decisions platforms make to operate their websites and applications worldwide, given H.B. 20’s extraterritorial reach. And the level of detail demanded threatens to require platforms to reveal trade secrets and other nonpublic, competitively sensitive information about how their algorithms and platforms operate. Above all, these detailed requirements interfere with, and chill the exercise of, platforms’ editorial discretion.

106. *Fourth*, if a platform receives “notice of illegal content or illegal activity” on the platform, it must “make

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a good faith effort to evaluate the legality of the content or activity within 48 hours of receiving the notice.” *Id.* § 120.102. And if a platform removes content based on a violation of its acceptable use policy, it shall “(1) notify the user who provided the content of the removal and explain the reason the content was removed”; (2) “allow the user to appeal the decision to remove the content to the platform”; and (3) “provide written notice to the user who provided the content” of the determination of the appeal requested or of the reason for the reversal of the platform’s decision, if there is a reversal. *Id.* § 120.103(a).

107. *Fifth*, each “social media platform” must set up an “easily accessible” complaint system. *Id.* § 120.101. If a “social media platform” receives a user complaint that the platform removed content “provided by the user . . . that the user believes was not potentially policy-violating content,” then the platform has 14 days (excluding weekends) from when it receives the complaint to: (1) “review the content”; (2) “determine whether the content adheres to the platform’s acceptable use policy”; (3) “take appropriate steps based on the determination”; and (4) “notify the user regarding the determination made . . . and the steps taken.” *Id.* § 120.104.

108. In combination, these disclosure and operational provisions require platforms to engage in operational investment to (1) publish their editorial standards; (2) report in punitive detail how they exercise their editorial judgment; (3) provide notice and an explanation to all users whose content is removed; and (4) provide personalized handling of every individual user complaint concerning how platforms exercise their editorial discretion and give

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every user recourse to challenge the platforms' editorial decisions, which will flood the covered platforms with such requests. This will only chill the platforms' exercise of editorial discretion.

109. The disclosure and operational provisions are enforceable through an action brought by the Attorney General against a "social media platform" to enjoin violations of any of the foregoing provisions. If the platform is successfully enjoined, then the Attorney General may recover costs incurred, including reasonable attorneys' fees and investigative costs. *Id.* § 120.151(a)-(b).

CLAIMS**COUNT I****42 U.S.C. § 1983****VIOLATION OF THE FIRST AMENDMENT,
AS INCORPORATED AGAINST THE STATES
THROUGH THE FOURTEENTH AMENDMENT**

110. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

111. The First Amendment of the Constitution of the United States provides that "Congress shall make no Law . . . abridging the Freedom of Speech, or of the Press; or of the Right of the People peaceably to assemble." U.S. Const. amend. I. The protections of the First Amendment have been incorporated against the States through the

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Due Process Clause of the Fourteenth Amendment to the Constitution.

112. In exercising editorial discretion over their platforms, Plaintiffs’ members offer a “presentation of an edited compilation of speech generated by other persons,” which “fall[s] squarely within the core of First Amendment security.” *Hurley*, 515 U.S. at 570.

113. Plaintiffs’ members have a First and Fourteenth Amendment right to exercise “editorial control” over the user-submitted content that they present on their social media platforms. *Tornillo*, 418 U.S. at 258; *see also, e.g., Hurley*, 515 U.S. at 575-76; *PG&E*, 475 U.S. at 10-12 (plurality op.). Plaintiffs’ members have a concurrent constitutional right not to be compelled to include unwanted content on their platforms. Likewise, they have a right to engage in their own direct expression. And the government may not circumvent the First Amendment’s protections by imposing other requirements—such as burdensome disclosure and operational requirements—designed to chill expression.

114. H.B. 20, however, singles out Plaintiffs’ members for disfavored treatment and eviscerates the editorial discretion that they exercise—violating their rights by requiring the covered platforms to “alter the expressive content of their” message. *Hurley*, 515 U.S. at 572-73. Section 7 of H.B. 20 makes it unlawful for covered platforms “to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression” based on *anyone’s*

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“viewpoint.” Tex. Civ. Prac. & Rem. Code §§ 143A.001(1); 143A.002(a). In other words, H.B. 20 completely denies platforms their right of editorial discretion over what appears on their websites.

115. H.B. 20 both compels speech and prohibits the covered platforms from engaging in their own speech.

116. Moreover, H.B. 20 imposes expression-chilling disclosure burdens and operational requirements that exceed the “purely factual” and “noncontroversial” informational disclosures—which cannot be “unjustified or unduly burdensome”—that the Supreme Court has held permissible. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). H.B. 20 compels disclosure of non-public, competitively sensitive information that the platforms would otherwise not reveal. And H.B. 20’s mandated operational requirements are so costly and unworkable that they further burden the platforms’ exercise of editorial judgment.

117. H.B. 20 is content-based and thus triggers strict scrutiny in the following ways. *Riley*, 487 U.S. at 795.

118. *First*, H.B. 20 compels speech—both through its restrictions on editorial discretion and its disclosure requirements. *See* Tex. Bus. & Com. Code. § 120.051(a); Tex. Civ. Prac. & Rem. Code § 143A.002(a). “[P]rohibiting a platform from making a decision based on content is itself a content-based restriction.” *NetChoice*, 2021 WL

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2690876, at *10; *see also Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 756 (9th Cir. 2019) (en banc) (holding that compelled speech doctrine requires the compelled disclosure to be “(1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome”); *Washington Post v. McManus*, 944 F.3d 506, 514- 15 (4th Cir. 2019) (government cannot “force elements of civil society to speak when they otherwise would have refrained” and “[i]t is the presence of compulsion from the state itself that compromises the First Amendment”); *Herbert v. Lando*, 441 U.S. 153 (1979) (the First Amendment prohibits “law[s] that subject[] the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest”).

119. *Second*, H.B. 20 singles out Plaintiffs’ members for disfavored treatment, based on their platforms’ content and message, while allowing other preferred platforms to continue to exercise *their* constitutional rights to exercise editorial discretion over their sites. By statutory definition, covered platforms do not include websites “that consist[] primarily of news, sports, entertainment, or other information or content that is not user generated.” Tex. Bus. & Com. Code § 120.001(1)(C)(i). H.B. 20 also discriminates based on speaker size and circulation, excluding platforms with less than 50 million monthly active users in the United States. *Id.* § 120.001(1); Tex. Civ. Prac. & Rem. Code § 143A.003(c); *see also Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575 (1983). As addressed

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supra ¶ 79, there are no legislative findings supporting the user threshold, and the Legislature arbitrarily switched between various user thresholds throughout the legislative sessions. These unconstitutional content-based preferences infect the entire Bill, including its disclosure provisions.

120. *Third*, H.B. 20 has two content-based exemptions from its prohibition on editorial discretion (Section 7). *See* Tex. Civ. Prac. & Rem. Code § 143A.006(a)(2)-(3).

121. *Fourth*, H.B. 20 also discriminates against the particular viewpoints of Plaintiffs' members. As revealed by Legislators' public statements and the platforms H.B. 20 targets, H.B. 20 restricts the editorial discretion of Plaintiffs' members over their platforms because of the members' perceived political views. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."). H.B. 20 is motivated by a desire to target, punish, and retaliate against Plaintiffs' members for their perceived political or ideological viewpoints. Viewpoint discrimination is a particularly egregious form of content discrimination and is virtually *per se* unconstitutional. *NetChoice*, 2021 WL 2690876, at *10 ("[The] viewpoint-based motivation [behind the Florida statute], without more, subjects the legislation to strict scrutiny, root and branch.").

122. H.B. 20 fails First Amendment scrutiny no matter what level of scrutiny applies. But these content-based distinctions plainly fail strict scrutiny as they lack

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a compelling government interest and are not narrowly tailored. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

123. As the Supreme Court held in *Tornillo*, government cannot—consistent with the First Amendment—compel publication of speech to promote a balance of viewpoints. *See* 418 U.S. at 254. Whatever interest the state may have in “ensur[ing] that a wide variety of views reach the public,” that interest is not sufficient to justify compelling private parties to host speech they do not want to host. *Id.* at 248.

124. Likewise, H.B. 20 is not narrowly tailored because (1) it burdens private actors with compelled speech, over less restrictive alternatives, including a proposal to instead create a true public forum for speech, *see supra* ¶ 69; and (2) after impermissibly choosing to burden private actors, H.B. 20 only compels speech from an over- and under-inclusive subset of disfavored websites and applications. In all events, H.B. 20 burdens more speech than is necessary to further whatever interest H.B. 20 promotes.

125. H.B. 20 also fails intermediate and “exacting” scrutiny.

126. At bottom, H.B. 20 imposes a “far greater burden on the platforms’ own speech than” the Supreme Court has ever recognized as permissible. *NetChoice*, 2021 WL 2690876, at *9. And H.B. 20 is not supported with any evidence, let alone “evidence to justify painting with such a broad brush.” *Washington Post*, 944 F.3d at 522.

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COUNT II

42 U.S.C. § 1983

VOID FOR VAGUENESS

127. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

128. Vague laws, particularly those that regulate communication protected by the First Amendment to the Constitution, are null and void under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. A vague law that regulates constitutionally protected speech also violates the First Amendment.

129. H.B. 20 contains numerous provisions that do not provide a person of ordinary intelligence fair notice of their meaning, and that invite arbitrary and discriminatory enforcement against disfavored content, viewpoints, and speakers. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

130. Key parts of H.B. 20's anti-editorial-discretion provisions in Section 7 are unconstitutionally vague, including but not limited to the following.

131. The scope of speech over which covered platforms lack editorial discretion is unclear. The statute does not define what constitutes a protected "viewpoint," which—without limitation—could encompass essentially all expression.

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132. Similarly, the scope of impermissible forms of editorial discretion is unclear. H.B. 20’s definition of “censor” contains terms that lack further definition and threaten to encompass even the basic functions that Plaintiffs’ members use to present content. In particular, it is not clear what forms of editorial discretion would “deboost,” “deny equal access or visibility to, or otherwise discriminate against expression” under the statute. Tex. Civ. Prac. & Rem. Code § 143A.001(1). *See also NetChoice*, 2021 WL 2690876, at *11 (requiring “a social media platform to apply its standards in a consistent manner” is “especially vague”).

133. These prohibitions purportedly do not apply if the platform “is specifically authorized to censor by federal law”—but H.B. 20 makes no mention of what this provision covers, and H.B. 20 does not define “specifically authorized.” Tex. Civ. Prac. & Rem. Code § 143A.006(a)(1).

134. Furthermore, the statute says that the Attorney General may “bring an action to *enjoin* a violation *or a potential violation*.” *Id.* § 143A.008(b) (emphases added). This language, by its plain terms, may allow courts to enjoin “potential violations” of the statute’s anti-editorial-discretion provisions. Even assuming that “viewpoint” and “censor” were not vague, the fact that the statute may apply to situations beyond those terms’ requirements means that Plaintiffs’ members have no guidance about what editorial discretion they may lawfully exercise. And it would grant the Attorney General incredibly broad enforcement authority—raising serious concerns about arbitrary or discriminatory enforcement.

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135. Additionally, H.B. 20 permits platforms to “authoriz[e]” or “facilitat[e] a user’s ability to censor specific expression on the user’s platform or page at the request of that user.” *Id.* § 143A.006(b). But it is not clear what this provision entails. For instance, if a user wants to block hate speech, H.B. 20 does not clearly explain whether the covered social media platform may label certain posts as hate speech to “facilitat[e]” its users’ desires to avoid hate speech—or if that labeling would “censor” the hate speech.

136. H.B. 20’s definition of “social media platform” is also vague, because it does not apply to platforms that “primarily” provide “news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider.” Tex. Bus. & Com. Code § 120.001(1)(c)(i). Does this include gaming platforms, such as Roblox, that allow users to create games and play games created by other users? Even if “primarily” means “greater than 50%,” the question remains: 50% of what? A person of ordinary intelligence would have no idea what “primarily” refers to as either the relevant numerator or denominator. How is the amount of content to be measured—by the number of individual pieces of content, by file size, by frequency of appearance, by editorial emphasis, by usage, or by some other metric? How are different kinds of digital content, such as video and text, to be equated and measured? A person of ordinary intelligence would have no idea how to answer any of these questions, and thus would have no idea whether H.B. 20 covers her platform.

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137. Similarly, it is not clear what it means for a website or application to “enable[] users to communicate with other users for the *primary purpose* of posting information, comments, messages, or images.” *Id.* § 120.001(1) (emphasis added). Does the fact that websites like eBay allow their users to post reviews (*i.e.*, information, comments, messages, and images) about the items they purchase suffice? Likewise, people of ordinary intelligence would have no idea what makes a chat or comment section “incidental to, directly related to, or dependent on” a platform’s preselected content. *Id.* Roblox provides another good example, as may Twitch (a game streaming platform), Xbox, PlayStation, or Nintendo Switch: Is user-submitted content on those online-gaming platforms incidental, directly related, or dependent? H.B. 20 provides no guidance about the necessary degree of connection or how much of the discussion in the chat or comment section must relate (and how closely) to the platform’s preselected content. *Id.* § 120.001(1)(C)(ii).

138. Finally, H.B. 20’s onerous disclosure and operational provisions are also unconstitutionally vague for myriad reasons. For instance, H.B. 20 requires covered social media platforms to (1) publish required disclosures and policies in an “easily accessible” location, *id.* § 120.051(c), 52; and (2) “provide an easily accessible complaint system,” *id.* § 120.101. But “easily accessible” has no established legal meaning, and an ordinary person would have no idea how “easy” user access must be, or in what respects.

139. These vague aspects of H.B. 20 not only provide constitutionally insufficient notice, they also invite

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arbitrary and discriminatory enforcement against disfavored content, viewpoints, and speakers.

COUNT III

42 U.S.C. § 1983

**VIOLATION OF THE COMMERCE CLAUSE,
THE FULL FAITH AND CREDIT CLAUSE,
AND THE FOURTEENTH AMENDMENT'S
DUE PROCESS CLAUSE**

140. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

141. Article I, Section 1 of the U.S. Constitution vests Congress with the power “to regulate Commerce . . . among the several States” and “among foreign Nations,” U.S. Const., art. I, § 8, cl. 3.

142. “Although the Clause is framed as a positive grant of power to Congress,” it “also prohibits state laws that unduly restrict interstate commerce.” *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). It is thus well-established that the Commerce Clause prohibits states from regulating or burdening out-of-state commerce, penalizing extraterritorial conduct, or imposing charges that have the purpose or effect of discriminating against interstate commerce and firms that engage in such commerce.

143. The Commerce Clause “precludes the application of a state statute to commerce that takes place wholly

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outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

144. The Commerce Clause does not permit a single state to dictate the rules of content for the global Internet. H.B. 20 would regulate wholly-out-of-state conduct—balkanizing the Internet by imposing onerous extraterritorial regulation on the operation of covered social media platforms. This vastly exceeds Texas's regulatory purview and will impede commerce across the Internet.

145. H.B. 20 unconstitutionally regulates beyond Texas's borders and, if upheld, threatens Plaintiffs' members with potentially inconsistent regulations from other States. The statute regulates editorial discretion that takes place outside of Texas and it regulates editorial discretion over content that is neither created nor posted in Texas. Tex. Civ. Prac. & Rem Code § 143A.004. Indeed, H.B. 20 explicitly regulates conduct wholly outside Texas in at least four ways, as addressed *supra* ¶¶ 92-96.

146. Besides exceeding Texas's territorial power, H.B. 20 also unconstitutionally discriminates against companies engaged in interstate and foreign commerce. H.B. 20 exclusively targets online platforms with over 50 million monthly active users in the United States (an arbitrary number nevertheless designed to include disfavored platforms), which is only possible through interstate commerce. H.B. 20 also compels social media platforms to serve Texas users by prohibiting platforms from discriminating based on "a user's geographic location

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in [Texas] or any part of [Texas],” penalizing companies that would prefer to engage in interstate commerce outside Texas. Tex. Civ. Prac. & Rem Code § 143A.002(a)(3).

147. Thus, H.B. 20 is *per se* unconstitutional under the Commerce Clause because it regulates beyond Texas’s borders, it discriminates against out-of-state firms, it discriminates against firms for engaging in inherently interstate commerce, and it discriminates against firms for refusing to engage in interstate commerce in Texas.

148. At the very least, the burden that H.B. 20 imposes on interstate commerce “is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

149. Furthermore, H.B. 20’s extraterritorial reach also violates the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV. Under both clauses, a State may regulate transactions only with which it has “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (citation omitted).

150. The content and conduct regulated by the anti-editorial-discretion provisions of H.B. 20 largely take place outside Texas.

151. By imposing liability for the extraterritorial conduct of Plaintiffs’ members, H.B. 20 regulates conduct

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outside of Texas. Liability imposed by H.B. 20 will be borne entirely by out-of-state companies based upon their out-of-state conduct.

152. Applying Texas law under H.B. 20 to such out-of-state conduct would be arbitrary and unfair.

COUNT IV

42 U.S.C. § 1983

**PREEMPTION UNDER THE SUPREMACY
CLAUSE OF THE CONSTITUTION AND
47 U.S.C. § 230**

153. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

154. Congress enacted Section 230 “to promote the continued development of the Internet and other interactive computer services and other interactive media” and “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(1)-(2). Congress recognized that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.” *Id.* § 230(a)(4).

155. “Congress provided broad immunity under [Section 230] to Web-based service providers for all claims stemming from their publication of information created by

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third parties.” *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). Congress recognized the danger in exposing websites and online services to liability when those websites or service providers attempted to prevent third parties from posting harmful or offensive content. Section 230 thus provides: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). “Section 230 ‘specifically proscribes liability’ “ for a website’s “ ‘decisions relating to monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher’s role.” *MySpace*, 528 F.3d at 420 (quoting *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003)).

156. Section 230 further protects websites and applications from state laws imposing liability for good faith actions to restrict access to or availability of content that they consider objectionable. 47 U.S.C. § 230(c)(2), (e)(3). The statute specifically provides that “[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” *Id.* § 230(c)(2).

157. Section 230 similarly prohibits liability for “any action taken to enable or make available to information content providers or others the technical means to restrict access to” objectionable material. *Id.* § 230(c)(2)(B). This provision applies to tools that online service providers

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make available to users to help them avoid or limit their exposure to potentially objectionable content.

158. Under Section 230, “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3). This provision expressly preempts inconsistent state laws that seek to hold online service providers liable for engaging in editorial discretion protected by Section 230(e). Preemption applies equally to private causes of action and public enforcement actions. These provisions collectively reinforce the First and Fourteenth Amendment’s preexisting protection for websites’ editorial discretion over their platforms. *See Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003) (Section 230 “sought to further First Amendment . . . interests on the Internet”).

159. Among the important purposes advanced by Section 230, Congress sought “to encourage service providers to self-regulate the dissemination of offensive material over their services.” *NetChoice*, 2021 WL 2690876, at *6 (citation omitted). This is its principal purpose. *See Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163 n.12 (9th Cir. 2008) (en banc).

160. Section 230 is designed to prevent any disincentive to review and remove content that an online service provider considers or believes its users would consider to be harmful or offensive. Without Section 230, online service providers would face the constant threat of litigation and thus have an incentive to take a hands-off approach to exercising editorial discretion over third-

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party content for fear that doing so would subject them to liability. *See id.* at 1174 (characterizing the threat of constant litigation as “death by ten thousand duck-bites”). Alternatively, they could respond to the threat of unlimited liability by severely restricting the number and types of messages posted. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (“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. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.”) (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997)).

161. For purposes of Section 230, an “interactive computer service” is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.” 47 U.S.C. § 230(f)(2). The “provider” of such a service includes those who own or operate websites, such as social media platforms, and therefore covers Plaintiffs’ members who are subject to H.B. 20.

162. H.B. 20’s anti-editorial-discretion provisions are inconsistent with Section 230 because they impose liability on platforms covered by Section 230 for taking actions explicitly protected by Section 230—and are thus expressly preempted. *Id.* § 230(c)-(e).

163. H.B. 20 is also preempted under implied preemption and obstacle preemption because it frustrates

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and undermines the basic purposes and policy goals of Section 230. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000).

COUNT V**42 U.S.C. § 1983****VIOLATION OF THE EQUAL PROTECTION
CLAUSE OF THE FOURTEENTH AMENDMENT**

164. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

165. The Fourteenth Amendment to the United States Constitution guarantees to all citizens “equal protection of the laws,” and it forbids any state government from denying that protection “to any person within its jurisdiction[.]” U.S. Const. amend. XIV, § 1. At a minimum, it forbids state governments from engaging in arbitrary discrimination against its citizens. The Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

166. Distinctions “affecting fundamental rights,” including the exercise of First Amendment rights, trigger strict scrutiny under the Equal Protection Clause, even if the distinctions do not themselves constitute suspect or invidious classifications. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). “The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives.” *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 101 (1972).

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167. H.B. 20 purports to regulate the conduct of “social media platforms.” H.B. 20’s definition of that term is arbitrary and discriminatory, thereby rendering it in violation of basic equal protection principles.

168. H.B. 20’s definition of businesses that are covered by H.B. 20 discriminates against larger and more popular websites and social media companies by targeting them for restrictions and disfavored governmental treatment. It targets only select companies that: (i) have more than 50 million active users in the United States (an arbitrary threshold that the Legislature settled on without legislative findings), (ii) are “open to the public,” and (iii) “allow[] a user to create an account” to “communicate with other users for the primary purpose of posting information, comments, messages, or images.” Tex. Bus. & Com. Code § 120.001(1); Tex. Civ. Prac. & Rem. Code § 143A.001(4). Meanwhile, H.B. 20 irrationally excludes other favored companies. Further, H.B. 20 excludes (i) Internet service providers, (ii) electronic mail, and (iii) websites or applications that “consist[] primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider” where user chats and comments are “incidental to” the content posted by the website or application. Tex. Bus. & Com. Code § 120.001(1)(A)-(C). Such arbitrary distinctions demonstrate that H.B. 20 unconstitutionally discriminates against the speech of certain speakers, that it is gravely under- and over-inclusive, and that it is not justified by any legitimate (much less compelling) governmental interest.

169. Because the definition of platforms is both arbitrary and discriminatory, Section 7 will operate

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to unlawfully deprive Plaintiffs' members of their fundamental equal protection rights.

170. Additionally, Section 2 establishes multiple new affirmative and onerous obligations that would affect Plaintiffs' members, but irrationally exclude other, favored entities. *See supra* ¶¶ 83-109. This separately violates equal protection.

171. Texas cannot establish any rational basis for crafting this statutory scheme—much less satisfy strict scrutiny—and, accordingly, the statutory provisions discussed above violate the equal protection rights of Plaintiffs' members.

COUNT VI**EQUITABLE RELIEF**

172. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

173. For the reasons discussed above, Sections 2 and 7 of H.B. 20 violate federal law and thereby deprive Plaintiffs and their members of enforceable rights secured by federal law.

174. Federal courts of equity have the power to enjoin unlawful actions by state officials. Such equitable relief has traditionally been available in the federal courts to enforce federal law. *Armstrong*, 135 S. Ct. at 1384.

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175. This Court can and should exercise its equitable power to enter an injunction precluding the Defendant from enforcing Sections 2 and 7 of H.B. 20 against Plaintiffs' members.

COUNT VII

42 U.S.C. § 1983 AND 28 U.S.C. § 2201

DECLARATORY RELIEF

176. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

177. For the reasons discussed above, H.B. 20 violates the First Amendment of the Constitution and thereby deprives Plaintiffs and their members of enforceable rights.

178. Furthermore, H.B. 20 violates the Commerce Clause, the Due Process Clause, the Equal Protection Clause, and the Full Faith and Credit Clause.

179. H.B. 20's anti-editorial-discretion provisions in Section 7 are preempted by Section 230.

180. With exceptions not relevant here, in any "case of actual controversy within [their] jurisdiction," federal courts have the power to "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a).

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181. This Court may and should exercise its equitable power to enter a declaration that Sections 2 and 7 of H.B. 20 are unconstitutional and otherwise unlawful.

182. In the alternative, the Court should enter a declaration stating that, within the meaning of Tex. Bus. & Com. Code §§ 143A.005 and 143A.006, federal law protects platforms from enforcement of H.B. 20's remedies for violation of Sections 2 and 7 of H.B. 20 and has the effect of specifically authorizing them to exercise editorial discretion over user content, and that platforms are therefore not subject to enforcement of Sections 2 and 7 of H.B. 20.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- A. Declare that Section 2 of H.B. 20 is unlawful as applied to Plaintiffs' members;
- B. Declare that Section 7 of H.B. 20 is unlawful as applied to Plaintiffs' members;
- C. Declare that Section 7 of H.B. 20 is preempted by federal law;
- D. Declare that federal law protects Plaintiffs' members from enforcement of H.B. 20's remedies for violation of Sections 2 and 7 and specifically authorizes them to exercise editorial discretion over user content, and that Plaintiffs' members

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are therefore not subject to enforcement of Sections 2 and 7;

- E. Preliminarily and permanently enjoin Defendant and his agents, employees, and all persons acting under his direction or control from taking any action to enforce Sections 2 and 7 of H.B. 20 against Plaintiffs' members;
- F. Enter judgment in favor of Plaintiffs;
- G. Award Plaintiffs their attorneys' fees and costs incurred in bringing this action, including attorneys' fees and costs under 42 U.S.C. § 1988(b) for successful 42 U.S.C. § 1983 claims against state officials; and
- H. Award Plaintiffs all other such relief as the Court deems proper and just.

Dated: September 22, 2021

Respectfully submitted.

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**APPENDIX B — Declaration of CCIA in the United
States District Court for the Western District of
Texas, Austin Division, Filed October 1, 2021**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TEXAS AUSTIN DIVISION

Civ. Action No. 21-cv-00840

NETCHOICE, LLC, D/B/A NETCHOICE, A 501(C)(6)
DISTRICT OF COLUMBIA ORGANIZATION; AND
COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6) NON-
STOCK VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

**DECLARATION OF CCIA IN SUPPORT
OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

I, Matthew Schruers, pursuant to 28 U.S.C. § 1746,
declare under penalty of perjury as follows:

1. I am the President of the Computer & Communications
Industry Association (“CCIA”). I have worked at the
organization for sixteen years. Upon joining the Association,
I focused on legal, legislative, and policy matters, before

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taking on the roles of Chief Operating Officer and President. In each of these capacities, I have worked closely and communicated often with CCIA members regarding how public policy proposals affect their businesses, operations, and relationships with their users.

2. Trust and safety operations, and content moderation specifically, is an important area of CCIA's work and a constant focus for many of our members. As a result, I spend significant time understanding the content-related policies and practices of CCIA's members, as well as monitoring and analyzing the legislative and policy proposals that affect the critical business function of trust and safety. I also interact regularly with trust and safety experts throughout the industry, and have an understanding of the challenges faced by trust and safety professionals. I have been tracking and evaluating the various legislative proposals in Texas bearing on our members' editorial and curatorial discretion—including House Bill 20 ("H.B. 20") and its companion bills and predecessors—since before its passage so as to advise CCIA members on its provisions and impact on their businesses.

3. The statements contained in this declaration are made upon my personal knowledge. I am over 18 years of age and am competent to make the statements set forth herein.

About CCIA

4. CCIA is an international, not-for-profit membership association representing a broad cross-section of companies in the computer, Internet, information technology, and telecommunications industries. For

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nearly fifty years, CCIA has promoted open markets, open systems, and open networks, and advocated for the interests of the world's leading providers of technology products and services before governments and the courts.

5. CCIA's membership includes computer and communications companies, equipment manufacturers, software developers, service providers, re-sellers, integrators, and financial service companies. Currently, CCIA's members include: Amazon, Apple, BT Group (British Telecommunications), Cloudflare, Dish Network, eBay, Eventbrite, Facebook, Google, Intel, Intuit, McAfee, Mozilla, Newfold Digital, Pinterest, Powerhouse Management, Rakuten, Red Hat, Samsung, Shopify, Stripe, Twitter, Uber, Vimeo, Waymo, Wolt, Yahoo, and Zebra.

6. Because of the broad definition of "social media platform" within the recently enacted H.B. 20, a number of CCIA's members would qualify even though their services would not be considered as such by the general public. Such members span various sectors and products, and enable billions of users around the world to create and share using their products, whether to facilitate work, study, prayer, socialization, commerce, or communications. These companies moderate and curate what is displayed on their services as a vital part of operations, and some must manage a massive and constantly expanding amount of content in order to provide valuable products and tools for their users.

7. Because content moderation is central to the operations of these members, issues surrounding trust and safety constitute a significant part of CCIA's policy and advocacy work. To that end—among our other

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endeavors and programs in this area—CCIA is currently incubating a new non-profit organization called the Digital Trust & Safety Partnership.¹ The members of this new partnership include CCIA members and others dedicated to identifying and preventing harmful content online.²

8. This new organization aims to develop and iterate upon industry best practices for, among other things, the moderation of third-party content and behavior, with the goal of ensuring a safer and more trustworthy Internet. The Partnership’s objectives include the facilitation of internal assessments, and subsequently independent third-party assessments, of participants’ implementation of identified best practices for promoting the safety of their users and the online communities that they maintain. The organization balances these collective goals with the recognition that each of its member companies has its own values, product aims, digital tools, and human-led processes for moderating the extremely broad range of human expression they facilitate.

Content Moderation: How It Works and Why It Matters

9. The online services provided by many CCIA members display or support a wide variety of user-created content in myriad forms—including text, videos, audio clips, and photographs. The scale of users and activity

1. Digital Trust & Safety Partnership, <https://dtspartnership.org/>.

2. *Tech giants list principles for handling harmful content*, Axios (Feb. 18, 2021), <https://www.axios.com/tech-giants-list-principles-for-handling-harmful-content-5c9cfba9-05bc-49ad-846a-baf01abf5976.html>.

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on these services is significant. Facebook³ and YouTube⁴ each has over two billion users. Every day, users watch over a billion hours of video on YouTube.⁵ Over 100 billion messages are shared every day on Facebook.⁶ Billions of searches are run on Google every day.⁷ More than 500 hours of content are uploaded to YouTube every *minute*.⁸ Amazon has more than 1.9 million small- and medium-sized businesses selling on its online store,⁹ and countless user-generated reviews are posted on the listings for the products of those businesses and others.¹⁰

3. *Hearing Before The United States Senate Judiciary Committee Subcommittee on Privacy, Technology, and the Law* (Apr. 27, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Bickert%20Testimony.pdf>.

4. *YouTube has over 2 billion monthly logged-in users*, YouTube, <https://blog.youtube/press/>.

5. *Id.*

6. *Company Info*, Facebook, <https://about.facebook.com/company-info/>.

7. *Zeitgeist 2012*, Google, <https://www.internetlivestats.com/google-search-statistics/>.

8. *YouTube has over 2 billion monthly logged-in users*, YouTube, <https://blog.youtube/press/>.

9. *2020 Letter to Shareholders*, Amazon (Apr. 15, 2021), <https://www.aboutamazon.com/news/company-news/2020-letter-to-shareholders>.

10. *Update on customer reviews*, Amazon (Oct. 3 2016), <https://www.aboutamazon.com/news/innovation-at-amazon/update-on-customer-reviews>.

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10. The material uploaded to these services comes from all over the world and is incredibly diverse. The services enable and provide a forum for the height of human thought and creativity: material that is culturally significant, highly informative, brilliantly funny or satirical, and politically engaging. To raise just a few examples of notable uses of members' services during the ongoing public health crisis:

- a. When the COVID-19 pandemic struck, and communities implemented stay-at-home orders, many small businesses turned to social media services and online tools to continue operations, engage current and prospective customers, and cultivate loyalty in a socially distant context.¹¹ Many small businesses who succeeded in the "shut-in economy"¹² did so by embracing social media services and digital tools.¹³
- b. Amid a quarantine of indeterminate length, schools and public services both turned to social media tools

11. *5 Small Business Owners Reveal How They Are Marketing On Social Media During COVID-19*, U.S. Chamber (Sept. 3, 2020), <https://www.uschamber.com/co/goodcompany/growth-studio/promoting-business-on-social-media-during-pandemic>.

12. *As COVID-19 Continues, Online Commerce Rises*, Project DisCo (Dec. 14, 2020), <https://www.project-disco.org/competition/121420-as-covid-19-continues-online-commercerises/>.

13. *See, e.g.*, Allison Hatfield, *7 ways technology is helping small businesses during COVID-19*, Dallas Morning News (Nov. 20, 2020), <https://www.dallasnews.com/business/2020/11/20/7-ways-technology-is-helping-small-businesses-during-covid-19/>.

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to meet the needs of distance-education students and citizens with special needs, such as live captions at local government press conferences on public health via Facebook Live,¹⁴ and live captions for remote learning via Google Meet and Zoom.¹⁵ These virtual tools helped make life during social distancing more accessible and inclusive for people who are deaf or English-language learners,¹⁶ as well as helping families communicate when they are apart.¹⁷ Social media has also been a tool for mutual aid in Texas, both during COVID and when Texans lost power and heat during a storm in February and turned to digital tools like Twitter, Google Forms, and Venmo.¹⁸

c. Social media and digital services are also a critical tool as learning returns to the classroom. For

14. *Powered by AI, new automated captions are helping people receive news and critical updates*, Facebook (Sept. 15, 2020), <https://tech.fb.com/powered-by-ai-new-automated-captionsare-helping-people-receive-news-and-critical-updates/>.

15. *Google Meet expands live captions to 4 more languages, extends unlimited meetings*, ZDNet (Dec. 15, 2020), <https://www.zdnet.com/article/google-meet-expands-live-captions-to-4-more-languages-extends-unlimited-meetings/>.

16. *Live captions come to Meet in four new languages*, Google (Dec. 15, 2020), <https://blog.google/products/meet/live-captions-new-languages/>.

17. *A CODA story: Why accessible technology matters*, Google (Apr. 22, 2021), <https://blog.google/outreach-initiatives/accessibility/tonys-story-accessibility-features/>.

18. Marissa Martinez, *Texans used mutual aid to help their communities through a devastating winter storm* (Feb. 23, 2021), <https://www.texastribune.org/2021/02/23/mutual-aidtexas-storm/>.

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instance, in 2019 an elementary school teacher in Houston, Texas founded the #ClearTheList movement to help teachers clear their online wish lists from platforms like Amazon and Donors Choose to help teachers defray their personal expenses on classroom items, which now includes new technology for virtual learning and PPE.¹⁹ Social media has also enabled Texas country musicians to raise money for teachers in Texas and Oklahoma using the hashtag #TroubadoursForTeachers, especially as they've been home during COVID.²⁰

11. By contrast, some of the material posted on online services is the polar opposite. Because almost anyone can create an account and post content on certain social media services, users can attempt to submit content ranging from dangerous, illegal, and abusive, to things that are just undesirable or annoying. A few examples of content shared on the darker side of the Internet, which trust and safety teams work around the clock to address, include:

- a. Video footage of the mass shootings targeting a mosque in Christchurch, New Zealand that was recorded by the gunman and broadcast online, which despite being removed within minutes,

19. Allison Slater Tate, *School supplies: Help teachers #ClearTheList with PPE, wipes*, TODAY (July 30, 2020), <https://www.today.com/parents/school-supplies-help-teachersclearthelist-ppe-wipes-t188220>.

20. Katy Blakey, *Texas Country Artists Lend Their Voices to Help Teachers*, NBC-DFW (Aug. 30, 2021), <https://www.nbcdfw.com/news/local/texas-country-artists-lend-their-voices-tohelp-teachers/2730463/>.

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resurfaced on various other services, leading to extensive efforts across the industry to remove the videos.²¹

- b. Videos and propaganda posted by ISIS to recruit American teenagers or otherwise persuade them to adopt its extremist ideology.²²
- c. Fraud schemes that specifically target older adults online; for instance, by contacting a senior through social media, building a relationship, and then asking for money.²³
- d. Sexual, graphic, or otherwise disturbing content that is lawful but may be inappropriate for certain audiences or contexts, such as on gaming platforms used by children.²⁴

21. *Update on New Zealand*, Facebook (Mar. 18, 2019), <https://about.fb.com/news/2019/03/update-on-new-zealand/>; Olivia Solon, *Six months after Christchurch shootings, videos of attack are still on Facebook*, NBC News (Sept. 20, 2019), <https://www.nbcnews.com/tech/tech-news/six-months-after-christchurch-shootings-videosattack-are-still-facebook-n1056691>.

22. Dorian Geiger, *This Is How ISIS Uses Social Media to Recruit American Teens*, Teen Vogue (Nov. 20, 2015), <https://www.teenvogue.com/story/isis-recruits-american-teens>.

23. *Common Scams That Target the Elderly*, Senior Living (Feb. 9, 2021), <https://www.seniorliving.org/research/common-elderly-scams/>.

24. *Roblox tries to deal with adult content on a platform used by many kids (2020)*, Trust & Safety Foundation (Apr. 19, 2021),

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- e. Content that promotes or glorifies self-harm, including suicide, or that encourages young people to engage in dangerous conduct, such as consuming detergent pods or other bizarre behavior.²⁵

12. The companies my association represents, and many others like them,²⁶ therefore have an obvious business need to address certain kinds of content and behavior, as well as to take action against abusive users who repeatedly or flagrantly violate their rules or post illegal, dangerous, or offensive material. Without the ability to respond to that content per the company's stated policies and terms of service (along with limiting the ability of repeat offenders to continue abusing the company's services), many services would be flooded with abusive, objectionable, and in some cases unlawful

<https://www.tsf.foundation/blog/roblox-tries-to-deal-withadult-content-on-a-platform-used-by-many-kids-2020>.

25. Chaim Gartenberg, *YouTube is taking down Tide Pod Challenge videos and oh my god don't eat laundry pods*, The Verge (Jan. 17, 2018), <https://www.theverge.com/2018/1/17/16902990/youtube-tide-pod-challenge-video-take-downcommunity-guidelines-removal>.

26. *E.g.*, Drew Harwell, *Rumble, a YouTube rival popular with conservatives, will pay creators who 'challenge the status quo'*, Washington Post (Aug. 12, 2021), <https://www.washingtonpost.com/technology/2021/08/12/rumble-video-gabbard-greenwald/>; ArLuther Lee, *Team Trump back in the game with new social media app called GETTR*, The Atlanta Journal-Constitution (July 2, 2021), <https://www.ajc.com/news/team-trump-back-in-thegame-with-new-social-media-app-called-gettr/L4N5FCAINBF6ZNMU4NBBMP37RA/>.

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material, drowning out the good content and making their services far less enjoyable, useful, and safe.

13. For that reason, CCIA members have rules governing what kinds of material and uses are, and are not, permitted.²⁷ That is also why these services put significant amounts of time, resources, personnel, and effort into developing sophisticated trust and safety operations to protect users and the public. The scope of these efforts reflects the sheer scale and volume of user-generated content posted on popular online services.

14. Content moderation takes many forms, including both human review and the use of digital tools that rely in part on algorithms (or other automated sorting). Moderation sometimes requires removing objectionable or illegal content or terminating the accounts of users who post it. But far more frequently, it involves context-specific decisions about how to arrange and display content, how best to recommend content to users based on their interests, and how easy it should be to access certain kinds of content. Instagram, for example—an image- and video-sharing service popular with younger users (which is owned by CCIA member Facebook)—has made it harder to search for graphic images involving

27. *E.g.*, *Pinterest Community Guidelines*, Pinterest, <https://policy.pinterest.com/en/community-guidelines>; *Facebook Community Standards*, Facebook, <https://www.facebook.com/communitystandards/>; *The Twitter Rules*, Twitter, <https://help.twitter.com/en/rules-and-policies/twitter-rules>; *YouTube Community Guidelines*, YouTube, <https://www.youtube.com/howyoutubeworks/policies/community-guidelines/>.

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suicide attempts and self-harm, and taken steps to stop recommending such content to users.²⁸

15. Another example of moderation is “age-gating,” whereby certain content is made accessible only to adults or teenagers but not to younger children. YouTube, for example, does this extensively.²⁹ Content that may be age-restricted includes: videos about a cannabis dispensary; material featuring people in sexually provocative poses; material using vulgar language; or videos that show violent or gory imagery.³⁰

16. In other circumstances, moderation includes giving users tools to decide for themselves what content they wish to avoid, such as by obscuring potentially upsetting but clearly newsworthy information, blocking or muting other users (meaning that they no longer see that user’s content), making certain content inaccessible to their children, or shielding themselves from material that is likely to offend sensitive users. For instance, YouTube provides a Restricted Mode that users (or institutions such as libraries and schools) can choose to activate in order

28. *Tightening Our Policies and Expanding Resources to Prevent Suicide and Self-Harm*, Facebook (Sept. 10, 2019), <https://about.fb.com/news/2019/09/tightening-our-policies-andexpanding-resources-to-prevent-suicide-and-self-harm/>.

29. *Age-restricted content*, YouTube, <https://support.google.com/youtube/answer/2802167?hl=en> (“Sometimes content doesn’t violate our policies, but it may not be appropriate for viewers under 18. In these cases, we may place an age-restriction on the video.”).

30. *See id.*

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to avoid such material.³¹ Likewise, on Instagram, users have a variety of tools for controlling how they interact with other users' content, including blocking accounts or commenters, muting an account (which stops content from that user from showing up in a feed), and creating lists of words or emojis that the user does not wish to see in the comments on his or her posts.³²

17. Content moderation can also include direct speech by service providers. Sometimes the services engage in direct speech when they have made a considered determination that particular material conveyed via their service requires additional information or context. For example, services may decide to attach warning labels, disclaimers, or general commentary informing users that certain user-submitted content has either not been verified by official sources or may contain upsetting imagery:

- a. Facebook adds “warning screens” over potentially sensitive content such as violent or graphic imagery, nudity, and posts related to suicide or suicide attempts.³³ Similarly, Twitter requires

31. *Disable or enable Restricted Mode*, YouTube, <https://support.google.com/youtube/answer/174084>. 32 *Keeping Instagram a safe and supportive place*, Instagram, <https://about.instagram.com/community/safety>.

32. *Keeping Instagram a safe and supportive place*, Instagram, <https://about.instagram.com/community/safety>.

33. *Providing context on sensitive or misleading content*, Facebook, <https://transparency.fb.com/enforcement/taking-action/context-on-sensitive-misleading-content/>.

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users who may legitimately intend to share violent or abusive but newsworthy content (such as news media, bloggers, or citizen journalists) to mark their accounts as sensitive, such that media can be placed behind interstitial warnings. This ensures unsuspecting users are not suddenly confronted with sensitive media, such as violent news coverage from war zones or mass shootings.³⁴

- b. YouTube adds labels to content by state-supported media channels, including flagging sources of funding—such as for videos sponsored by the Russian government.³⁵
- c. During the 2020 election, Twitter added warning labels to Tweets making claims about election results that had not been verified by official sources.³⁶

34. *Sensitive media policy*, Twitter, <https://help.twitter.com/en/rules-and-policies/mediapolicy>.

35. *Greater transparency for users around new broadcasters*, YouTube, <https://blog.youtube/news-and-events/greater-transparency-for-users-around>; *State media warning can counteract the effects of foreign misinformation*, Harvard Kennedy School Misinformation Review, <https://misinforeview.hks.harvard.edu/article/state-media-warninglabels-can-counteract-the-effects-of-foreign-misinformation/>.

36. *Additional steps we're taking ahead of the 2020 US Election*, Twitter, https://blog.twitter.com/en_us/topics/company/2020/2020-election-changes.html (“Tweets which include premature claims will be labeled and direct people to our official US election page.”).

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18. Other times, however, content moderation is necessary so that even the most basic online functions, like shopping or searching for local businesses or having material arranged by topic or geography, work as intended. Without prioritizing, classifying, and ordering the never-ending volume of online content, online services would have no way to deliver the content users want—or even critically need—to see. This, for example, is the essential function of Internet search engines like Google.³⁷ The ability to search is also an essential function of many other online services. Customers rely on services like eBay to search for products they want to buy, and to provide helpful information and reviews about those products; users on Facebook want and expect to be able to search for people they might know; users on Pinterest want and expect to be able to search for recipes and design inspiration according to their taste and preferences.

19. Content moderation serves at least three distinct vital functions. *First*, it is an important way that online services express themselves and effectuate their community standards, thereby delivering on commitments that they have made to their communities. Content rules and enforcement actions reflect normative judgments about what will best foster the kind of environment that companies have promised to their users. Choices about whether to allow pornography, depictions of violence, or certain kinds of offensive language, for example, are all editorial expressions of the service's own preferences—

37. *How Google Search works*, Google, <https://www.google.com/search/howsearchworks/>.

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important statements about the kind of online community it wishes to foster and what speech and speakers the company wishes to associate with or avoid.

20. *Second*, content moderation is often a matter of ensuring online safety. Some content posted online unfortunately can be highly dangerous, whether to specific individuals or to the public at large. Social media companies regularly enforce their terms of service to remove material such as illegal non-consensual intimate imagery (sometimes referred to as “revenge pornography”), depictions of child sexual abuse, calls for genocide, efforts to steal people’s personal information, attempts to encourage teens to commit suicide, attempts to sell illegal weapons and drugs, content that aids counterfeiting, and efforts by foreign adversaries to manipulate the American public. Any effort that hamstring how online services respond to these egregious communications threatens the safety of those services, their users, and the public.

21. *Third*, content moderation facilitates the organization of content, rendering an online service more useful. Imagine if a search engine presented results in a random or purely chronological order—instead of prioritizing what is most relevant. Or if an online store presented a random assortment of products or listings—instead of those products the user actively sought out. For many digital services, the main utility they offer to users is the editorial and curatorial functions of organizing, sorting, and presenting of the vast amount of information available online.

*Appendix B***The Importance of Content Moderation**

22. A daily challenge facing many CCIA members is pursuing these goals—upholding their terms in order to protect users—while addressing a massive and ever-changing body of content that users generate. Each piece of content involves different circumstances and different potential risks, which often requires an individualized judgment by the service regarding whether it calls for moderation. Rightly or not, members of the public often associate digital services with third-party content that appears on their service. Advertisers also associate digital services with content that appears on their site, due to concerns about the indirect impact on the advertisers’ brand. The reputational costs of such connections can be permanent. Thus, objectionable content that appears on a digital service—even if its presence were compelled by law—may irreparably harm the business prospects of a digital service.

23. Normative judgments about how content is moderated within the bounds of a service’s policies frequently involve matters of opinion and values about which people could very well disagree. The choice of whether a violent but newsworthy video should be removed, left up, or obscured behind an interstitial warning pursuant to a service’s policy on sensitive media is as equally expressive as a newspaper’s calls about which stories make the front page, which editorials appear in the opinion column, and what is newsworthy, as a general matter. The difference is that online service providers are called upon to make moderation decisions on a vast scale for immense volumes of content.

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24. For example:

- a. Facebook is a community of over three billion people, and over one billion “stories” (audio or video clips) are shared on its service every day.³⁸ As one would expect, that means that Facebook has to remove millions of pieces of content each year to ensure that its service is safe and enjoyable for users. In the first quarter of 2021, Facebook removed 8.8 million pieces of “bullying and harassment content,” 9.8 million pieces of “organized hate content,” and 25.2 million pieces of “hate speech content.”³⁹ Since the beginning of the pandemic Facebook has removed over 3,000 accounts, Pages and groups for repeatedly violating its rules against spreading COVID-19 and vaccine misinformation and removed more than 20 million pieces of content for breaking these rules.⁴⁰
- b. Over 500 million accounts are active daily on Instagram, where they view and/or post photos,

38. *Company Info*, Facebook, <https://about.facebook.com/company-info/>.

39. *Id.*; *Community Standards Enforcement Report, First Quarter 2021*, Facebook, <https://about.fb.com/news/2021/05/community-standards-enforcement-report-q1-2021/>.

40. Monika Bickert, *How We’re Taking Action Against Vaccine Misinformation Superspreaders*, Facebook (Aug. 18, 2021), <https://about.fb.com/news/2021/08/taking-actionagainst-vaccine-misinformation-superspreaders/>.

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stories, and “reels.” To keep the service safe and usable, Instagram removed 5.5 million pieces of “bullying and harassment content,” 324,500 pieces of “organized hate content,” and 6.3 million pieces of “hate speech content” in the first quarter of 2021.⁴¹

- c. There are more than 300 billion “pins” or pieces of posted content on Pinterest. Because the Pinterest community is not welcoming to pornography,⁴² between October and December 2020, the service took down over 2.1 million distinct images containing adult content, which amounted to nearly 50 million pins (meaning that some images were pinned by users multiple times). In addition, Pinterest removed over 1.3 million discrete images or 3.4 million pins containing spam.⁴³

41. *Tell your brand story your way with Instagram*, Facebook, <https://www.facebook.com/business/marketing/instagram>; *Community Standards Enforcement Report, First Quarter 2021*, Facebook, <https://about.fb.com/news/2021/05/community-standardsenforcement-report-q1-2021/>.

42. *Community guidelines*, Pinterest, <https://policy.pinterest.com/en/community-guidelines>.

43. *Transparency report*, Pinterest, <https://policy.pinterest.com/en/transparency-report>

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- d. In the last six months of 2020, Twitter took action against 3.5 million accounts, suspended over 1 million accounts, and removed 4.5 million pieces of content. With respect to the removed content, the top three categories were (1) “hateful conduct,” which includes the promotion of violence against people on the basis of race, gender, age, and other protected characteristics (approx. 5,737,500 instances); (2) “abuse/harassment” (approx. 5,053,000 instances); and (3) “sensitive media,” including graphic violence and adult content (approx. 3,381,000 instances).⁴⁴

- e. YouTube sees 500 hours of content uploaded to its platform every minute and has a community of over 2 billion users.⁴⁵ In the last three months of 2020 alone, YouTube removed just over 2 million channels and over 9 million videos for violations of its policies, the majority of which had fewer than ten views each at the time of removal due to the use of automated processes for reviewing and removing violative content.⁴⁶ Since February 2020, YouTube has removed more than 1 million videos related to dangerous

44. Twitter Transparency Report, *Rules for Enforcement*, Twitter, <https://transparency.twitter.com/en/reports/rules-enforcement.html#2020-jul-dec>.

45. *YouTube for Press*, YouTube, <https://www.youtube.com/intl/en-GB/about/press/>.

46. YouTube Transparency Report, *YouTube Community Guidelines enforcement*, YouTube, <https://transparencyreport.google.com/youtube-policy/removals?hl=en>.

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coronavirus misinformation, like false cures or claims of a hoax.⁴⁷

25. The sheer number of decisions that online services are forced to make is often matched by the degree of difficulty and nuance involved in the hardest judgment calls. For certain pieces of content, there is simply no right answer as to whether and how to moderate, and any decision holds significant consequences for the service's online environment, its user community, and the public at large. To raise a few examples of such cases:

- a. Facebook generally aims to remove content that advertises marijuana. But for some pieces of content, it can be difficult to determine whether the material in question actually *is* advertising marijuana—such as when the product is obscured by packaging or resembles other products.⁴⁸
- b. YouTube generally attempts to remove content that supports Nazi ideology or white supremacy. However, its policies on restricting such content are tested by material where it is not obvious whether the content is actually supporting Nazism or, instead, historical or informative in nature. For those videos, YouTube must determine whether ambiguous discussions

47. Neal Mohan, *Perspective: Tackling Misinformation on YouTube* (Aug. 25, 2021), <https://blog.youtube/inside-youtube/tackling-misinfo/>.

48. *F8 2019 Day 2 keynote and session videos*, Facebook, <https://engineering.fb.com/2019/05/01/ai-research/f8-2019-day-2/>.

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regarding Nazism or interviews with white supremacists serve an educational function or, instead, glorify those ideologies.⁴⁹

- c. Given my role within the industry, I am aware that companies beyond CCIA's membership frequently face similar problems. For example, Spotify previously announced that it would try to harmonize its values with the artists that it promoted. In practice, this included moderating or removing the portfolios of artists that engaged in reprehensible conduct, such as sexual assault. These judgment calls, however, are sensitive in nature, and prompt comparisons to other artists that are also accused of or found responsible for misconduct.⁵⁰

26. To make reasonable decisions about such content, a service needs flexibility to craft policies and rules that reflect their commitment to users and to adapt those policies to the everchanging circumstances presented by

49. *YouTube's new policy on Nazi content results in removal of historical and education videos (2019)*, Trust & Safety Foundation, <https://www.tsf.foundation/blog/youtube-s-newpolicy-on-nazi-content-results-in-removal-of-historical-and>; Michael Grosack, *A look at how we treat educational, documentary, scientific, and artistic content on YouTube* (Sept. 17, 2020), <https://blog.youtube/inside-youtube/look-how-we-treat-educational-documentary-scientific-andartistic-content-youtube/>.

50. *Spotify enforces hateful conduct policy, removing artists from its platform for off-platform behavior (2018)*, Trust & Safety Foundation, <https://www.tsf.foundation/blog/spotifyenforces-hateful-conduct-policy-removing-artists-from-its-platform>.

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user content. CCIA's members have never claimed that they will allow anyone to post any content without it being subject to moderation decisions. CCIA's members have always moderated content to some degree. It goes without saying that no service is able to anticipate unexpected forms of content *and* decide how to moderate each instance *in advance*. It is for that very reason that these services develop policies and rules that act as guidelines for their future moderation decisions—and within which each service has the ability to exercise discretion in specific instances.

27. The content that CCIA's members moderate does not exist in a vacuum; it is also affected by societal circumstances and/or the service's own attitudes. Because those circumstances and attitudes also evolve over time, adapting to changed circumstances, services may view their terms of service differently as they gain experience and encounter new material:

- a. Facebook, for example, has placed a greater emphasis in identifying and proactively suppressing racist content (such as depictions of blackface) and antisemitic content (such as content that denies the Holocaust or encourages the idea that Jews control the world), as it encounters more and more examples of that kind of content.⁵¹

51. *Measuring Our Progress Combating Hate Speech*, Facebook, <https://about.fb.com/news/2020/11/measuring-progress-combating-hate-speech/>.

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- b. Similarly, Facebook, Instagram, Twitter, and YouTube have increasingly attempted to limit material that would encourage eating disorders or other forms of destructive self-harm.⁵²
- c. As yet another example, YouTube recently took action to limit the influence of the military in Myanmar after the military launched a coup that captured control of the government. As a result of the changing circumstances and the military's violence, YouTube prevented five television channels run by the military from conveying content via its service.⁵³
- d. Twitter's "hateful conduct policy" was updated to include "targeted misgendering or deadnaming

52. *Tightening Our Policies and Expanding Resources to Prevent Suicide and Self-Harm*, Facebook, <https://about.fb.com/news/2019/09/tightening-our-policies-and-expanding-resources-to-prevent-suicide-and-self-harm/>; *Taking More Steps To Keep The People Who Use Instagram Safe*, Instagram, <https://about.instagram.com/blog/announcements/more-steps-to-keep-instagramusers-safe>; *Suicide and Self-harm Policy*, Twitter, <https://help.twitter.com/en/rules-andpolicies/glorifying-self-harm>; *Suicide & self-injury policy*, YouTube, <https://support.google.com/youtube/answer/2802245>.

53. *YouTube Bans Myanmar Military Channel as Violence Rises*, New York Times (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/business/youtube-myanmar.html>; *YouTube removes five Myanmar TV channels from platform*, Reuters (Mar. 4, 2021), <https://www.reuters.com/article/us-myanmar-politics-youtube/youtube-removes-five-myanmartv-channels-from-platform-idUSKBN2AX0BQ>.

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of transgender individuals.” Twitter made that change as part of a broader change to its policy on “dehumanizing language,” which was expanded “to include content that dehumanizes others based on their membership in an identifiable group, even when the material does not include a direct target.”⁵⁴

28. Furthermore, many digital services are “multi-sided markets,” meaning that their business model unites distinct constituencies in transactions. Users, therefore, are not the only community whose interests these services must seek to safeguard. For ad-supported, free-to-the-user services, advertisers constitute another critical constituency. These advertisers are wary of what some refer to as “brand damage” should their products be advertised in proximity to problematic content. As a result, advertisers work closely with social media companies and other digital services to reduce the chance that their advertising dollars are perceived to support potentially harmful content or behavior.⁵⁵

54. *Hateful conduct policy*, Twitter, <https://help.twitter.com/en/rules-and-policies/hatefulconduct-policy>; see *How Twitter’s Ban on ‘Deadnaming’ Promotes Free Speech*, New York Times, <https://www.nytimes.com/2018/11/29/opinion/twitter-deadnaming-ban-free-speech.html>; *Creating new policies together*, Twitter, https://blog.twitter.com/official/en_us/topics/company/2018/Creating-new-policiestogether.html.

55. Martinne Geller, *Advertisers agree deal with social media on steps to curb harmful content*, Reuters (Sept. 23, 2021), <https://www.reuters.com/article/tech-advertising/advertisersagree-deal-with-social-media-on-steps-to-curb-harmful-content->

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29. Advertisers are not the only parties who associate expression on members' websites and applications with members. For instance, the Mozilla Foundation has asserted that YouTube "is recommending videos with misinformation, violent content, hate speech, and scams."⁵⁶

30. Content moderation is therefore far from static. Instead, it is a dynamic process in which the service has to account for its own values and opinions, user preferences, and what is happening in the world. Succeeding at that delicate balancing act requires companies to have the freedom to evolve moderation techniques over time, both to best serve the needs of their users and to protect the online environment that they are curating. Both the online and real world change from second to second, and each company must be able to respond to those changes in real time to protect its service and users.

31. Due to the scale at which the covered online services operate, much of their moderation work must be done algorithmically—or at least with the assistance of algorithms or automated processes—in order to function.

idUSKCN26E101; *Facebook to develop tools for advertisers to tackle harmful content*, Reuters (Jan. 29, 2021), <https://www.reuters.com/article/us-facebook-advertising/facebook-to-develop-tools-foradvertisers-to-tackle-harmful-content-idUSKBN29Y1UJ>.

56. Mozilla, *Mozilla Investigation: YouTube Algorithm Recommends Videos that Violate the Platform's Very Own Policies* (July 7, 2021), <https://foundation.mozilla.org/en/blog/mozillainvestigation-youtube-algorithm-recommends-videos-that-violate-the-platforms-very-ownpolicies/>.

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32. The capacity to make moderation decisions algorithmically in the first instance is vitally important to many services offered by CCIA members. Not only do these tools facilitate the moderation of the incalculable volume of content online, but for some of the content that requires moderation or removal—such as graphically violent, sexual, or criminal content—time is of the essence. An important aspect of the goodwill that many members have built up with their users over time is the ability of moderators to respond quickly to halt the spread of dangerous, illegal, or otherwise inappropriate content before it becomes widespread. Making certain moderation decisions algorithmically in the first instance allows the services to respond to objectionable content in a way that preserves the user experience, promotes online safety, and helps ensure that the communications that our members’ services disseminate reflect their community values.

The Burdens Posed by H.B. 20

33. Compliance with H.B. 20’s limitations on upholding terms of service would be unduly burdensome at a minimum, and may not be technically feasible at all.

34. Millions of Texans, and billions of people worldwide, use CCIA members’ services. And Texas users have access to all publicly available content on the websites and applications (subject to the settings the users have activated).

35. H.B. 20 bans “censorship” of “viewpoint.” Yet all expressions contain a viewpoint, of some sort, including

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pro-Taliban extremist content and medical disinformation aimed at the public by foreign government propagandists.⁵⁷ And “censor” is defined to include every enforcement tool available to the covered websites and applications: “to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.”

36. This definition even includes the platforms’ own speech, by prohibiting the platforms from broadly (and vaguely) “discriminat[ing]” against expression. For instance, when a platform appends a warning label or other expression on one piece of expression, but not another, H.B. 20 would allow users to sue for the disparate treatment.

37. Thus, combining the requirements of the two key operative definitions, H.B. 20 prohibits the exercise of editorial and curatorial discretion in implementing content moderation policies on the websites and applications H.B. 20 covers.

38. Decisions to remove a particular item of content uploaded by a user, to deprioritize a piece of content, or

57. Heather Greenfield, *Texas Legislators Approve Bill Making It Easier To Sue Companies For Policies Protecting Users Online*, CCIA (Aug. 30, 2021), <https://www.cciagnet.org/2021/08/texas-legislators-approve-bill-making-it-easier-to-suecompanies-for-policies-protecting-users-online/>; Rachel Pannett, *Russia threatens to block YouTube after German channels are deleted over coronavirus misinformation*, Washington Post (Sept. 29, 2021), <https://www.washingtonpost.com/world/2021/09/29/russia-ban-youtubegerman-coronavirus/>.

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to temporarily or permanently remove a user’s ability to upload content to the service, serve different purposes within our members’ businesses. These decisions often need to strike a balance between limiting the detrimental effects of objectionable content on the services and preserving open access.

39. Having a full panoply of moderation tools available enables CCIA member companies to strike an appropriate balance in each situation. H.B. 20’s requirements would remove the services’ ability to use those moderation tools and would upset the delicate balance between openness and responsibility that makes many members’ services usable and enjoyable by a wide variety of users.

40. H.B. 20 grants millions of Texans—and the Attorney General—the opportunity to sue over countless editorial decisions across billions of pieces of content.

41. With the risk of a lawsuit for any editorial decision—backed up by H.B. 20’s grant of authority for trial courts to impose daily punishments for “contempt”—it will be very difficult to justify removing or moderating any content at all.

42. The sheer volume of content on these websites and applications will also make H.B. 20’s “disclosure” and operational provisions unduly burdensome.

43. For instance, the requirement for a report detailing every piece of content over which a covered member upheld their policies would be voluminous and would ultimately

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deter that member from performing content moderation or otherwise exercising editorial or curatorial discretion.

44. Likewise, the notice requirement that applies whenever a Texas user is “censored” (as H.B. 20 defines that term) would likely result in the services sending millions of such notices per day. The breadth of the statutory definition of this term would apply to editorial decisions that remove clearly unacceptable material.

45. If these provisions were to go into effect, they would seriously undermine the safety and utility of the members’ services. The risk of liability on the basis of various provisions H.B. 20 would require many member services to substantially cut back on their moderation efforts, with the foreseeable results of (1) leaving offensive and dangerous content accessible to the public via the services; (2) making maintenance of family-friendly, curated collections of user-uploaded content nearly impossible; and (3) making the services less useful for their intended purposes.

46. For many services, a substantial proportion of the value provided to users is the service’s arrangement of relevant, useful, or entertaining information in a way that provides the sort of content and experience that the user is seeking. These ways of organizing information on a service can fall afoul of the statute’s definition of “censorship” despite being wholly conventional and benign.

47. The statute’s broad and vague descriptions of what practices are prohibited leave a number of questions

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unanswered, and the provisions that are comprehensible impose practices that would severely undermine the services' value to their users.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 29, 2021 in Washington D.C.

/s/ Matthew Schruers
Matthew Schruers

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**APPENDIX C — Declaration of NetChoice, LLC
in the United States District Court for the Western
District of Texas, Austin Division,
Filed October 1, 2021**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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

NETCHOICE, LLC D/B/A NETCHOICE, A 501(C)(6)
DISTRICT OF COLUMBIA ORGANIZATION,

and

COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6) NON-
STOCK VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

**DECLARATION OF NETCHOICE, LLC IN
SUPPORT OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

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I, Carl Szabo, declare as follows:

1. I am the Vice President and General Counsel of NetChoice, LLC (“NetChoice”). I submit this declaration in support of Plaintiffs’ Motion for a Preliminary Injunction. I am over the age of 18 and am competent to make the statements herein. I have personal knowledge of the facts set forth in this declaration and, if called and sworn as a witness, could and would competently testify to them.

2. In addition to providing legal counsel to NetChoice, I coordinate NetChoice’s advocacy before legislative bodies, courts, and government agencies to promote NetChoice’s mission of advancing free enterprise and free expression on the Internet.

3. Plaintiff NetChoice is a national trade association of online businesses that share the goal of promoting free speech and free enterprise on the Internet. NetChoice is a 501(c)(6) nonprofit organization. As our website explains, NetChoice “works to make the Internet safe for free enterprise and free expression” and “engages at the local, state, national, and international levels to ensure a bright digital future.”¹ In particular, we are dedicated to preserving the Internet as a vibrant marketplace for communication, commerce, and the exchange of ideas. When online businesses are free to make their own moderation decisions, they create choices for users and advertisers alike—for example, Texans looking for a less

1. Home, NetChoice, <https://perma.cc/3NPH-KH2T>.

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moderated experience can use social media platforms like Parler, Gab, or Rumble; those looking for more family-friendly services can find options from several NetChoice members. All in all, we strongly believe in giving users and advertisers choices in how they use the Internet.

4. For over two decades, NetChoice has worked to promote online speech and commerce and to increase consumer access and options through the Internet, while minimizing burdens on businesses to help make the Internet more accessible and useful for both businesses and consumers. Our members include a broad array of popular online services and platforms, including: Airbnb, Alibaba.com, Amazon.com, AOL, DII, DRN, eBay, Etsy, Expedia, Facebook, Fluidtruck, Google, HomeAway, Hotels.com, Lime, Nextdoor, Lyft, Oath, OfferUp, Orbitz, PayPal, Pinterest, StubHub, TikTok, Travelocity, TravelTech, Trivago, Turo, Twitter, Verisign, VRBO, Vigilant Solutions, VSBLTY, Waymo, Wing, and Yahoo!.²

5. Several of NetChoice’s members are subject to Texas’s new law, House Bill 20 (the “Bill”), as they meet the statutory definition of a covered “social media platform” under the Bill because they: (i) are open to the public (subject to their respective terms and conditions and community guidelines); (ii) allow users to create accounts; (iii) enable users to communicate with other users for the “primary purpose” (though this requirement is vague) of posting information, comments, messages, or images; and (iv) have more than 50 million monthly users in the

2. About Us, NetChoice, <https://perma.cc/4NPV-PLU7>.

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United States of America. Several of these NetChoice members have submitted declarations attesting to the irreparable harms they will suffer if the Bill is allowed to go into effect.³

6. NetChoice has over two decades of experience advocating for online businesses and the principles of free speech and free enterprise on the Internet, so we are intimately familiar with the business models our members use and rely on to provide services to users and advertisers alike. That experience, combined with the practical applications of the law and declarations submitted by our members, leads us to conclude that this Bill, should it take effect, would irreparably harm our members and their business models by repelling users and advertisers and creating long-term, adverse impacts when it comes to our members' reputations.

7. These negative effects of the Bill are associative and enduring, and thus irreparable. Once the public associates an online business with harmful or offensive content, it is nearly impossible to undo that association. Indeed, what common sense suggests and evidence confirms is that users and advertisers prefer not to see harmful or objectionable content online and will strongly associate that content with the platform on which they saw it.⁴

3. See, e.g., Veitch Decl. (Sept. 30, 2021); Potts Decl. (Sept. 30, 2021); Esparza Decl. (Sept. 29, 2021).

4. See, e.g., Tiffany Hsu & Eleanor Lutz, *More Than 1,000 Companies Boycotted Facebook. Did it Work?*, N.Y. Times (last updated Nov. 17, 2020), <https://perma.cc/EL62-NCDP>.

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8. That is because online services, like most businesses, rely on their reputations—which they have often spent many years diligently cultivating and protecting—to gain and maintain users and advertisers.⁵ By hosting harmful or objectionable content, as the Bill would force them to do, online services would suffer enduring reputational harm. Many long-time users and advertisers will likely quit or reduce use of these online services should their websites become polluted with offensive content. This content is also likely to repel potential users⁶ and turn off potential advertisers by greatly deteriorating the value and usability of these services.⁷ And, as experience has shown, these deleterious effects would likely lead advertisers—the main source of revenue for many online services—to reduce or curtail their spending on advertisements on these websites.⁸

9. In fact, the World Federation of Advertisers—a leading global trade association for advertisers—is adamant that online services must moderate user-generated content to prevent exposure to objectionable or offensive content.⁹ “The issue of harmful content

5. Veitch Decl. (Sept. 30, 2021); Potts Decl. (Sept. 30, 2021).

6. Gutierrez Decl. (Sept. 27, 2021); Esparza Decl. (Sept. 29, 2021).

7. Veitch Decl. (Sept. 30, 2021); Potts Decl. (Sept. 30, 2021).

8. Veitch Decl. (Sept. 30, 2021); Potts Decl. (Sept. 30, 2021).

9. *See, e.g.*, WFA and Platforms Make Major Progress to Address Harmful Content, World Federation of Advertisers (Sept. 23, 2020), <https://perma.cc/YC3N-738F>.

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online,” WFA’s CEO Stephan Loerke explains, “has become one of the challenges of our generation. As the primary monetization mechanism of the online ecosystem, advertisers have a critical role to play in driving positive change A safer social media environment will provide huge benefits not just for advertisers and society but also to the platforms themselves.” Not only does the Bill impose immediate financial harm to online businesses, it risks permanent, irreparable harm should any of those users or advertisers decide never to return to our members’ sites based on their past experience or the detrimental feedback they have heard from others.

10. Because many online businesses (not just social media platforms, but also online exchanges and websites that allow users to post reviews) rely on advertising as a necessary mechanism to remain in business, the decisions of advertisers to take their business elsewhere have very serious consequences for these businesses, including lost revenue and long-term reputational damage.¹⁰ Not only will advertisers pull their ads and funding immediately after the Bill takes effect and forces our members to host objectionable content, advertisers will be hesitant to return to these businesses in the future. Consider that WFA’s call for advertisers to “driv[e] positive change” reveals an implicit truth about online services and digital platforms: their advertising space is valuable *only if* it is not displayed next to harmful and offensive content that users do not want to see and advertisers do not want to be associated with. This Bill, as discussed, makes our members more vulnerable to advertiser boycotts, which

10. Veitch Decl. (Sept. 30, 2021); Potts Decl. (Sept. 30, 2021).

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directly hurts their revenue and reputation. In the long run, this loss of a quintessential monetization mechanism could jeopardize the very business model on which so many of these digital services rely.

11. Being able to moderate, organize, curate, and otherwise prioritize content is critical to our members—especially search engines, social media platforms, and other digital services that retrieve and present information responsive to user requests—so that they can deliver users and advertisers the high-quality services they demand.¹¹ As noted above, it is essential for our members to be able to develop a brand and customer experience that allows them to avoid exposing their users to objectionable, offensive, harmful, or unlawful content.¹² It is also essential that our members be able to organize and curate content in a way that is useful to users. For example, an online marketplace that displayed items in purely chronological order (rather than categorizing them by product type) would be far less helpful in connecting users with the products they are looking for. Similarly, a social media platform that is forced to deliver content in purely chronological order may cause its users to miss out on more relevant content. This Bill would deny our members the ability to organize and display content in ways that best serve the needs of their users.¹³

11. Veitch Decl. (Sept. 30, 2021); Potts Decl. (Sept. 30, 2021); Gutierrez Decl. (Sept. 27, 2021); Rumenap Decl. (Sept. 29, 2021).

12. Veitch Decl. (Sept. 30, 2021); Potts Decl. (Sept. 30, 2021); Gutierrez Decl. (Sept. 27, 2021); Rumenap Decl. (Sept. 29, 2021).

13. Veitch Decl. (Sept. 30, 2021); Potts Decl. (Sept. 30, 2021); Gutierrez Decl. (Sept. 27, 2021); Rumenap Decl. (Sept. 29, 2021).

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12. If the Bill takes effect on December 2, 2021, NetChoice's mission to protect free speech and free enterprise online would be directly and substantially hurt.

13. NetChoice members would also be harmed by the Bill's severe restrictions on their ability to exercise editorial discretion over their websites and applications (action that is protected under the First Amendment) and its provisions exposing our members to myriad potential private and Attorney General lawsuits if they do not comply with these onerous restrictions.

14. The Bill will not only harm the private parties whose editorial discretion it restricts, it will also limit user choice and would pollute family-friendly websites with highly offensive and objectionable content and products, greatly reducing the value of the services for both users and advertisers.¹⁴ Most users do not want to see harmful content like advocacy of white supremacy, homophobia or bigoted speech, advocacy of extremism and terrorism, medical disinformation like so-called miracle cures for Covid-19, bullying and harassment, and other highly objectionable content.¹⁵ Advertisers likewise do not want their names and products displayed alongside such content. Users and advertisers would likely abandon online businesses that are no longer permitted to moderate offensive and harmful content.

14. Gutierrez Decl. (Sept. 27, 2021); Rumenap Decl. (Sept. 29, 2021).

15. Veitch Decl. (Sept. 30, 2021); Potts Decl. (Sept. 30, 2021); Gutierrez Decl. (Sept. 27, 2021); Rumenap Decl. (Sept. 29, 2021).

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15. NetChoice’s members exercise editorial discretion over massive amounts of content, and 6 months in 2018 alone, Facebook, Google, and Twitter took some action on over 5 billion accounts or user-submissions—including 3 billion cases of spam, 57 million cases of pornography, 17 million cases of content regarding child safety, and 12 million cases of extremism, hate speech, and terrorist speech.¹⁶

16. Such an outcome would greatly harm our members by directly and durably undermining their business models. Perhaps more concerning, advertisers and users would associate this content with our members themselves, creating irreparable damage to our members’ reputations and harming them well into the future. We have already seen this loss of revenue happen when advertisers removed millions of dollars’ worth of ads due to the presence of “extremist content.”¹⁷ NetChoice members moved quickly to rectify the situation, but even in this short instance, NetChoice members lost millions.¹⁸

16. See NetChoice Social Media Content Moderation Transparency Report 1-3, <https://bit.ly/2UzXPct>.

17. See, e.g., Olivia Solon, *Google’s Bad Week: YouTube Loses Millions as Advertising Row Reaches US*, *The Guardian* (Mar. 25, 2017), <https://perma.cc/YWO5-BXGB>; Kim Lyons, *Coca-Cola, Microsoft, Starbucks, Target, Unilever, Verizon. All the Companies Pulling Ads from Facebook*, *The Verge* (Jul. 2, 2020), <https://perma.cc/LTC2-HKFW>.

18. *Id.*

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17. For example, in 2017 Google’s wholly owned subsidiary YouTube lost millions of dollars in advertising revenue after a number of major corporations including Walmart, Verizon, Johnson & Johnson, and Pepsi took down their ads after seeing them distributed next to videos containing extremist content and hate speech.¹⁹ Similarly, in 2020 Facebook saw a nearly identical response as some of the largest businesses in the world including Coca-Cola, Microsoft, Starbucks, Target, Hershey, Honda, and Unilever all pulled their ads and boycotted Facebook citing concerns of third parties’ use of the website to spread hate speech and misinformation.²⁰

18. While the short-term loss of revenue resulting from these examples was already substantial, it pales in comparison to the long-term reputational loss this Bill will inflict on YouTube and Facebook’s overall brand—not to mention the fact that such third-party content runs counter to these companies’ policies and standards. Once harmful or offensive content is associated with a business, it is nearly impossible to undo the harm. The content will forever be intertwined with a user’s or advertiser’s perception of the underlying business.

19. Olivia Solon, *Google’s Bad Week: YouTube Loses Millions as Advertising Row Reaches US*, *The Guardian* (Mar. 25, 2017), <https://perma.cc/YW5-BXGB>.

20. Kim Lyons, *Coca-Cola, Microsoft, Starbucks, Target, Unilever, Verizon. All the Companies Pulling Ads from Facebook*, *The Verge* (Jul. 2, 2020), <https://perma.cc/LTC2-HKFW>.

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19. The Bill prohibits the private exercise of editorial discretion over private websites and applications. The plain sweep of the law reaches almost all expression and every editorial tool NetChoice’s members have at their disposal.²¹ The vagueness in the operative provisions will ensure that NetChoice’s members are chilled from exercising their editorial discretion over whatever remaining expression the statute purports not to reach.²²

20. Under the Bill, NetChoice members will have to host content that they would otherwise remove or restrict because it violates their editorial policies (like their terms of service and community guidelines), including the harmful and objectionable forms of content referenced above. Under the Bill, these online services would be significantly constrained in their ability to remove harmful content that offends their users and advertisers. As a result, NetChoice members would be forced to host harmful and offensive content including but not limited to: racial epithets;²³ Nazi antisemitism;²⁴ aggressive

21. Veitch Decl. (Sept. 30, 2021); Potts Decl. (Sept. 30, 2021).

22. Complaint, *NetChoice v. Paxton*, No. 1:21-cv-00840-RP (W.D. Tex. Austin Div.).

23. See Cheyenne MacDonald, *These Abhorrent Images From Parler Show Why Apple Upheld its Ban*, Input (Mar. 10, 2021), <https://perma.cc/H7GV-ZFZQ>.

24. Nathan Grayson, *Valve Removes Nazi Steam Profiles After German Complaints*, Kotaku (Dec. 11, 2019), <https://perma.cc/6L8E-E7NB>; Brianna Sacks, *Reddit Is Removing Nazi And Alt-Right Groups As Part Of A New Policy And Some Users Are Confused*, BuzzFeed News (Oct. 25, 2017), <https://perma.cc/W7NL-CKGN>.

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homophobia and transphobia;²⁵ medical misinformation and harmful at-home “remedies;²⁶ dangerous conspiracy theories;²⁷ and cyberbullying.²⁸

21. They will also be forced to host certain speakers as long as a single user in Texas wants to view that speaker’s content. For instance, Neo-Nazi websites like Stormfront would be privileged from NetChoice’s members’ private editorial discretion, regardless of how patently offensive or even dangerous Stormfront’s content may be.

22. Likewise, the Taliban would be protected from commonsense editorial discretion as long as one of millions of Texas users sues for private “censorship” against the Taliban.²⁹

25. See Removing Harassing Subreddits, Reddit (Jun. 10, 2015), <https://perma.cc/65FETPyC>.

26. See Beth Mole, *Facebook Bans Health and Conspiracy Site Natural News [Updated]*, ARS Technica (Jun. 10, 2019), <https://perma.cc/2875-RCYS>.

27. See Marianna Spring, *The Casualties of This Year’s Viral Conspiracy Theories*, BBC News (Dec. 26, 2020), <https://perma.cc/XAD2-3528>.

28. Alexandria Ingham, *7 Real Life Cyberbullying Horror Stories*, Family Orbit Blog (Nov. 11, 2018), <https://perma.cc/52DW-B3JN>.

29. *Taliban slam Facebook for curbing Afghanistan’s freedom of speech after social media ban*, India Today (August 18, 2021), <https://bit.ly/3zgWN14>.

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23. The potential for reputational harm is staggering. And the potential to repel users and advertisers is even worse: Trust between NetChoice members and their users and advertisers would evaporate and be difficult to regain—and understandably so. Society, online and off, has an obligation to protect the most vulnerable among us and to create inclusive services that attract and retain users of all backgrounds.³⁰

24. NetChoice’s members would incur substantial, unrecoverable costs in complying with the Bill’s overly burdensome requirements. These costs could not be recouped if Plaintiffs’ challenge to the Bill is ultimately successful on the merits.

I declare under penalty of perjury under the laws of the United States of America, pursuant to 28 U.S.C. § 1746, that the foregoing to be true and correct to the best of my knowledge.

Executed on this September 30, 2021 in Washington, DC.

/s/ _____
Carl Szabo

30. Gutierrez Decl. (Sept. 27, 2021); Rumenap Decl. (Sept. 29, 2021).

**APPENDIX D — Declaration of YouTube in the
United States District Court for the Western District
of Texas, Austin Division, Filed October 1, 2021**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civ. Action No. 21-cv-840

NETCHOICE, LLC, D/B/A NETCHOICE, A 501(C)(6)
DISTRICT OF COLUMBIA ORGANIZATION; AND
COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6) NON-
STOCK VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

**DECLARATION OF YOUTUBE IN
SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

I, Alexandra N. Veitch, declare as follows:

1. I am the Director of Public Policy for the Americas at YouTube. As part of my role, I lead a team that advises

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the company on public policy issues around online, user-generated content. My team advises on YouTube's content moderation policies and practices, identifies when changes to our policies or their application are required in response to new challenges, and assesses policy proposals and legislation, such as Texas's H.B. 20, that would affect YouTube's ability to moderate content.

2. The statements contained in this declaration are made upon my personal knowledge. I am over the age of 18 and am competent to make the statements herein. I make this Declaration in Support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter. If called as a witness, I could and would testify under oath as follows.

3. YouTube is an online platform that allows users to create, upload, and share videos with others around the world. YouTube strives to be a community that fosters self-expression on an array of topics as diverse as its user base, and to nurture a thriving creative and informational ecosystem, as well as an engine of economic opportunity. Over two billion logged-in users worldwide visit each month, and over 500 hours of content are uploaded every minute by an extraordinarily diverse community of creators, who span over 100 countries and 80 languages. On a daily basis, users watch over a billion hours of video on YouTube.

4. YouTube is a part of Google LLC, a member of NetChoice and CCIA. YouTube does business in Texas and many of its users are located in Texas. Texas users

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have access generally to all content on YouTube that is available in the United States and worldwide.

Responsibility at YouTube

5. YouTube believes that the Internet is a force for creativity, learning, and access to information. Supporting the free flow of ideas is at the heart of YouTube's mission. We believe that the world is a better place when we listen, share, and build community through our stories. We strive to make YouTube as open as possible: to empower users to access, create, and share information. We believe that openness brings opportunity, community, and learning, and enables diverse and authentic voices to break through.

6. Yet an open platform means challenges, and it demands accountability to connect people with quality information. When you create a place designed to welcome many different voices, some will inevitably cross the line. Bad actors will try to exploit platforms for their own personal gain, even as we invest in the systems to stop and deter them. Harmful content on our platform makes YouTube less open, not more, by creating a space where creators and users may not feel safe to share. We believe that, in order to have and protect openness, you must have responsibility. A commitment to openness is not easy. It sometimes means leaving up content that is outside the mainstream, controversial, or even offensive. But YouTube believes that hearing a broad range of perspectives ultimately makes us a stronger and more informed society, even if we disagree with some of those views. YouTube seeks to strike the right balance between

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fostering freedom of expression and decreasing the likelihood that users will encounter harmful content on our platform.

7. These beliefs and values drive the decisions we've made in building YouTube, and the editorial judgements we've made in crafting the content moderation tools and policies that protect our platform. We want YouTube to live up to the ideals of these values—despite challenges, complexities, and emerging threats. We work to maintain our community as a positive, open, and useful space on the Internet. Our balanced approach to content moderation, described below, represents these values. While important work remains to be done, this approach also represents years of ongoing conversations amongst YouTube and its users, creators, and advertisers, of the right balance for our products and businesses.

8. Responsibility is YouTube's number one priority. Indeed, our unique business model only works when our viewers, creators, and advertisers all have confidence that we are living up to our responsibility as a business. That responsibility has been critical to YouTube's success and essential to our continued growth, so we've invested heavily in hiring people and developing products, technology, and systems to apply our editorial discretion at scale.

YouTube's Approach to Responsibility and Content Moderation

9. YouTube takes a multi-faceted and nuanced approach to exercising its discretion in setting its content-

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moderation policies, working to distinguish those posts that are truly problematic, those that are borderline, and those that contribute positively to the YouTube community. To that end, we have a diverse set of tools to help us enforce our content-moderation policies, including: age-gating, removing videos and comments, appending warnings, and suspending and/or terminating accounts. We also have other tools to help us provide authoritative information on our platform - such as the use of information panels. And we further limit when YouTube makes recommendations of borderline content to users. Because removing content is only part of the discussion, YouTube has chosen to develop and invest in this diverse set of tools that are essential in balancing free expression and responsibility on our platform. Simply put, these tools give us broader options than simply removing (or not removing) content from our platform.

10. Yet H.B. 20 would eliminate much of our ability to make these kinds of choices in setting our policies and would subject YouTube and its community to serious harm by frustrating our ongoing efforts to make YouTube a far more accessible and welcoming place.

11. YouTube has always had policies that govern how people may use the service, including restrictions on the types of content that they may post. These policies are designed and regularly updated to make YouTube a safer and more enjoyable place for users and creators, and reflect years of experience, investment, and an ongoing conversation between YouTube and its users. YouTube's approach has four pillars, set forth below.

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12. **First, we remove content** that violates our **Community Guidelines**, a series of clear, publicly-facing policies governing what is allowed and not allowed on our platform. We¹ work closely with outside experts to help us craft these policies (and their enforcement), primarily focused on preventing real-world harms. The Community Guidelines prohibit a variety of harmful, offensive, and unlawful material, such as hate speech, pornography, terrorist incitement, false propaganda spread by hostile foreign governments, promotion of fraudulent schemes, spam, egregious violations of personal privacy like revenge pornography, violations of intellectual property rights, bullying and harassment, conspiracy theories, and dangerous computer viruses. A full list of YouTube’s Community Guidelines is available at: <https://bit.ly/3CbToFY>.

13. We employ an array of remedial actions when enforcing our policies, ranging from demonetization (i.e., removing a creator’s ability to earn advertising revenue) and warnings, to service-usage penalties such as temporary suspensions of uploading rights and permanent termination of accounts. When an account uploads content that violates the Community Guidelines, the content is removed and the account generally receives a warning. Subsequent violative content can result in a “strike,” which temporarily suspends the account’s ability to upload

1. We communicate our practices to all users through YouTube’s Community Guidelines, which are incorporated into our Terms of Service. A user must agree to both the Terms and the Community Guidelines in order to create an account and upload materials to YouTube.

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content. Generally, three strikes within 90 days leads to the account's termination and deletion of all content uploaded from the account. In the case of severe abuse (such as predatory behavior, spam, or pornography), YouTube will immediately terminate accounts to protect the YouTube community.

14. Second, we reduce the spread of harmful misinformation and content that brushes up against our policy lines. We refer to content that comes close to violating our Community Guidelines (but does not) as "borderline content". Borderline content is just a fraction of 1% of what is watched on YouTube in the United States, and examples include videos promoting a phony miracle cure for a serious illness or conspiracy theory videos (e.g., "the moon landing was faked").

15. Rather than remove such content outright, we've chosen to take steps to reduce the spread of such content using a variety of methods. Because such borderline content may be disturbing or otherwise inappropriate for some viewers, YouTube has chosen to take action (using algorithms) to reduce its availability, including updating YouTube's recommendations system, and disabling features like sharing, commenting, and liking for the borderline content. We set a high bar for what videos we display prominently in our recommendations on the YouTube homepage or through the "Up next" panel.

16. Third, we raise authoritative and trusted content. For subjects such as news, science, and historical events, we believe that accuracy and authoritativeness

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are key and the quality of information and context matter most (as compared to other topics such as music or entertainment, where we look to relevance, newness, and popularity). Here, content moderation can include affirmatively providing users with information to help them make choices about whether or not to interact with certain kinds of content. It is sometimes helpful to provide viewers with additional context about the content they are watching.

- **Information Panels.** We display a variety of information panels that provide users with context on content relating to topics and news prone to misinformation, as well as context about who submitted the content. One example is an information panel displayed on videos from a channel owned by a news publisher that is funded by a government.² Another example is National Suicide Prevention Hotline information that we display in response to search queries for terms related to suicide. Information panels, across all types, have been collectively shown billions of times. The COVID-19 information panels alone have been shown over 400 billion times.
- **Breaking News.** Similarly, after a breaking news event, it takes time to verify, produce, and publish high-quality videos. Journalists often write articles first to break the news rather than produce videos. So YouTube has chosen to prioritize these articles

2. <https://bit.ly/3fpnHzu>.

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and provides a short preview of news articles in search results on YouTube that link to the full article during the initial hours of a major news event.

17. Fourth, we reward trusted, eligible creators by setting a higher bar for ads/monetization. Users must meet additional eligibility requirements³ for the privilege of earning advertising revenue (“monetization”) on videos they upload. They must be eligible for, and join, the YouTube Partner Program (“YTPP”) and follow YTPP guidelines.⁴ Just over 2 million users worldwide, out of the 2 billion monthly users generally, are part of the YTPP and monetize their videos. Such users and their monetized videos also must meet more restrictive criteria, including the Ad-friendly Content Guidelines, because advertisers typically do not want to be associated with controversial or sensitive content on YouTube.⁵ Violations of the guidelines may result in a range of actions, such as (1) ads being disabled on a particular video, (2) suspending or permanently disabling a user’s eligibility to monetize ads, (3) or, in exceptional circumstances, suspending or disabling a user’s account altogether to protect the integrity of the platform or protect our users from harm.

3. <https://www.youtube.com/howyoutubeworks/policies/monetization-policies/>

4. https://support.google.com/youtube/answer/72851?hl=en&ref_topic=9153826

5. <https://bit.ly/3ojt7B9>.

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18. **Scale.** In Q2 2021 alone, YouTube removed over 4 million channels (or accounts), over 6 million videos, and over 1 billion comments, for violations of YouTube’s Community Guidelines alone. In Q2 2021, 29.9% of the videos removed were due to child safety issues.⁶ 55% of removed comments were due to spam. Further statistics (including others discussed in⁷ this declaration) may be found in the YouTube Community Guidelines enforcement report, updated quarterly.⁸

19. H.B. 20 significantly limits these ongoing efforts to prevent harm to our users and to make YouTube an accessible and welcoming place.

The Evolution of YouTube’s Content Moderation

20. YouTube has always had rules of what speech we permit on the platform, and we have never claimed that YouTube would host all user-generated content. YouTube has never allowed pornography, incitement to violence, or content that would harm children, for example.

6. Of those videos, more than 30,000 contained misinformation about the COVID-19 vaccine. This was part of YouTube’s larger effort to remove medical misinformation about the virus, which resulted in the removal of over 1,000,000 videos related to dangerous or misleading COVID-19 information since February 2020.

7. YouTube uses automated systems to identify comments that are likely spam.

8. <https://bit.ly/2VhAsVG>.

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21. The harms of user-generated content are ever-evolving and often unpredictable, and YouTube’s content moderation policies have necessarily had to evolve to address them. Each of our policies is carefully thought through (so they are consistent, well-informed, and can be applied to content from around the world), and often developed in partnership with a wide range of external industry and policy experts. We revise them regularly to account for new and different content or behavior that YouTube deems unacceptable, unsafe, or unwelcome on its service. YouTube has also invested significantly in being able to detect and respond quickly to emerging harms. YouTube’s Intelligence Desk, an internal team, monitors news, social media, and user reports to detect these new trends—such as the unpredictable viral ‘dares’ that risk significant physical harm by, for instance, encouraging viewers to ingest Tide Pods—so as to address them before they become a larger issue. YouTube has over 100 people working to develop new content-moderation policies and improve existing ones.

22. This approach and investment has given YouTube flexibility to build and maintain responsible practices to handle legal but potentially harmful speech. In 2020, for instance, YouTube updated its policies related to medical misinformation alone more than ten times, which is in line with historical trends. In 2019, YouTube made over 30 updates to its content moderation policies generally—on average, once every 12 days. We saw a similar pace in 2018. And when necessary, YouTube is able to react quickly to promote the safety of its users in changing and emerging contexts. For example, when mobile phone towers in the

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U.K. were set on fire after a conspiracy theory video blamed COVID-19 on 5G wireless networks, we updated our Community Guidelines in a single day to ban and remove that harmful content.

23. YouTube’s judgments evolve over time as social and cultural conditions change or unforeseen threats and challenges arise. For instance, after a recent violent military coup in Myanmar, YouTube took action against five existing YouTube channels run by the Myanmar military, terminating the channels to prevent the military from promoting political propaganda.⁹

Algorithms and Machine Learning

24. YouTube’s engineers have designed and built sophisticated software systems using machine learning—a type of algorithm—to moderate content in two key ways: 1) to proactively identify and flag potentially harmful content uploaded to the site, and 2) to automatically remove content that is identical or substantially similar to violative content that was previously removed. Machine learning is the product of human decision-making and is used to implement the standards set in our Community Guidelines, thereby reflecting YouTube’s editorial judgments. Our engineers design these systems to identify certain types of content. We then use data inputs (reflecting the judgment of human reviewers) to train these machine learning systems to identify patterns in content—both the rich media content in videos, as well as textual content like metadata and comments—so that our

9. <https://nyti.ms/3xoq0IW>.

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systems can make predictions and find new examples to match the identified types of content. Machine learning is well-suited to detecting patterns, which helps us to identify new content similar to that we have already removed, even before it is ever viewed. We also use hashes (or “digital fingerprints”) to automatically identify copies of known violative content before they are ever made available for viewing. These¹⁰ systems automatically remove content only where there is high confidence of a policy violation—*e.g.*, spam—and flag the rest for human review. Algorithmic detection identifies the vast majority of content deemed to violate the Community Guidelines.

25. Machine learning is critical to implementing all aspects of YouTube’s approach to content moderation and keeping our users safe. YouTube relies heavily on technology and algorithms to moderate content and cannot feasibly do otherwise, since over 500 hours of video are uploaded to YouTube every single minute of every day. At this massive scale, it would be virtually impossible to remove content that violates our Community Guidelines without the use of algorithmic tools, even with tens of thousands of reviewers watching newly uploaded videos 24 hours a day, 7 days a week. Due to large multi-year investments in machine learning algorithms, since 2017 we have seen a 70% drop in the quarterly estimate of the number of views for video deemed violate to our policies (known as the violative view rate, “VVR”).¹¹

10. In Q1 2021, 27.8% of removed videos were taken down before a single view. A further 39% of removed videos had between 1 and 10 views. <https://bit.ly/3fpoLmY>

11. See <https://bit.ly/38noixm>.

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26. The vast majority of Community Guidelines violations were flagged by algorithms. In Q2 2021, YouTube removed 6,278,771 videos that violated the Community Guidelines. The vast majority—5,927,201, or 94% of the total removals—were automatically flagged for moderation by YouTube’s algorithms. About 5%—351,570 videos—were removed based on initial flags by a user or other human. This removal system is highly efficient: the majority of removed videos were removed before accumulating more than 10 views. Similarly in Q2 2021, YouTube also removed over 1 billion comments, 99.5% of which were flagged for moderation by YouTube’s automated systems.

27. Our machine learning and human reviewers work hand in hand: machine learning is effective for scale and volume, whereas human reviewers can evaluate context for more nuanced enforcement of our policies. Once our machine learning systems flag a potentially violative video without high confidence of a policy violation, human reviewers assess whether the content does indeed violate our policies, and remove those that do. In making those judgment calls, the reviewers seek to protect content that has an educational, documentary, scientific, or artistic purpose, keeping such videos on the platform. These human decisions and judgments are in turn used as data inputs to improve the accuracy of our automated detection systems so that we are constantly updating and improving the system’s ability to identify potentially violative content. Using that human review, our machine learning systems can automatically remove re-uploads of content that has already been reviewed and determined to

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violate our policies. In addition, when we introduce a new policy or alter an existing one, it takes our systems time to improve detection rates and begin accurately detecting violative content at scale. Our enforcement of new policies improves over time.

Further Examples of Our Values Embodied in YouTube's Content Moderation Processes.

28. During summer 2020, YouTube faced a dilemma when confronting the tension that arises between 1) accuracy when enforcing content policies and 2) the need to limit potentially harmful content accessible on the site. In response to COVID-19 lockdowns worldwide, YouTube took steps to protect the health and safety of our extended workforce and reduced in-office staffing. As a result of reduced human review capacity, YouTube had to choose between limiting enforcement while maintaining a high degree of accuracy, or relying on automated systems and algorithms to cast a wider net to remove potentially harmful content quickly but with less accuracy. Because of YouTube's belief that responsibility is critical, YouTube chose the latter, despite the risks that automation would lead to over-enforcement—in other words, removing more content that may not violate our policies for the sake of removing more violative content overall.

29. For certain sensitive high-risk policy areas, such as violent extremism and child safety, YouTube chooses to accept a lower level of accuracy to remove as many pieces of violative content as possible (again, to protect the health and safety of our extended workforce and reduced in-office

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staffing). This also means that, in these areas specifically, a higher amount of non-violative content was removed. YouTube’s decision to over-enforce in these policy areas—out of an abundance of caution—has led to a more than 3x increase in removals of content that our systems suspected was tied to violent extremism or potentially harmful to children. These include dares, challenges, or other posted content that may endanger minors. Moreover, YouTube will immediately suspend users for egregious violations (rather than allowing a user multiple ‘strikes’).

30. **EDSA.** Because YouTube values creativity and learning, our content policies have an exception for videos that would otherwise be in violation if there is a compelling educational, documentary, scientific, or artistic reason that is apparent in the content or context of the video. YouTube refers to this exception as “EDSA,” which is a critical way to make sure that important speech remains on YouTube, while simultaneously protecting the wider YouTube ecosystem from harmful content.¹² These decisions depend on a variety of factors that depend on context and require nuanced judgments, and the bar varies by video and policy category. For example, hate speech and encouragement of violence violate our policies but a documentary about WWII that features speeches from Nazi leaders may be allowed if the documentary provides historical context and does not aim to support the despicable views promoted by the Nazis. There are also certain types of content where we don’t allow an EDSA exception under any circumstances because of

12. <https://bit.ly/2VhM7DW>

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the sensitivity and egregiously harmful nature of the content, or when it violates the law. For example, content that endangers children or any content with footage of deadly violence filmed by the perpetrator is not allowed on YouTube regardless of the context.

Transparency

31. Given YouTube's scale, we sometimes make mistakes, which is why creators can appeal video removal decisions. YouTube generally notifies creators when their video is removed, and we provide a link with instructions on how to appeal the removal decision. If a creator chooses to submit an appeal, the video goes to human review, and the decision is upheld, reversed, or modified (modification leads to reinstatement of the video but with restricted access). We provide transparency about our appeals process. As reported in our most recent Transparency Report, in Q2 2021, creators appealed approximately 217,446 videos, or 3.5% of all videos removed. Of those, more than 52,696 were reinstated.

The Burdens Posed by H.B. 20

32. I understand that on September 9, 2021, the State of Texas enacted H.B. 20, which will go into effect on December 2, 2021.

33. The restrictions of H.B. 20 would fundamentally burden and undermine YouTube's ability to operate responsibly and enforce the content-moderation policies described above. The statute has a broad definition

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of “censorship” (“to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.”) that covers YouTube’s broad portfolio of content-moderation tools (reflecting our judgment and discretion) across a broad variety of topics.

34. “Expression” is defined broadly by H.B. 20, and would include any and all user-generated content on YouTube.

35. For instance, YouTube simply “blocks” or “removes” certain speech like hate speech that violates our Community Guidelines’ policy on hate speech. But because hate speech expresses “viewpoints”—as abhorrent as those viewpoints are—H.B. 20 would bar YouTube from taking any content moderation action against such content, such as removing it, age-restricting it, or demonetizing it.

36. H.B. 20’s “censorship” prohibition will directly prevent YouTube from enforcing critical standards designed to prevent the degradation of our users’ experiences on the platform and to ensure their safety, including for children. YouTube needs discretion and flexibility when designing, building, and maintaining our content-moderation policies because it encounters such a broad range of content, and at such high volumes. As described above, YouTube’s Terms of Service, Community Guidelines, and other content-moderation rules include flexible terms that allow YouTube to exercise its judgment about specific uses or pieces of content in order to provide a better and safer user experience.

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37. While H.B. 20 contains certain content exceptions chosen by the Texas Legislature under Section 143A.006, the state's narrow choices mean that the broad restrictions on content moderation would still eliminate wholesale many of the categories of content (in both our Community Guidelines and Advertising policies) that YouTube has chosen to moderate.

38. YouTube currently has numerous viewpoint-based policies against many kinds of harmful content, for which H.B. 20 has no applicable exception. For example, YouTube's Community Guidelines has a Violent Criminal Organizations policy¹³ under which YouTube currently removes content produced by violent criminal or terrorist organizations ("VCTOs"), content praising or justifying violent acts carried out by VCTOs, content aimed at recruiting members for VCTOs, or hostage videos. In order to comply with H.B. 20, YouTube would have to stop removing such violent extremist content. Similarly, paragraphs 41-45 below discuss examples of additional categories ranging from dangerous pranks risking imminent harm, drug use, suicide/self harm, animal abuse, and medical misinformation.

39. H.B. 20 seems to allow moderation of content that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group." But this limited exception actually excludes many categories found in YouTube's Community Guidelines

13. bit.ly/3m0tMVo.

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hate speech policy.¹⁴ 143A.006(3). For example, YouTube removes content “promoting violence or hatred against individuals or groups based on,” among other things, veterans status or sexual orientation. H.B. 20 would stop YouTube from taking action against, for example, content promoting violence or hatred against veterans. Even in the categories that H.B. 20 enumerates, H.B. 20 would still bar YouTube from taking action against content “promoting violence or hatred” without a specific threat of violence.

40. Reflecting our view of the nuance involved in balancing freedom of expression and responsibility, YouTube has chosen to build systems and processes that apply different standards for different content-moderation actions. For example, we apply the Community Guidelines for removals, and the Ad-friendly Content Guidelines for demonetization. We also age-restrict, reduce availability or functionality, or restrict other borderline content (which otherwise remains available on our platform). By treating all these actions as prohibited “censorship,” H.B. 20 will eliminate YouTube’s discretion to find the right balance between free expression on YouTube and responsibility for fostering a safe community for its users. The following are examples showing the nuance and complexity of YouTube’s content moderation policies applied in contexts where H.B. 20 would prohibit YouTube from taking action.

41. **Dangerous Pranks.** Under our Community Guidelines we remove videos depicting extremely

14. https://support.google.com/youtube/answer/2801939?hl=en&ref_topic=9282436

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dangerous challenges that pose an imminent risk of physical injury, such as the well-known “Tide Pod” challenge. Another example is the “No Lackin” challenge, where people post videos of themselves pointing guns at others.¹⁵ Because YouTube is concerned that minors could easily imitate such challenges, we may allow, but age-restrict, content that explains these challenges in an educational or documentary way. However, YouTube may allow, without restriction, a video warning minors against performing such challenges. H.B. 20 would require YouTube to treat each of these examples of dangerous prank-related content equally and leave all of them up on our platform.

42. Drug Use. Under our Community Guidelines, we remove videos with depictions of the use of hard drugs (like intravenous heroin injection), and depictions of minors using *any* alcohol or drugs (using vaporizers, e-cigarettes, tobacco, or marijuana). Still, we may allow videos that discuss the scientific effects of drug use, content that does not promote or glorify drug usage (e.g., a personal story about the opioids crisis), or news reports about drug busts (with no visible consumption or distribution). Such content, especially if it shows the injection of drugs, may still be age-restricted. H.B. 20 would require YouTube to treat each of these different examples of drug use-related content equally and leave all of them up on our platform.

15. News articles report that this challenge was involved in one 2019 death in the Houston area. <https://abc13.com/no-lackin-challenge-teen-shooting-killed-playing-with-guns/5009272/>

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43. Suicide. Our Community Guidelines prohibit (1) videos promoting or glorifying suicide, (2) providing instructions on how to self-harm or die by suicide, and (3) graphic images of self-harm posted to shock or disgust viewers. Still, we may permit, without advertising, videos with first-person accounts (e.g., a biography or detailed interview on survivors and their pasts) and detailed descriptions of suicide. Further, for searches for terms related to suicide, YouTube shows authoritative content helping users connect with the National Suicide Prevention Hotline. H.B. 20 would require YouTube to treat each of these different examples of suicide-related content equally and leave all of them up on our platform.

44. Animals. Under our current Community Guidelines, we remove depiction of content that includes a human maliciously causing an animal to experience suffering, or where animals are encouraged or coerced to fight by humans. Under our Ad-Friendly Content Guidelines, we demonetize, but allow, videos with graphic depictions of skinning or slaughtering animals. We permit advertising on videos portraying animal preparation for eating by professionals focusing on the trade and act of cutting animals, or the preparation of meat or fish (such as BBQ cooking techniques). H.B. 20 would require YouTube to treat each of these different examples of animal-related content equally and leave all of them up on our platform.

45. Medical Misinformation. YouTube does not allow certain types of misleading or deceptive content with serious risk of egregious harm, like medical misinformation (such as content claiming that harmful

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substances or treatments can have health benefits). This includes content about COVID-19 that poses a serious risk of egregious harm, such as treatment misinformation. One example is content that promotes drinking “mineral miracle solution (MMS)” as a treatment for COVID-19. The FDA has warned that “MMS Consumers Are Drinking Bleach” since “when mixed according to package directions, [MMS products] become a strong chemical that is used as bleach.¹⁶” H.B. 20 would bar YouTube from taking any content moderation action against content expressing these viewpoints.

46. More generally, much of what YouTube does is to vary “access or visibility” to certain pieces of content—or certain classes of content—according to subjective judgments about the viewpoint expressed in the speech in accordance with its policies and what YouTube believes will be most relevant to individual users.

47. Because H.B. 20’s definition of “censor” includes “restrict” and “deboost,” H.B. 20 would prohibit YouTube’s approach to borderline content—content that, in our judgement, comes close to violating our Community Guidelines. Rather than remove this content entirely, YouTube currently takes steps to reduce the spread and restrict its availability (rather than remove the content outright). In 2019, we changed our recommendation system to reduce suggesting such borderline content to users.

16. <https://bit.ly/3kNf8BF>.

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48. YouTube has designed our search ranking systems and algorithms to prioritize different factors depending on the search term requested. In areas such as music or entertainment, we often use relevance, freshness, or popularity to rank search results. In other areas where veracity and credibility are key, including news, politics, and medical or scientific information, our search systems prioritize surfacing authoritative content from trusted sources. For example, when you proactively search for news-related topics, a Top News section will appear near the top of search results, which raises relevant results from authoritative voices including news sources like CNN and Fox News.

49. So H.B. 20 will forbid YouTube from making both *individualized decisions* that perhaps one user will prefer certain content relative to other content because of the “viewpoints” expressed in that content; and *broad decisions* that certain content should be emphasized or deemphasized across all users.

50. H.B. 20’s definition of censorship includes action to “demonetize” based on viewpoint. Currently, YouTube requires that users wishing to monetize their content comply with Community Guidelines, but also an additional set of viewpoint-based guidelines, the Advertiser-friendly Content Guidelines. H.B. 20 would bar YouTube from enforcing these guidelines, and prevent YouTube from demonetizing harmful/offensive content. YouTube would be forced to continue to let a harmful content creator earn advertising revenue off YouTube’s platform and thus encourage that creator to upload as much harmful and offensive content as quickly as possible.

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51. Finally, H.B. 20 prohibits YouTube from engaging in its *own speech* because it prohibits YouTube from “otherwise discriminat[ing]” against user-submitted expression. This provision—as vague and broad as it is—encompasses situations in which YouTube appends its own expression to user-submitted content, whether to express disagreement with or disapproval of that expression, or to add context YouTube believes is necessary for certain topics prone to misinformation. For certain content (e.g., potential hate speech) that is both close to the Community Guidelines line for removal and is offensive to viewers, YouTube adds a warning message before viewers can watch the video. Because YouTube will only append its own expression based on the “viewpoint” expressed in the content, that would constitute censorship under H.B. 20. Similarly, YouTube displays a variety of information panels that provide users with context on content relating to topics and news prone to misinformation, as well as context about the publishers of the content.

52. Therefore, YouTube will face an impossible choice between (1) risking liability by moderating content identified to violate its standards or (2) subjecting YouTube’s community to harm by allowing violative content to remain on the site.

Other Impact

53. Age Gating, Restricted Mode, and YouTube Kids. YouTube provides features, tools, and age-gated offerings to sensitive users and organizations (such as libraries and families with young children). These features are a way for YouTube to balance free expression with

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responsibility. For example, YouTube uses age-gating, a process whereby certain content—such as material featuring sexual situations, heavy profanity, or graphic depictions of violence—is made inaccessible to users under age 18. In order to view this content, users coming to YouTube must be signed-in and the age associated with their account must be 18 or older in order to view the video. YouTube also has a feature called Restricted Mode, an optional setting that sensitive users can choose to use to limit the content they see on YouTube. It is also used by libraries, schools, and public institutions. Videos containing potentially adult content like drugs or alcohol use, sexual situations, or violence are not shown to users in Restricted Mode.¹⁷ YouTube also produces an app called YouTube Kids, which includes only videos that are determined to be suitable for children through a combination of human and algorithmic review, and which blocks access to comments more suitable for adults. For example, YouTube Kids does not show videos with paid product placements or endorsements, nor overly commercial or promotional videos. Over 35 million weekly viewers in more than 100 countries use YouTube Kids.

54. H.B. 20’s prohibition on “censorship” includes “restricting” content. Complying with that requirement would force Restricted Mode and YouTube Kids to display all content, even if that content would otherwise be violative of YouTube’s policies, or is content that YouTube (and a reasonable user would) believe in its judgment to be inappropriate for those audiences. Similarly, YouTube would have to stop age-gating such content. These

17. <https://bit.ly/3jiTW11>.

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changes would contradict the purpose of these features and products to give parents options for increased safety, forcing YouTube to make age-inappropriate content available to minors generally, and to other users choosing to use Restricted Mode.

55. Disclosure and Notice Requirements. The “disclosure” and operational restrictions will likewise burden YouTube’s discretion in designing its content-moderation systems and processes. While YouTube endeavors to be transparent with its users and creators, this law would impose ambiguous and wide-ranging transparency requirements on all of YouTube’s decisions to remove content of any kind. For example, these transparency requirements would apply to all types of content—not just videos—on YouTube. When removing videos under the Community Guidelines, YouTube generally provides users with notice, a complaint system, and an ability to appeal—but it does not currently provide any of this when removing comments.

56. To comply with H.B. 20, YouTube would have to expand these systems’ capacity by over 100X—from a volume handling millions of removals to that of over a billion removals: during the last quarter (Q2 2021), YouTube removed 9.5 million videos and well over 1.16 billion comments. YouTube would have to provide notice of each of these 1.16 billion decisions to remove a comment. When any users receiving notice complain about, or appeal, those 1.16 billion removal decisions, YouTube will have to handle those requests within an accelerated response period.

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57. Though YouTube endeavors to be transparent about its Terms of Service, Community Guidelines, and other content moderation practices generally, H.B. 20 does not explain the level of “specific information” required by the public disclosures section. For example, it seeks public disclosure of “search, ranking, or other algorithms or procedures.” Public disclosure of that aspect (and others) of YouTube’s content moderation would risk revealing its trade secrets and other confidential intellectual property to our competitors, since YouTube relies on sophisticated proprietary software systems, including machine learning algorithms, in which YouTube has invested significant resources to build and develop. Moreover, detailed disclosure of technical details of our enforcement methods would risk empowering the unscrupulous users seeking gaps and weaknesses in our systems for exploitation and to evolve their tactics to evade our efforts. For these reasons, YouTube does not publicly disclose these kinds of technical details.

58. H.B. 20 requires a biannual transparency report calling for expansive though ambiguous disclosure including, for example, whenever YouTube took action including “any other action taken in accordance with the platform’s acceptable use policy,” including detailed breakdowns by rule violated and source of alert. At the immense scale that YouTube operates, this level of granular reporting of every content-moderation decision would be extremely burdensome.

59. The specter of liability from countless private lawsuits (only for the anti-editorial-discretion provisions) and Attorney General enforcement (for all of the

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provisions) will substantially chill YouTube’s use of editorial discretion to moderate content.

60. User Scope. H.B. 20 prohibits “censoring” a Texas “user’s ability to receive the expression of another person,” and that “person” need not be in Texas. YouTube has no way to comply without altering its editorial policies platform-wide, because YouTube’s Community Guidelines are enforced consistently across the globe, regardless of where the content is uploaded. When content is removed for violating YouTube’s Community Guidelines, it is removed globally.

61. Harm to YouTube. To comply with this law, YouTube would have to eliminate many, if not most, of our content-moderation standards that currently apply to any video and comment posted platform-wide. Users will leave YouTube for platforms that are able to responsibly moderate their platforms. Controversial content generally does not perform well with users on YouTube (compared to other categories like music or comedy). Advertisers do not want their brands associated with problematic content and actors. We’ve seen first-hand that when advertisers lack trust in our systems, they scale back their spend on YouTube. In response to several prior incidents involving extremist, child exploitation, and other harmful content, advertisers (who do not want their advertisements next to objectionable content) have stopped advertising on YouTube. Loss of advertiser trust negatively impacts creator earnings (since that revenue is dependent upon the willingness of advertisers to associate their brands with YouTube content), causing creators, too, to seek alternative platforms. The cost of not taking sufficient

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action over the long term results in lack of trust from our users, advertisers, and creators. Past egregious actions of just a handful of creators have harmed the reputation of YouTube and the creator community among advertisers, the media industry and most importantly, the general public. When just one creator does something particularly blatant—like conducts a heinous prank where people are traumatized, promotes violence or hate toward a group, demonstrates cruelty, or sensationalizes the pain of others in an attempt to gain views or subscribers—we have seen how it can cause lasting damage to the community, including viewers, creators and the outside world.

62. This harm is why responsibility is critical to YouTube’s success, and is our number one priority. YouTube has responded to these past incidents by updating the way we moderate content with stricter policies, better controls, and greater transparency. We’ve made much progress to earn trust, recognizing more can and should be done. Yet H.B. 20 would unilaterally replace much of this entire framework to content moderation and runs contrary to user safety and enjoyment of the user experience.

I declare under penalty of perjury under the laws of the United States of America, pursuant to 28 U.S.C. § 1746, that the foregoing to be true and correct to the best of my knowledge. Executed on this September 30, 2021 in Washington, DC.

Alexandra N. Veitch

**APPENDIX E — Declaration of Facebook in the
United States District Court for the Western District
of Texas, Austin Division, Filed October 1, 2021**

IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF TEXAS AUSTIN DIVISION

Civ. Action No. 1:21-cv-00840-RP

NETCHOICE, LLC, D/B/A NETCHOICE, A 501(C)(6)
DISTRICT OF COLUMBIA ORGANIZATION; AND
COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6) NON-
STOCK VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

**DECLARATION OF FACEBOOK
IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

I, Neil Potts, declare as follows:

1. I am currently a Vice President, Trust & Safety Policy, at Facebook, Inc. (“Facebook”), and have been

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employed there since April 2016. The statements contained in this declaration are made upon my personal knowledge. I am over the age of 18 and am competent to make the statements herein. I make this Declaration in Support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter. If called as a witness, I could and would testify under oath as follows.

Background

2. Facebook was founded in 2004. Its products enable more than 3 billion people around the world to share ideas, offer support, and discuss important issues, including politics, public health, and social issues. Users of Facebook's products share over a billion stories and over 100 billion messages, every day.

3. On Facebook, people can share status updates, photos, videos, and links (among other types of content) with family and friends. People can also follow Pages managed by businesses, organizations, and public figures (such as politicians or celebrities) that share content, as well as join Groups or attend Events that relate to topics of interest to them. These are some of the many ways in which people can share and interact with others on Facebook.

4. The average person could be flooded with millions of posts each day from people all over the world, but most people do not have time (or interest) to look at all of their available content. As a result, Facebook has invested significant resources to develop systems to "rank" content

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that users are most likely to find relevant and meaningful. The rankings are unique to each user and are informed by their individual choices and actions (both historical and real-time).

5. Facebook displays ranked content in a curated News Feed, a feature Facebook launched in 2006. News Feed uses algorithms to show a constantly updated and personalized list of stories—for example, vacation pictures from friends, videos from family gatherings, articles from local or national news outlets, and much more.

6. Millions of Facebook users reside in Texas and have access to and engage with content posted by users across the United States and throughout the world.

Content Moderation

7. Facebook’s mission is to give people the power to build community and bring the world closer together.

8. Facebook has invested substantial resources to foster and maintain a safe experience for its community. People will not use Facebook if they do not feel safe. Similarly, advertisers will not advertise on Facebook if they believe it is not effective at removing harmful content or content that violates our community standards. Indeed, people and advertisers have stopped using Facebook due to these concerns.

9. Facebook has long recognized the importance of giving its users a voice and allowing debate on topics about

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which people may disagree. But content that harasses, threatens, seeks to defraud, or violates the rights of other users makes the community less safe and/or puts people at risk of harm.

10. Facebook has over many years developed robust policies and practices relating to content permitted on its service. Facebook continues to refine these policies and practices based on its experience, evolving societal norms, extraordinary current events, and input from external stakeholders and experts (among others). Moderating speech often involves difficult judgment calls—a task further complicated by the sheer volume of content appearing online, the global reach of Facebook’s products, and the absence of vital context typically accompanying speech in the offline world.

11. Facebook’s publicly available Terms of Service (to which people must agree to use the service) and Community Standards (which people agree not to violate) describe what content is acceptable. Facebook has had terms and policies like these in place for many years, though the specific requirements have evolved.

12. The Terms of Service prohibit users from, among other things, doing or sharing anything that is “unlawful, misleading, discriminatory or fraudulent” or that “infringes or violates someone else’s rights, including their intellectual property rights.”¹

1. *Terms of Service*, Facebook, <https://www.facebook.com/terms.php> (last visited Sept. 29, 2021).

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13. The Community Standards provide details about what content is not allowed on Facebook.² The Community Standards are organized into five categories: (i) violence and criminal behavior, (ii) safety, (iii) objectionable content, (iv) integrity and authenticity, and (v) respecting intellectual property. Within each of those five categories, the Community Standards identify additional subcategories, such as “adult nudity and sexual activity” or “hate speech.” Users can see Facebook’s policy rationale for prohibiting each category of content and examples. For example, the Community Standards explain that “hate speech” is not allowed on Facebook. Facebook, however, recognizes that people sometimes share content that includes someone else’s hate speech to condemn it or raise awareness.³ In other cases, user expression, including speech, that might otherwise violate our standards can be used self-referentially or in an empowering way. Facebook’s policies are designed to allow room for these types of expression. The Community Standards also include information about when content may be accompanied by a sensitivity warning.

14. Facebook relies on both automated and human review to enforce its terms and policies at scale across its global service. For many categories, Facebook’s artificial intelligence systems find more than 90% of the content they remove before anyone reports it. Facebook also has

2. *Community Standards*, Facebook, <https://www.facebook.com/communitystandards/> (last visited Sept. 29, 2021) (*Facebook Community Standards*).

3. *Facebook Community Standards*.

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over 35,000 people working on safety and security. Teams across the company work together to, for example, prevent millions of attempts to create fake Facebook accounts and remove million of pieces of content containing adult nudity, sexual activity, bullying and harassment, child nudity and sexual exploitation of children, and hate speech, content shared by terrorist and organized hate groups, and content that violates intellectual property rights. Facebook publicly shares information about its enforcement efforts in its Transparency Center.⁴

15. Facebook regularly publishes updates about its efforts to remove harmful content and protect its community. For example, in September 2018, Facebook published an article on how it uses artificial intelligence on Facebook to help suicide prevention efforts. In October 2019, Facebook published an article about the substantial efforts it had undertaken to protect against efforts to interfere with the 2020 U.S. election. In June 2020, Facebook published an article related to labels it would add to content and ads from entities believed to be state-controlled media; in February 2021, Facebook announced it would add informational labels to some posts related to climate change. In May 2021, Facebook published a threat report on efforts it is taking to protect against influence operations aimed at manipulating or corrupting public debate on Facebook by governments, commercial entities, politicians, and conspiracy and fringe political groups.

4. *Transparency Center*, Facebook, <https://transparency.fb.com/> (last visited Sept. 29, 2021) (*Facebook Transparency Center*).

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16. Facebook has had to implement changes to its policies and practices in response to extraordinary situations. For example, following Myanmar’s military coup in February 2021, Facebook reduced the distribution of misinformation shared by the Myanmar military but also protected content, including political speech, that allowed “the people of Myanmar to express themselves.” Facebook also revised its policies as information emerged during the COVID-19 pandemic.

17. Facebook has an appeals process for users to request review of most of its enforcement decisions. If Facebook determines it should not have removed the content under its policies, it will restore the content. In May 2020, Facebook established an external Oversight Board to review some of the most difficult enforcement decisions; the Oversight Board’s decisions are binding on Facebook. Facebook also relies on independent, third-party fact-checkers to help identify and review certain types of content. If a fact-checker determines a particular post contains false information, Facebook will label the content and reduce its distribution.

18. Facebook also has tools that enable users to further curate their own News Feeds—for example, choosing a list of “Favorite” friends and pages to feature, blocking content from certain users or Pages, and reporting content they believe is inappropriate. Facebook has rolled out other features in response to feedback, such as the ability to turn off a counter displaying how many people have “liked” a post or photo.

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19. Facebook has implemented a number of changes over the years to the way it ranks and displays content in News Feed. For example, in January 2018, Facebook announced changes to prioritize content from friends, family, and Groups in News Feed. Facebook recognized this change would likely decrease the amount of time users spent on Facebook, which it did, but believed it would be good for the community and its business over the long term. Facebook also announced recently that users were requesting to see less political content in their News Feeds and so it was studying ways to reduce the prominence of such posts.

House Bill 20's Impact on Facebook

20. I understand that on or around September 9, 2021, the State of Texas enacted House Bill 20 (the "Bill"), which is set to go into effect on December 2, 2021. I also understand that Facebook will be subject to the law.

21. The Bill will significantly undermine, if not outright prevent, Facebook from enforcing its content policies and will require substantial and burdensome changes to the design and operation of its products. I will describe some examples below.

22. I understand that the Bill will force Facebook to display and prioritize content it would otherwise remove, restrict, or arrange differently. For example, the Bill prohibits "censorship" of any content based on the "viewpoint" of the expression or the speaker. "Censorship" includes decisions "to block, ban, remove,

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deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.”

23. This definition is broad enough to prevent Facebook from enforcing its terms and policies and even “ranking” the content that users are eligible to see in their News Feeds.

24. The definition of “viewpoint” is broad enough to include virtually any type of user expression, including hate speech and other objectionable content like white supremacist content, anti-Semitic conspiracy theories, and other racist content.

25. Similarly, the vague prohibition against “deny[ing] equal access or visibility to” content would appear to strike directly at Facebook’s ability to rank and prioritize content to show people what they individually would deem most meaningful and valuable.

26. Further, because the Bill prohibits Facebook from “censoring” a Texas “user’s ability to receive the expression of another person,” the Bill effectively will require Facebook to alter its policies globally as Texans can access and engage with billions of pieces of content shared by billions of people across the world and every statement arguably expresses some viewpoint. The required changes will be extraordinarily burdensome to implement and will adversely impact Facebook’s community.

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27. Finally, the Bill appears to prohibit Facebook from engaging in its *own speech* because it vaguely prohibits Facebook from “otherwise discriminat[ing]” against user-submitted expression—which encompasses situations where Facebook appends a warning label (or other statement) to certain user-submitted content. So, for example, Facebook effectively will be precluded from warning users, including teens, before viewing graphically-violent content or about content independent fact-checkers have determined is false.

28. I also understand that the Bill will impose a number of “disclosure”, administrative, and operational requirements on Facebook. These requirements are also extraordinarily burdensome.

29. I understand that the Bill requires Facebook to “publicly disclose accurate information” regarding its content moderation practices, “including specific information regarding how the social media platform: (i) curates and targets content to users; (ii) places and promotes content, services, and products, including its own content, services, and products; (iii) moderates content; (iv) uses search, ranking, or other algorithms or procedures that determine results on the platform; and (v) provides users’ performance data on the use of the platform and its products and services.”

30. Though Facebook publishes its terms of service and community standards, the Bill does not explain what it means that Facebook’s editorial policies must be “sufficient to enable users to make an informed choice

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regarding the purchase of or use of access to or services from the platform.”

31. Moreover, although Facebook’s detailed policies are publicly available, the Bill purports to demand even more without any guidance, making it impossible to publish policies that will account for each and every decision Facebook makes regarding the billions of pieces of content users can access on its services every day. All such decisions are unique and contextspecific, and involve some measure of judgment.

32. The Bill also requires Facebook to disclose highly confidential, competitively sensitive business information, such as the “algorithms or procedures that determine results on the platform.” The underlying technology and processes that personalize users’ News Feeds are highly proprietary and critical to Facebook’s success. The public disclosure of this kind of information will result in competitive harm to Facebook and also expose Facebook and its community to harm by bad actors who will exploit such information.

33. I also understand that the Bill imposes a wide range of administrative and operational requirements that will be extraordinarily burdensome and require a substantial investment of time and resources to comply—for example:

- If Facebook removes content based on a violation of its “acceptable use policy,” it must notify the user who provided the content of the removal and explain why the content was removed.

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- Facebook must publish a “biannual transparency report” “outlining actions taken to enforce the policy,” such as, for example, the number of instances the platform “was alerted to” and “took action with respect to illegal content, illegal activity, or potentially policy-violating content,” including things like “content removal,” “content demonetization,” “content deprioritization” (which happens every time a user loads her or his News Feed since our product experiences are personalized), “account suspension,” and “account removal,” among others. The report must also include information on other matters, such as the “number of coordinated campaigns,” the number of appeals by users, the percentage of successful appeals, and more.
- Facebook must implement a user complaint system that requires Facebook, within 14 days (excluding weekends), to review the content that is the subject of the complaint, determine whether the content adheres to Facebook’s “acceptable use policy,” “take appropriate steps based on the determination,” and then notify the user “regarding the determination made” and “steps taken.” Facebook also must implement a specific appeals process that allows the user to appeal the decision to remove content from the platform, and provides written notice to the user of the determination of the appeal.

34. Given the extraordinary scale of Facebook’s systems and enforcement efforts, as described above and

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in Facebook's transparency reports, these disclosure, administrative, and operational requirements would impose an enormous burden on Facebook, to the extent compliance is even feasible.

35. In short, if the Bill's restrictions go into effect, it will, among other things, force Facebook to display, arrange, and prioritize content it would otherwise remove, restrict, or arrange differently; it will chill Facebook's own speech; it will lead some users and advertisers to use Facebook less or stop use entirely; it will force Facebook to substantially modify the design and operation of its products; it will force Facebook to disclose highly sensitive, confidential business information; and it will impose highly onerous administrative and operational burdens on Facebook.

I declare under penalty of perjury under the laws of the United States of America, pursuant to 28 U.S.C. § 1746, that the foregoing to be true and correct to the best of my knowledge. Executed on September 30, 2021 in Washington, D.C..

/s/ _____
Neil Potts

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**APPENDIX F — Declaration of LGBT Technology
Institute in the United States District Court for the
Western District of Texas, Austin Division, Filed
October 1, 2021**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civ. Action No. 1:21-cv-00840

NETCHOICE, LLC, D/B/A NETCHOICE, A 501(C)(6)
DISTRICT OF COLUMBIA ORGANIZATION; AND
COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6) NON-
STOCK VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

**DECLARATION OF LGBT TECHNOLOGY
INSTITUTE IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

I, Carlos Gutierrez, declare as follows:

1. I am Deputy Director and General Counsel of
LGBT Technology Institute (LGBT Tech), a 501(c)(3)

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nonprofit organization incorporated in West Virginia and headquartered in Staunton, VA.

2. I submit this declaration in support of Plaintiffs' Motion for a Preliminary Injunction. I am over the age of 18 and am competent to make the statements herein. I have personal knowledge of the facts set forth in this declaration and, if called and sworn as a witness, could and would competently testify to them.

3. LGBT Tech is a national, nonpartisan group of LGBT organizations, academics, and high technology companies. First, we engage with critical technology and public policy leaders about media, technology, and telecommunications issues of specific concern to LGBTQ communities. And second, we work to bridge the technology gap for all LGBTQ individuals.

4. We also engage in research, education, volunteerism, and partnerships to provide cutting-edge technology and resources to improve the lives of LGBTQ individuals, especially those who are disadvantaged.

5. At bottom, our efforts ensure that the LGBTQ community's specific concerns are part of the conversation. Because of the unique stigmas society often inflicts on those identifying as LGBTQ, and because too many LGBTQ individuals still face isolation, these concerns are often overlooked or overpowered. But technology—smart phones, social media, high-speed networks—help connect LGBTQ individuals, allowing them to form connections, to meet, and to find support. Thanks to technology, LGBTQ

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individuals can form inclusive, supportive communities that transcend geography. To cite a few examples of technology's importance to LGBTQ communities and individuals:

- For the LGBTQ community, the internet has always been a vital tool to access education, employment opportunities and health care. High numbers of LGBT youth use the internet to search for health information and a majority of LGBTQ individuals use the internet to connect with other members of their community via social networking.
- LGBTQ youths are no longer confined to growing up in a world where they feel alone; thanks to the internet, social media, messaging services, and smartphones, they can connect no matter their culture or background;
- LGBTQ individuals—and those struggling with their sexual orientation or gender identity—have access to information and support that is not always available in-person, especially in smaller or remote communities; and
- Exposure to LGBTQ individuals and LGBTQ-related content, especially on social media, has helped society accept LGBTQ individuals and better understand our concerns.

6. Despite all these benefits, however, technology poses unique risks to LGBTQ communities. Consider just a few ways:

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- Without adequate privacy controls, technology, including social media accounts, can be used to “out”—or even harass, threaten, or blackmail—an LGBTQ teenager; and
- Without adequate content moderation policies, digital forums and apps can become breeding grounds for homophobia, bullying (cyber and otherwise), harassment, and misinformation.

7. It is the latter example—unsafe and toxic internet forums and social media platforms—that we wish to address in this Declaration. If Texas’s new social media law, known as House Bill 20, takes effect, covered platforms like Snap (owner of Snapchat), Amazon, Facebook, TikTok, YouTube, Twitter, Reddit, and even LinkedIn will be prohibited from “censoring” content based on either (a) the user’s “viewpoint” or (b) the content’s “viewpoint.” We are greatly concerned that this law will make the internet, including the very services and platforms LGBTQ individuals use daily, unsafe to such an extent that LGBTQ communities will lose access to valuable—indeed, sometimes life-saving—information and services.

8. While the law’s supporters claim it is meant to protect free speech, including “hate speech,” it will inflict unique harms on LGBTQ communities and individuals who rely on technology platforms’ content moderation systems to remove the worst of the worst. In particular, the proliferation of such content will make it harder for marginalized groups like LGBTQ individuals to

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participate and communicate freely on the internet or to do so without being harassed. It also risks fomenting homophobic and hateful stereotypes and myths in society more broadly.

9. And it could have serious consequences. Consider conversion therapy. Despite conclusive scientific and medical research proving it is dangerous to an LGBTQ individual's emotional, spiritual, mental, and physical wellbeing, too many organizations and individuals continue to peddle it as a miracle "cure all." Under this law, conversion therapists could promote and market their harmful services without any pushback; anti-LGBTQ groups and individuals could flood spaces intended to be safe havens for LGBTQ individuals with misinformation about conversion therapy's "success" rate; and non-LGBTQ individuals, including parents of a teen struggling with their sexuality, would get a false sense of conversion therapy's alleged benefits. But under HB 20, platforms would have to leave this content up because it reflects a "viewpoint"—a dangerous one.

10. Consider also "hate speech." While the law's sponsors and supporters spoke specifically about protecting conservative speech, the law goes far beyond protecting political speech. It protects, promotes, and prioritizes hateful content that is neither liberal nor conservative, just hateful. Here are real-life examples of content that is currently removed or restricted but that platforms would be compelled to host should the law take effect:

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- Anti-trans content that insists transgender individuals are mentally ill;
- Homophobic content that recycles old stereotypes of gay men being social deviants who deserve to contract HIV, and professional LGBTQ individuals like teachers being inherently predatory toward children; and
- Harassing and bullying content that uses words like “faggot” and that uses LGBTQ culture and sexual orientation as verbal weapons to degrade others, be they heteronormative or LGBTQ.

11. To be sure, creating safe, inclusive online communities for LGBTQ users is no easy feat. Even without HB 20 in effect, platforms and civil society face growing challenges. According to GLADD’s Social Media Safety Index, published earlier this year and citing Pew Research survey results from January, an astounding 68% of LGBTQ *adults* have encountered online hate and harassment, and 51% have been targeted for “more severe forms of online abuse.”¹ By comparison, roughly 41% of straight adults reported enduring *any* form of online harassment.²

12. These survey results confirm what LGBT Tech knows firsthand: content moderation is essential to

1. See p. 9 https://www.glaad.org/sites/default/files/images/2021-05/GLAAD%20SOCIAL%20MEDIA%20SAFETY%20INDEX_0.pdf

2. *Id.*

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reducing online hate and harassment. But under HB 20, a user's hateful or harassing "viewpoint" is protected and prioritized over protecting users and prioritizing inclusivity. The law leaves little wiggle room: Should the platforms remove hateful content, they may be sued. The practical effect of that liability threat accords with common sense: like any business in any industry, an online platform will seek to minimize its risks and mitigate its liability. To do that in Texas, however, will mean sacrificing the internet's growing acceptance of and support for LGBTQ individuals everywhere, not just in Texas, and rolling back the clock on social progress.

13. While social media platforms are not without their problems, they offer LGBTQ individuals and communities unprecedented opportunities to connect safely and participate in a society that is still not available to them on fully equal terms. Rather than promoting civil discourse and mutual understanding between different groups, HB 20 threatens to sabotage online speech and drive reasonable users from the marketplace of ideas. Put simply, few users—gay, straight, trans; white, black, brown; young or old—want to scroll through hateful content and messages. But because HB 20 compels platforms to host such content, and because bad actors tend to spam message boards, private group pages, and other forums with hateful messages, many users will flee these platforms. At the very least, many will engage less.

14. More broadly, we, along with other LGBTQ groups across the spectrum, encourage businesses and corporations to take inclusivity seriously and to keep

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LGBTQ individuals in mind as they craft policies and implement practices. Since content moderation policies often reflect a company's values, we have been encouraged to see platforms adopt explicit anti-hate-speech policies that protect LGBTQ individuals' access to their services. To be sure, there is still work to be done and as technology evolves, new challenges will arise. But if a State like Texas can force a private company to abandon its values and to host all viewpoints, then State lawmakers and *their* viewpoints and values will come to define the internet. Aside from the obvious dangers of state-run media, such a power dynamic would mean that marginalized communities are once again shut out of the conversation and once again left to the whims of the political process—which, as history has shown, is rarely on our side.

I declare under penalty of perjury under the laws of the United States of America, pursuant to 28 U.S.C. § 1746, that the foregoing to be true and correct to the best of my knowledge. Executed on this 27th day of September in Silver Spring, MD.

/s/ _____
Carlos Gutierrez

**APPENDIX G — Declaration of Stop Child
Predators in the United States District Court for the
Western District of Texas, Austin Division,
Filed October 1, 2021**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civ. Action No. 21-cv-00840

NETCHOICE, LLC, D/B/A NETCHOICE, A 501(C)(6)
DISTRICT OF COLUMBIA ORGANIZATION; AND
COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6) NON-
STOCK VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

**DECLARATION OF STOP CHILD PREDATORS
IN SUPPORT OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

I, Stacie D. Rumenap, declare as follows:

1. I am President at Stop Child Predators (SCP), an organization founded in 2005 to combat the sexual exploitation of children and protect the rights of crime

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victims nationwide. I have led SCP since 2006, having worked in all 50 states-including spearheading the passage in 46 states of Jessica's Law-on laws and educational efforts to bring together a team of policy experts, law enforcement officers, community leaders, and parents to launch state and federal campaigns to inform lawmakers and the public about policy changes that will protect America's children from sexual predators both online and in the real world.

2. The statements contained in this declaration are made upon my personal knowledge. I am over the age of 18 and am competent to make the statements herein. I make this Declaration in Support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter. If called as a witness, I could and would testify under oath as follows.

3. We work with parents, lawmakers, and technology companies to better educate families, schools, and lawmakers about the potential risks children face online, including grooming, luring, bullying, child pornography, and other harms to children.

4. We also launched the Stop Internet Predators (SIP) initiative in 2008 because sex offender management and child safety must be addressed both in the real world and online. SIP recognizes that child predators often use online social-networking platforms to recruit child sextrafficking victims, to groom children for sexual exploitation, and to sexually victimize children in general. Because previously convicted and registered sex offenders are the most identifiable and likely class of predators

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to target children online, we focus our policy efforts on keeping social media and the Internet more broadly safe for children.

5. To do this, we work with leading online platforms, including Plaintiffs' members, to develop and enforce safety policies that prioritize children's safety while still promoting free speech. Our goal is to help these businesses develop tools and mechanisms to identify illegal content—Child Sexual Abuse Material (CSAM)—as soon as possible so that children are not exposed to abuse.

6. Unfortunately, CSAM is prolific on the Internet. In 2018 alone, leading social media platforms reported over 45 million photos and videos of children being social media platforms reported over 45 million photos and videos of children being sexually abused.¹ In fact, there are so many reports of child exploitation that FBI and Department of Justice officials said it would require assigning cases to every FBI agent. The government does not presently have the resources to do that.²

7. The government's limited resources underscore the critical importance of private moderation and filtering technologies. In order to detect CSAM, as well as to report it to authorities, online companies must develop and use advanced algorithms and other screening tools.

1. Katie Benner & Mike Isaac, *Child-Welfare Activists Attack Facebook Over Encryption Plans*, N.Y. Times (Feb. 5, 2020), <https://nyti.ms/38rN3IX>.

2. *Id.*

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8. If House Bill 20 (HB 20) is allowed to go into effect, we are concerned it will be harder to remove objectionable content online and to keep children safe online.

9. The online platforms we work with remove millions of pieces of content that would otherwise enable child predation and harm children. We have grave concerns that HB 20 will impede their ability to remove such content and undermine my group's efforts to stop child predation and to make the internet safer for children. HB 20 is also vague and broad enough to prohibit the covered "social media platforms" from using algorithms in ways that could flag, remove, restrict, or demote harmful content, including CSAM.

10. Similarly, HB 20's disclosure requirements give child predators a roadmap to escape detection. If they know how algorithms and other forms of editorial discretion work in detail, they will have an easier time evading detection and preying on vulnerable children.

11. Likewise, HB 20's onerous obligations for account and content removal will likely cause online platforms to moderate less aggressively. That is particularly concerning at a time when we need even more moderation and even more filtering.

12. I understand that HB 20 permits the covered "social media platforms" to continue their editorial discretion over expression that "is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment."

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13. While this carve-out is welcome, we still have three main concerns.

14. First, it is unclear whether this carve-out applies only to individual pieces of harmful content, or whether it prevents the programmatic efforts we have helped develop with the covered “social media platforms.”

15. Second, in all events, we are concerned that the threat of countless lawsuits will lead to under-enforcement of such policies.

16. And third, it relies entirely on third-party organizations to detect and flag such content. As someone who has experience reporting such content for removal, I can say that it is impossible for third-party organizations to flag *all* or even most of this content. Sadly, many types of harmful content—including child grooming and predatory messages—remain hidden from public view. That is why it is essential that the platforms retain their right to remove harmful content and to use algorithms to help with that.

I declare under penalty of perjury under the laws of the United States of America, pursuant to 28 U.S.C. § 1746, that the foregoing to be true and correct to the best of my knowledge. Executed on this [28th day of September, 2021] in [Washington, DC].

/s/
[Stacie D. Rumenap]

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**APPENDIX H — Order of the District Court
for the Western District of Texas, Austin Division,
Filed November 2, 2021**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

1:21-CV-840-RP

NETCHOICE, LLC D/B/A NETCHOICE, A 501(C)(6)
DISTRICT OF COLUMBIA ORGANIZATION, AND
COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6) NON-STOCK
VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

ORDER

Before the Court is Plaintiffs NetChoice, LLC d/b/a NetChoice, a 501(c)(6) District of Columbia organization, and Computer & Communications Industry Association d/b/a CCIA, a 501(c)(6) non-stock Virginia corporation's ("Plaintiffs") Motion for Protective Order, (Dkt. 29),

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and Defendant Ken Paxton’s (“Defendant”) response in opposition, (Dkt. 34). After considering the parties’ briefs, the record, and the relevant law, the Court grants the motion.

The Court finds that Plaintiffs have shown good cause for entry of a protective order. The Court finds that Defendant has not negotiated with Plaintiffs or followed this Court’s order in good faith. In its October Order, this Court permitted expedited discovery that was narrowly-tailored and “targeted . . . to obtain precise information without burdening Plaintiffs’ members.” (Order, Dkt. 25, at 4). The Court expressed confidence that Defendant would “significantly tailor” his requests. (*Id.*). Defendant failed to do so. For example, Defendant insisted on still serving 8 out of 9 exceedingly overbroad document requests that would result in a production of millions of documents. (Mot., Dkt. 29, at 2–4); (*see* Resp., Dkt. 34, at 4–6). By failing to significantly tailor its requests, Defendant has not followed this Court’s Order and has needlessly wasted its very limited time to seek discovery in advance of its November 22, 2021 response deadline.

IT IS ORDERED that Plaintiffs’ motion for protective order, (Dkt. 29), is **GRANTED**.

IT IS FURTHER ORDERED that Defendant may seek only the following expedited discovery in advance of its November 22, 2021 response deadline:

1. Depositions of Matthew Schruers (CCIA), Carl Szabo (NetChoice), Alexandra N. Veitch

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(YouTube), and Neil Potts (Facebook), limited to the information contained in their respective declarations, and limited to no longer than 4 hours each;

2. Depositions of Carlos Gutierrez (LGBT Technology Institute), Stacie D. Rumenap (Stop Child Predators), and Servando Esparza (Technology Network), limited to the information contained in their respective declarations, and limited to no longer than 2 hours each;
3. Requests for production of the non-privileged documents the declarants relied on when drafting their declarations; and
4. Interrogatories directed to the two Plaintiffs, as served by Defendant on October 28, 2021.

IT IS FINALLY ORDERED that the documents shall be produced by November 8, 2021, and the depositions shall occur between November 10 and 17, 2021.

The Court again stresses that it expects the parties to work together in good faith to resolve discovery disputes and to follow this Court's orders and instructions.

SIGNED on November 2, 2021.

/s/ Robert Pitman
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

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**APPENDIX I — Expert Witness Report of Adam
Candeub in the United States District Court for the
Western District of Texas, Austin Division, Filed
November 22, 2021**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TEXAS AUSTIN DIVISION

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

NETCHOICE, LLC, ET AL.,

Plaintiffs,

v.

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

Defendant.

**FEDERAL RULE OF CIVIL
PROCEDURE 26(a)(2)(b) EXPERT
WITNESS REPORT OF ADAM CANDEUB**

I. Introduction

A. Purpose

I am an expert in the historical development and application of the common carrier doctrine and the

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regulatory powers of government over communications networks, public utilities, and the internet. The Texas Office of the Attorney General has retained me as an expert in connection with *NetChoice, LLC v. Paxton*, Civil Action No. 1:21-cv-00840-RP (filed in the Western District of Texas, Austin Division), to offer opinions regarding the historical basis for Texas' regulation of social media platforms and email service providers as common carriers, as expressed in Texas' recently enacted H.B. 20.

I am being paid for my work in connection with this litigation at the rate of \$350 per hour, plus reimbursement for any reasonable expenses. My compensation is not dependent upon my opinions or the outcome of this case.

The opinions I express are based on my own personal knowledge, qualifications, experience, research, and professional judgment. If called as a witness in this case, I am prepared to testify as a fully competent witness about my opinions.

I understand that discovery in this case is ongoing, and I reserve the right to amend or add to my opinions if new evidence is provided or if new opinions or arguments are presented by other parties, amici, or experts.

B. Qualifications

My qualifications are summarized in my Curriculum Vitae (or "CV"), which is included as Appendix A to this Report. My CV contains all my scholarly publications authored in the previous ten years. Appendix B contains an additional list of my articles written for popular audiences.

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I have served as a law professor at Michigan State University for over 17 years, was tenured in 2010, and have written over 25 scholarly publications. Most of those publications involve common carriage and/or communications/internet law. My historical analyses of common carrier networks have been cited by federal courts. In addition, I have extensive experience in communications and internet law, serving as an attorney advisor for the Federal Communications Commission's Common Carriage Bureau and later Acting Assistant Secretary of Commerce for the National Telecommunications and Information Authority.

I have not testified as an expert at trial or by deposition in any case during the past four years.

C. Materials Considered

In addition to my knowledge based on many years of studying and working in relevant fields, as well as the extensive materials cited in this report, I have reviewed various documents specifically related to this case. The case-specific documents that I reviewed are listed in Appendix C to this Report.

II. Opinions

The State of Texas has the power to regulate large social media platforms as common carriers or firms "affected with the public interest." State and federal governments rely on these legal categories for the authority to regulate large communications networks. Just as courts

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recognized states' power in the 19th century to categorize the then cutting-edge telegraphs and telephones as common carriers, so may Texas now regulate social media platforms and email service providers, which are but communication technology's more recent iterations. Limiting this authority would constitute a judicial diminishment of government's regulatory power not seen since the days of *Lochner v. New York*.¹

Throughout the centuries, courts have defined common carriers in numerous ways. A recent statement by one of the current Supreme Court Justices well summarizes this law into five tests: (1) whether a firm exercises market power, (2) whether an industry is affected with "the public interest," (3) whether the entity regulated is part of the transportation or communications industry, (4) whether the industry receives countervailing benefits from the government, or (5) whether the firm holds itself out as providing service to all.²

These tests are necessarily broad because they give government the ability to ensure all citizens have access to essential services, ranging from gas, electricity, and water to airline and railway travel as well as telephone and internet access. In today's world, this regulation is particularly necessary to ensure equal and non-discriminatory access to the internet, which the United

1. *Lochner v. New York*, 198 U.S. 45 (1905).

2. *Biden v. Knight First Amendment Inst.*, _U.S._, 141 S. Ct. 1220, 1222-23 (Thomas, J., concurring statement concerning denial of certiorari).

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States Supreme Court has termed our “modern public square.”³

But even under the Plaintiffs’ and their Amici’s, at times, incomprehensible description of social media, the major social media platforms satisfy each of the five tests courts have set forth for common carrier status and industries “affected with the public interest.” Purporting to avoid this conclusion, Plaintiffs and their Amici put forth novel legal tests for common carrier status that lack any basis in precedent as a matter of historical fact.

A. Common Carriers: The Historical Development of the Legal Concept

The five tests for common carriers listed above accurately reflect centuries of legal decisions distinguishing between common carriers and other firms. Until the Supreme Court’s decision in *Nebbia*,⁴ which reversed much of the *Lochner* era constitutional restrictions on government regulation of business, the Court had ruled that government could impose extensive regulation only upon common carriers and other industries “affected with the public interest.”⁵ These tests, therefore, received much attention during the 19th and early 20th century because they demarcated the limits of government regulatory

3. *Packingham v. North Carolina*, _U.S._, 137 S.Ct. 1730, 1737 (2017).

4. *Nebbia v. New York*, 291 U.S. 502 (1934).

5. *Munn v. Illinois*, 94 U.S. 113, 126 (1876).

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power. Important for the case at hand, under any of these tests, a social media platform is properly classified as a common carrier.

A “common calling,” of which common carrier is but one type, is a legal concept with roots in the earliest chapters in English law. Mentioned in the Year Books, the earliest law reports, a common calling refers to any trade or industry that had an obligation to serve all without discrimination on generally accepted terms and conditions.⁶ Common callings typically worked under special, higher standards of care and liability.⁷ Given that the early legal system of England was largely status-based, as opposed to contract-based, there were many such callings. For example, millers, who were obligated to process all surrounding farmers’ grain, were considered a common calling, as were bakers, who were obligated to provide daily bread for all in a village. According to Arterburn, the first litigated legal case on record concerning a common calling dates

6. See, e.g., Y.B. 2 Hen IV.7, pl. 31 (mentioning innkeepers). According to Arterburn, the first “duty to serve” case dates from the 15th century. Norman F. Arterburn, *Origin and First Test of Public Callings*, 75 U. Pa. L. Rev. 411, 424 (1926-1927), citing Keilw. 50, pl. 4 (1450).

7. Joseph H. Beale, Jr., *The Carrier’s Liability: Its History*, 11 Harv. L. Rev. 158, 163 (1897) (“From the earliest times certain tradesmen and artificers were treated in an exceptional way, on the ground that they were engaged in a “common” or public occupation; and for a similar reason public officials were subjected to the same exceptional treatment. Such persons were innkeepers, victuallers, taverners, smiths, farriers, tailors, carriers, ferrymen, sheriffs, and gaolers.”).

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from 1348 and involved a ferryman.⁸ Adler asserts that the first mention of common carriers, referred to as *aliis communibus cariatoribus*, can be found in the Beverley Town Documents (Selden Society) dating from between 1300 and 1600.⁹

In the centuries since the concept's introduction into English law, courts have entertained numerous tests to distinguish common carriers from ordinary businesses. Writing in the early 1900s, Bruce Wyman suggested that in the infancy of England's trade economy in the 14th and 15th centuries, the special common calling duties applied to all trades and businesses, because in any area, few persons were engaged in each trade and the problem of monopoly or market power abuse was thus endemic.¹⁰ He viewed common callings as a type of early common law antitrust or trade regulation. This view has been criticized because many early public callings clearly had no obvious monopoly power.¹¹ Gustavus Robinson

8. Arterburn, *Origin and First Test of Public Callings*, 75 U. Pa. L. Rev. at 421 (citing Y.B. 22 Ass. 95, pl. 41 (1348)).

9. Edward A. Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135, 147 n.31 (1914-1915).

10. Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156 (1904).

11. Adler, 28 Harv. L. Rev. at 149 ("When we consider the principle of monopoly as producing in the early days the supposed distinction between classes of callings, its failure is clearly apparent, for no evidence of any kind is offered that carriers were less numerous than butchers, or that innkeepers were fewer than carpenters, or barbers than weavers. Tailors were no less numerous than fullers.").

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expands Wyman's notion arguing that public utilities serve a central economic *and social* role in society without necessarily being a monopoly.¹² This interpretation of common carriage law is reflected in the first of Justice Thomas's tests, "whether a firm has market power," and many courts and agencies have adopted this test.¹³

In contrast, other scholars have argued that the difference between common callings and other trades was in the legal nature of their offering. Singer as well as Haar & Fessler contend that common callings offered their goods and services on general terms and conditions to all.¹⁴ In the

12. *The Public Utility Concept in American Law*, 41 Harv. L. Rev. 277 (1928); *see also* Arterburn, 75 U. Pa. L. Rev. at 427-28 (asserting that social and economic conditions led to particular industries being labelled common and arguing the Black Death's labor shortage led to the development of the duty to serve all).

13. *Mozilla Corp. v. Fed Commc'ns Comm'n*, 940 F.3d 1, 57 (D.C. Cir.2019) (the "premise of Title II and other public utility regulation is that [broadband providers] can exercise market power sufficient to substantially distort economic efficiency and harm end users"); *In the Matter of Pol'y & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor*, 84 F.C.C.2d 445, 448 (1981) ("we have tentatively determined that those communications suppliers without market power need not be treated as common carriers").

14. Charles M. Haar & Daniel W. Fessler, *The Wrong Side Of The Tracks: A Revolutionary Rediscovery Of The Common Law Tradition Of Fairness In The Struggle Against Inequality* 15 (1986) ("Over the centuries, the common law doctrine of equal services and the duty to serve surfaced and resurfaced as a potent and dynamic means to address changing—and often the grimmest imaginable—

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17th and 18th century, courts continued to treat certain industries, such as common carriers and innkeepers, as common callings on public policy and fairness grounds. Burdick has argued that a firm was categorized as a common calling “because a person held himself out to serve the public generally, making that his business, and in doing so assumed to serve all members of the public who should apply, and to serve them.”¹⁵ This interpretation of common carriage is found in Justice Thomas’s fifth test: whether the actor holds itself out as providing service to all. Many courts have adopted this test.¹⁶

social and economic traditions.”); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1298 (1996) (“the most plausible statement of the law is that all businesses open to the public had a duty to serve the public”).

Justice Story adopts this view too. He states, “To bring a person within the description of a common carrier he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation, *pro hac vice*.” Story, *Commentaries of the Law of Bailments* § 495 (9th ed. 1878) at 323 (citations omitted).

15. Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*. Part 11, 11 Colum. L. Rev. 616, 635 (1911).

16. See, e.g., *Refrigerated Transp. Co. v. I.C.C.*, 616 F.2d 748, 754 (5th Cir. 1980) (a “common carrier has a duty to serve”); *N. Am. Acc. Ins. Co. v. Pitts*, 213 Ala. 102, 105 (1925) (“A common carrier of passengers is one who is engaged in a public calling, which imposes upon him the duty to serve all without discrimination.”); *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, 294 (1932) (“the doctrine that common carriers and others under like duty to serve the public”); *W. Union Tel. Co. v. Byrd*, 155 Tenn. 455, 458 (1927) (“Telegraph and telephone companies have frequently been termed ‘common carriers,’

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In addition, Burdick also argued that “the peculiar duties resting upon them [common carriers and public utilities] grow out of the exercise of public franchises or the receipt of financial aid from the state.”¹⁷ Here, he presaged Justice Thomas’s fourth test: whether an industry receives countervailing benefits from the government, such as tax benefits or powers of eminent domain, which some courts have followed.¹⁸

By the 17th century, the law was clear that an “implied contract” required common callings to serve all on the same nondiscriminatory terms. At the same time, as this law developed in the 17th and 18th century, contract

or common carriers of news or information, and in some jurisdictions have been declared to be common carriers by constitutional or statutory provisions; but while they are in the nature of common carriers in regard to their quasi-public character, and their duty to serve the public generally and without discrimination.”).

17. Burdick, 11 Colum. L. Rev. at 621.

18. *Tex. Rice Land Partners, Ltd v. Denbwy Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 205 (Tex. 2012) (“To qualify as a common carrier with the power of eminent domain, the pipeline must serve the public; it cannot be built only for the builder’s exclusive use.”); *Tenn. Gas Pipeline Co. v. Rylander*, 80 S.W.3d 200, 205 (Tex. App.—Austin 2002, pet. denied) (“The Comptroller’s interpretation of Rule 3.297 does not deny effect to Tennessee Gas’s status as a licensed and certificated carrier because it can still qualify for exemptions in the tax code intended to be available to common carrier pipelines or to licensed and certificated carriers generally. As the Comptroller points out, by virtue of its status as a common carrier pipeline, Tennessee Gas may qualify for an exemption under section 151.330(h) of the tax code . . .”).

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law began to govern most commercial activities, such as “taylor” or “workman,” limiting the number of common callings.¹⁹

The following excerpt from Blackstone, writing in the 17th century, demonstrates this shift. Blackstone recognized as common callings trades so recognized in the subsequent centuries by American courts, namely innkeeper, common carrier or bargemaster, and common “farrier,” a blacksmith that specialized in shoeing horses.²⁰ At the

19. William C. Scott, *Judicial Logic as Applied in Delimiting the Concept of Business Affected with a Public Interest*, 16 Ky. L.J. 19, 21-23 (1930).

20. According to Scott, “With the dawn of what we might call our modern judicial era, or at least semi-modern, we find that only two members of the erstwhile ‘common’ group retain their status, namely, carriers and innkeepers.” 16 Ky. L.J. at 23. In addition, farriers as well were considered common carriers. *See Lord v. Jones*, 24 Me. 439, 443 (1844) (“[T]he law has given this privilege to persons concerned in certain trades and occupations, which are necessary for the accommodation of the people. Upon this ground common carriers, innkeepers, and farriers had a particular lien.” (quotation omitted)); *N. Chicago Street Railroad Co. v. Williams*, 140 Ill. 275, (1870) (“[A]mong the instances of implied contracts are mentioned those of the common innkeeper to secure his guest’s goods in his inn, of the common carrier to be answerable for the goods he carries, and of the common farrier that he shoes a horse well without laming him. ‘The law presumes or implies from the fact of receiving, as common carriers, the passenger to carry for hire, a contract.’”); *Conwell v. Voorhees*, 13 Ohio 523, 540 (1844) (“These authorities establish the rule that if a party undertakes to perform work without consideration, and does not proceed on the work, no action will lie; but these authorities expressly except from the rule common carriers, innkeepers, porters, ferrymen, farriers.”).

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same time, reflecting older law, Blackstone recognized trades which would not be considered common just a century later, such as “taylor,” or workman.

There is also in law always an implied contract with a common inn-keeper, to secure his guest’s goods in his inn; with a common carrier, or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common taylor, or other workman, that he performs his business in a workmanlike manner; in which if they fail, an action on the case lies to recover damages for such breach of their general undertaking Also, if an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler.²¹

The trades and occupations that courts continued to classify as common carriers were typically related to transportation and communications. Innkeepers and farriers were, of course, vital to travel by horse and coach and transporting goods through the 17th to the 19th centuries. By the same token, these industries

21. III William Blackstone, *Commentaries On The Law Of England*, 163.

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were central to communication. Until the emergence of the telegraph in the 19th century, communications were exclusively by letter. And a significant portion of letters were borne by private carrier as the United States Post Office for most of the 19th century failed to provide home delivery in most places.

Armed with these legal concepts, courts in the 19th century expanded the notion of common carrier to new technologies, such as steamboats and railroads. Eventually, courts realized that most types of “[t]ransportation, as its derivation denotes, is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing done are identical in result” and classified most types of transportation services as common carriers.²²

In addition, courts and legislatures expanded the common carrier category to keep up with technology innovation in communications as telegram and telegraph replaced the physical letter. For instance, the Supreme Court held that telegraphs, because they “resemble[d] railroad companies and other common carriers,” were “bound to serve all customers alike, without discrimination.”²³ The Court later stated, “As a common carrier of messages for hire, the telegraph company, of course, is bound to carry

22. *Curtiss-Wright Flying Service v. Glose*, 66 F.2d 710, 712 (3d Cir. 1933).

23. *Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 14 (1894).

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for [all] alike.”²⁴ Similarly, numerous states classified telegraphs as common carriers by statute, with courts seeing “no good reason why the Legislature may not, in the exercise of its discretion, when it deems such action appropriate, fix upon a telegraph company the status of a common carrier.”²⁵

Perhaps most important, federal law recognized telegraphs and telephones—indeed all “wire communications” as common carriage. The Mann-Elkins Act of 1910 resolved

24. *Moore v. NY. Cotton Exch.*, 270 U.S. 593, 605 (1926); *see also Pac. Tel. Co. v. Underwood*, 55 N.W. 1057, 1057 (Neb. 1893) (“A telegraph company is a common carrier of intelligence for hire, bound to promptly and correctly transmit and deliver all messages intrusted to it.”); *Parks v. Telegraph Co.*, 13 Cal. 423, 424 (1859) (“The rules of law which govern the liability of telegraph companies are not new. They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or packages along a route. The physical agency may be different, but the essential nature of the contract is the same.”).

25. *Blackwell Mill. & Elevator Co. v. W. Union Tel. Co.*, 89 P. 235 (Okla. 1906); *Reaves v. W. Union Tel. Co.*, 110 S.C. 233 (1918) (“Is defendant a common carrier in the transmission of money by telegraph? With regard to the transmission of intelligence for hire, defendant was made a common carrier by section 3 of article 9 of the Constitution, which provides that all telegraph corporations engaged in the business of transmitting intelligence for hire are common carriers. That provision, however, is merely declaratory of the common law.”).

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whether telegraphs and telephones were classified as common carriers and gave regulatory control of telegraph and telephone services to the Interstate Commerce Commission (ICC).²⁶ Similarly, Section 201 of the Communications Act of 1934 regulates all common carriage service that is “communication by wire” to this day.²⁷ Thus, we get Justice Thomas’ s third test: whether the entity regulated is part of the transportation or communications industry. No one can doubt that social media platforms and email services providers are modern communications industries.

Finally, common carriers fall under the rubric of industries affected with the public interest. In *Munn v. Illinois*, the Court ruled that grain elevators could be constitutionally subject to state nondiscrimination and rate regulation because they were “affected with the public interest.”²⁸ States could regulate these industries despite the *Lochner*-era restrictions on government action.

Chief Justice Waite stated that an industry is “clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.”²⁹ While the New Deal Supreme Court’s disavowal

26. Mann-Elkins Act, Pub. L. No. 61-218, § 7, 36 Stat. 539, 544 (1910).

27. 47 U.S.C. § 201.

28. *Munn v. Illinois*, 94 U.S. 113, 126 (1876).

29. *Id.*; see also Walton H. Hamilton, *Affectation with Public Interest*. 39 Yale L.J. 1089, 1097 (1930).

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of *Lochner* lessened the term's importance to regulatory authority, see *Nebbia v. New York*, 291 U.S. 502 (1934), the term retains its validity. The Supreme Court cases such as *Nebbia* simply expanded the power of government to regulate and never overturned or disavowed the common carriage. Here we get Justice Thomas's second test: whether the entity is affected with "the public interest."

B. Based on Established Legal History, Social Media Platforms and Email Service Providers May Be Regulated As Common Carriers.

As an initial matter, Plaintiffs have produced nothing to show that their members are not in fact common carriers under the various historical tests. This is particularly true in light of the minimal factual development at this stage of litigation. "Courts routinely hold that "[w]hether a particular individual is a common carrier is a question of fact to be determined from the evidence."³⁰ Plaintiffs'

30. *Williams v. Limpert*, SO V.I. 467, 470 (D.V.I. Aug. 4, 2008) (citing *Commonwealth v. Babb*, 70 A.2d 660, 662 (Pa. Super. Ct. 1950); *Esprit De Corp. v. Victory Express*, No. 95-16887, 1997 U.S. App. LEXIS 7724, at *4, 1997 WL 191466 (9th Cir. Apr. 17, 1997) ("Whether a carrier meets the statutory and regulatory requirements to act as a contract carrier or a common carrier is a question of fact.") (citation omitted); *Powerhouse Diesel Servs. v. Tinian Stevedore*, Civ. No. 93-0003, 1994 U.S. Dist. LEXIS 10661, at *34-35, 1994 WL 383231 (D.N. Mar. I. July 15, 1994) ("What constitutes a common carrier, and what constitutes a contract carrier, are questions of law, but whether the carrier is acting as a common carrier or as a contract carrier is a question of fact.") (quotation omitted); *Wright v. Midwest Old Settlers & Threshers Ass'n*, 556 N. W.2d 808, 810 (Iowa 1996) ("It is a question of law for the court to determine what constitutes a common

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members, despite their claim otherwise, do not constitute “common carriers as a matter of law” (Dkt. No. 12 at 32) under any historical test. As the above analysis shows, common carriage tests often present complicated, fact-intensive questions.

Yet, even given the currently inadequate factual record, large social media platforms and email service providers are *prima facie* common carriers within the various historical understandings of that term. First, it is unquestionable that the large social media platforms and email service providers have market power. They currently face numerous antitrust suits in Europe and the United States.³¹ While these cases have yet to find the

carrier, but it is a question of fact whether, under the evidence in a particular case, one charged as a common carrier comes within the definition of that term and is carrying on its business in that capacity.”); *Beavers v. Federal Ins. Co.*, 437 S.E.2d 881, 882–83 (N.C. Ct. App. 1994) (“[W]hat constitutes a common carrier is a question of law, but whether one is acting as a common carrier is ordinarily a question of fact.”) (citation omitted); *Adkins v. Slater*, 298 S.E.2d 236, 240 (W. Va. 1982) (“What constitutes a common carrier is a question of law, but whether a party in a particular instance comes within the class is a question of fact, to be determined as the case may arise.”) (quotation omitted)).

31. See, e.g., Adam Satariano, *Facebook Faces Two Antitrust Inquiries in Europe*, N.Y. Times, June 4, 2021, available at <https://tinyurl.com/2stnassb>; Katyanna Quach, *US States’ Antitrust Lawsuit Against Google’s Advertising Business Keeps Growing*, The Register, Nov. 16, 2021, available at <https://tinyurl.com/hv8n5b9j>; Cecelia Kant, *States Say They Will Appeal the Dismissal of Their Facebook Antitrust Suit*, N.Y. Times, July 28, 2021, available at <https://tinyurl.com/2y5dffpa>; Aoife White. *EU, UK. Open First*

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platforms violate the U.S. antitrust laws, market power is but one part of a successful antitrust suit. The economic consensus holds that the large platforms exercise market power against advertisers and have deterred entrance in an anticompetitive manner.³²

Second, both social media and email service providers are industries “affected with the public interest.” The category is broad and no doubt includes entities traditionally recognized as common carriers as well as public utilities. In his highly influential listing of industries affected with the public interest, Chief Justice Taft includes both common carriers and public utilities.³³

Transportation and communications industries form the core of those affected with the public interest as industries providing basic services. In a series of cases, the Supreme Court expanded the concept to include industries closely related to transportation and communication. For instance, the Court ruled meat slaughtering yards were affected with the public interest because they were so interconnected to trains and thus part of the

Antitrust Probe into Facebook, Bloomberg, June 4, 2021, available at <https://tinyurl.com/v7fnv3bw>.

32. J. Alleman, E. Baranes & P.N. Rappaport, “Multisided Markets and Platform Dominance,” in J. Alleman, P.N. Rappaport & M. Hamoudia (eds.), *Applied Economics in the Digital Era* (Palgrave Macmillan 2020); Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 Berkeley Tech. L.J. 1051 (2017).

33. *Charles Wolff Packing Co. v. Ct. of Indus. Reis. of Kan.*, 262 U.S. 522, 535–36 (1923)

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transportation network and essential to food production.³⁴

Surely, if industries such as meat packing or express messaging, which are peripheral to a transportation or communication network, are affected with the public interest, then social media would qualify *a fortiori*. There is nothing peripheral about social media. Rather, it is, as the Supreme Court says, the “modern public square.”³⁵

Third, there is no doubt that social media is part of the communications industry.

Fourth, social media platforms receive countervailing benefits from the government of the sort typically enjoyed only by common carriers. Most importantly, they have conduit immunity under section 230 of the Communications Decency Act, meaning they do not have liability for the third-party content they carry (e.g., unlawful content).³⁶

34. *Id.*; see also *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 414-15 (1914) (fire insurance relied upon as an essential service for all industries); *Brass v. North Dakota ex rel. Stoesser*, 153 U.S. 391, 405 (1894) (grain elevators that were an integral part of grain transportation and the commodity trade); *Fort St. Union Depot Co. v. Hillen*, 119 F.2d 307, 312 (6th Cir. 1941) (railroad terminals that simply receive traffic are common carriers because they are essential to transportation); *Railway Express Agency v. Kessler*, 189 Va. 301, 305 (1949) (express messenger services that rely upon regular train operation).

35. *Packingham v. North Carolina*, U.S., 137 S. Ct. 1730 (2017).

36. 47 U.S.C. § 230(c)(1); see *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

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This protection is shared with common carriers, which do not have legal liability for the content of the messages they bear.³⁷

Like other historic common carriers, social media platforms enjoy a federal exemption from local taxation on the services they provide. The Internet Tax Freedom Act (ITFA) prohibits state and local entities from taxing internet access services that the platforms provide.³⁸ Again, extraordinary tax privileges and exemptions are historically typical for common carriers, which have often enjoyed exemptions from state and local taxes.³⁹

Fifth, social media holds itself out as providing service to all. Anyone can join a social media platform on equal terms as set forth in the platform's terms and conditions.

37. Telegraph companies generally had no liability for the statements they transmitted, but they could be liable if they acted with malice or with knowledge that the sender was not privileged to make the statement. *See* Restatement (Second) Of Torts § 612(2); *Mason v. W. Union Tel. Cu.*, 125 Cal. Rptr. 53, 56 (1975); *W. Union Tel. Cu. v. Lesesne*, 182 F.2d 135, 137 (4th Cir. 1950); *Von Meysenbug v. W. Union Tel. Co.*, 54 F. Supp. 100, 110 (S.D. Fla. 1946).

38. Title IX, Pub. L. No. 105-277, 112 Stat. 2681-719 (1998).

39. *See supra* note 18.

*Appendix I***C. Plaintiffs' and Amici's Proposed Common Carriage Tests Have No Historical Legal Bases.**

Rather than apply the accepted historical tests for common carriage to large social media firms, Plaintiffs and their Amici invent tests out of whole cloth and then claim that social media platforms fail to meet their ersatz tests. Contrary to historical precedent, they erroneously claim that (1) common carriers must serve users “indifferently” and may not have terms and conditions concerning the goods, passengers, or messages they carry; and (2) common carriers produce or provide standardized or uniform goods or services, which at least one Amicus terms a “widget of information,” whereas social media is rapidly advancing public-facing communications. Neither argument has a basis in legal history.

Plaintiffs assert that large social platforms “are not common carriers as a matter of law or fact . . . [because] common carriers were those who undertook to transport or carry goods ‘indifferently.’” (Dkt. No. 12 at 32) Plaintiffs define “indifferent” as not distinguishing among customers, materials, or content carried. They contend that because social media platforms are *not* indifferent and, for instance, do not permit adult content or pornography or only accept users who agree to the platforms’ terms and policies and comply with each platform’s respective community standards, the platforms cannot be common carriers.

First, there is no historic common carrier legal test that requires “indifference.” Common carriers were never

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obligated—and to this day have no obligation—to accept all traffic. They are *not indifferent* to the passengers, goods, and messages they transport. Airlines can deny service to unruly passengers or those who otherwise violate their rules, as can railroads.⁴⁰ Telephones are not obligated to carry harassing phone calls.⁴¹

Rather, cases that use “indifferent” refer to Blackstone’s implied contract, which must be offered to all but can distinguish among customers, materials, or content. Historically, common carriers must serve all under the same and “non-different” general terms and conditions, i.e., Justice Thomas’s fifth test for common carriers. But, in this context, “indifferently” means that the terms and conditions in the implied contract must be offered to all. “Indifferent” here means “not different.” Common carriers must have “nondiscriminatory . . . terms.”⁴² A common carrier need not “make individualized decisions,

40. *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (recognizing the “common law rule that ‘where a carrier has reasonable cause to believe, and does believe, that the safety or convenience of its passengers will be endangered by a person who presents himself for transportation, it may refuse to accept such person for transportation and is not bound to wait until events have justified its belief’); *Dir. Gen. of Railroads v. Viscose Co.*, 254 U.S. 498 (1921) (a common carrier railroad may refuse to transport artificial silk providing such limitation was duly promulgated in tariffs).

41. See 47 U.S.C. 223—Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications.

42. *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1000 (2005).

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in particular cases, whether and on what terms to deal.”⁴³ For example, a common carrier railroad may refuse to carry artificial silk, provided that such prohibition is duly published in its tariffs and thereby included in its terms or service.⁴⁴ A common carrier is not obligated to carry all substances.

Even though common carriers have traditionally been required to offer the same contract to all, that historical requirement has not meant that common carriers cannot refuse certain passengers, freight, or messages or have demanding terms of service, provided these terms and conditions are non-discriminatorily applied. Further, the “rule of the common law [is] that common carriers have the right to decline shipment of packages proffered in circumstances indicating contents of a suspicious, indeed of a possibly dangerous, nature.”⁴⁵

The cases Plaintiffs cite do not negate this historical understanding. In *Allen v. Sackrider*,⁴⁶ the court answered the question of whether a sloop hired in what

43. *Am. Orient Exp. Ry. Co., LLC v. Surface Transp. Ed.*, 484 F.3d 554, 557 (D.C. Cir. 2007) (citing *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976)).

44. *Dir. Gen. of Railroads*, 254 U.S. 498.

45. *United States v. Pyba*, 502 F.2d 391, 399 (D.C. Cir. 1974); see also *Nitro-Glycerine Case (Parrott v. Wells)*, 82 U.S. (15 Wall.) 524, 535-36 (1872); *Bruskas v. Railway Express Agency*, 172 F.2d 915, 918 (10th Cir. 1949).

46. *Allen v. Sackrider*, 37 N.Y. 341, 342 (1867).

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appeared to be a one-off contract to carry grain was a common carrier. Finding that the sloop did not make a general offering of services to all, the court held that it was not a common carrier. It stated, quoting Story on Contracts, § 752: “Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out in common, that is, to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with some private individual, to carry for hire.”⁴⁷

The full quotation makes it apparent that the case is an example of Justice Thomas’s fifth test for common carrier: whether a firm “holds himself out in common” to all offering the same, non-differentiated contracts. The case does not mean that a common carrier must carry all and has no power to refuse—rather it must make a common offering of terms and conditions, which can be restrictive or selective, to all.

Bank of Orange v. Brown,⁴⁸ is also an example of this same test for common carrier, which the court applied to a steamboat that apparently mislaid bank bills. Plaintiffs quote the court: “Every person who undertakes to carry, for a compensation, the goods of all persons indifferently,

47. *Id.*

48. *Bank of Orange v. Brown*, 1829 WL 2396 (N.Y. Sup. Ct. 1829).

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is, as to the liability imposed, to be considered a common carrier.” Plaintiffs omit the very next sentence: “There is an implied undertaking on his part to carry the goods safely, and on the part of the owner to pay a reasonable compensation.”⁴⁹ The court was speaking about an “implied undertaking” that is the same, i.e., the carrier had to offer in its implied contract the same standard of liability to all. However, that does not mean that he must carry more grain than his ship can safely carry or bear unlawful substances in his steamboat.

Finally, *Gisbourn v. Hurst*,⁵⁰ is inapposite. The case involved whether a landlord could seize cheese transported by a common carrier who owed the landlord rent. The opinion explains that “indifferently” means that a common carrier must offer the same terms and conditions to all. In other words, Hurst was obligated to carry cheese or similar goods for all. It did not mean that he had to be indifferent to what he carried, i.e., he could refuse to carry unlawful substances or things unsafe or too large for his wagon.

Amicus TechFreedom forwards different claims, which also lack historical legal basis. TechFreedom states that the “business of common carriers is, at its core, the transportation of property.” (Dkt. No. 32 at 3 (internal quotation marks omitted).) As shown above, this claim has no historical basis. As an initial matter, one of the

49. *Id.* at *2.

50. *Gisbourn v. Hurst*, 1 Salk. 249, 250, 91 Eng. Rep. 220, 220 (1710).

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most important types of “property” that common carriers carried for most of history was letters. Given that history, courts classified new technologies that carry messages, such as telephones and telegraphs, as common carriers. As even TechFreedom concedes, telegraphs and telephones are regulated as common carriers under the Mann-Elkins Act of 1912. (Dkt. No. 32 at 3-4.) The Communications Act of 1934 discussed above defines common carriers even more broadly to include wire communications.

Retreating from its own claim that common carriers do not involve communications industries, TechFreedom argues that social media is somehow metaphysically different from telegraphs and telephones. “Although it doubtless contains a message, a telegram is best thought of as a widget of information conveyed along ‘public ways’ by a commodity carrier” (Dkt. No. 32 at 3 (citation omitted).) In contrast, social media platforms “are not interchangeable carriers of information widgets. The core aspect of their product, in fact, is not *transportation* at all. What the platforms offer is a wide array of differentiated—and rapidly evolving—forms of public-facing communication.” (Dkt. No. 32 at 4.)

TechFreedom’s discussion leaves it unclear what it means by “differentiated—and rapidly evolving—forms of public-facing communication,” let alone a “widget of information.” (Dkt. No. 32 at 3-4.) Indeed, all of its examples involve transmitting messages just like telegraphs and telephones. TechFreedom says, “Twitter’s main product is a microblog.” (Dkt. No. 32 at 4.) Well, no. Twitter transmits its users’ messages (“tweets”) to their

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followers. TechFreedom says Instagram “is primarily a photo-sharing service.” (Dkt. No. 32 at 4.) Instagram sends pictures just as the post office or a fax machine does. Facebook, we learn, “has embraced several of these other forms, [although] has recently recommitted to fostering group pages.” (Dkt. No. 32 at 4.) Again, a group page is simply a forum where multiple individuals send each other messages. As a matter of fact, each of these modern examples falls squarely within the historical definition of a common carrier.

TechFreedom also quotes the famous gnomic statement of media scholar Marshall McLuhan that “the medium is the message.” (Dkt. No. 32 at 4.) But, even with famous quotations, TechFreedom cannot misrepresent the essential nature of social media: carrying messages between users and recipients the user chooses—just as phones, telegraphs, and messenger services have historically done.

Finally, TechFreedom claims that “[t]he FCC has long held that data *transport* is the essence of telecommunications common carrier service, whereas any offering over the telecommunications network which is more than a basic transmission service is not.” (Dkt. No. 32 at 4 (internal quotation marks omitted).) It claims that services other than telephones, “even simple text messaging, which requires the carrier to undertake some information processing during transmission, is not” basic transmission. (Dkt. No. 32 at 4.)

This argument simply misrepresents federal law and FCC regulation. All communications services, basic or enhanced,

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offered to the public is potentially regulable under section 201 common carrier authority.⁵¹ The Communications Act of 1934 states that it “shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor.”⁵² For decades, the FCC *chose* to exempt computer-based communications, such as internet access or text messaging, from common carriage, but continued to regulate them as “enhanced” or “information services.”⁵³ But, the FCC never disclaimed the power to regulate these information services as common carriers—and indeed recently has so regulated them.⁵⁴

51. *Verizon v. Fed. Commc’ns Comm’n*, 740 F.3d 623, 629-30 (D.C. Cir. 2014) (The FCC “drew a line between ‘basic’ services, which were subject to regulation under Title II of the Communications Act of 1934 as common carrier services, *see* 47 U.S.C. §§ 201 *et seq.*, and ‘enhanced’ services, which were not What distinguished ‘enhanced’ services from ‘basic’ services was the extent to which they involved the processing of information rather than simply its transmission.”).

52. 47 U.S.C. § 201.

53. *Mozilla Corp. v. Fed. Commc’ns Comm’n*, 940 F.3d 1, 34 (D.C. Cir. 2019) (“Petitioners are in a weak posture to deny that inclusion of ‘search engines and web browsers’ could support an ‘information service’ designation . . .”).

54. *In the Matter of Protecting & Promoting the Open Internet*, 30 F.C.C. Red. 5601, 5614-16 (2015).

*Appendix I***D. It is Historically Well-Established That States May Impose Nondiscrimination Requirements on Common Carriers Transmitting or Receiving Interstate and Intrastate Messages.**

The United States Supreme Court has long held that states have the power, pursuant to their common carrier authority, to impose non-discrimination requirements not only on intrastate common carriers but also on interstate carriers transmitting or delivering messages within their borders.

In *Western Union v. James*,⁵⁵ the Court reviewed a claim that a Georgia law regarding telegraph delivery within the state violated the Constitution by interfering with the federal government’s power under the commerce clause. The Georgia law read in relevant part: “Be it enacted . . . [that] every electric telegraph company . . . wholly or partly in this state . . . shall transmit and deliver the same with *impartiality and good faith*.”⁵⁶

This case presented the exact issue the Court now faces—whether Texas may impose nondiscrimination requirements on communications firms for in-state transmission and delivery. The Supreme Court in *Western Union v. James* ruled that states do have that power. Rejecting a constitutional challenge that the state exceeded Commerce Clause limits, the Court reasoned that there “are many occasions where the police power

55. *W. Union Tel. Co. v. James*, 162 U.S. 650, 651 (1896).

56. *Id.* (emphasis added).

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of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce.”⁵⁷

Western Union v. James was hardly an isolated decision. In subsequent decades, the Supreme Court and state supreme courts made clear that states could require communications firms within their borders to transmit and deliver messages in an impartial and good faith manner.⁵⁸

III. Conclusion

Over the centuries, courts have developed five widely accepted tests for what constitutes a common carrier. It is my expert opinion that large social media firms qualify under each of these tests. Therefore, Texas is within its historical legal authority to regulate social

57. *Id.* at 662.

58. *See W. Union Tel. Co. v. Crovo*, 220 U.S. 364, 367 (1911) (New York law “makes it the duty of every telegraph company doing business in the state to receive and transmit prepaid messages ‘faithfully, impartially, with substantial accuracy, as promptly as practicable.’ But the standard of duty under the statute is precisely that imposed at common law upon such a common carrier.”); *W. Union Tel. Co. v. Com. Milling Co.*, 218 U.S. 406 (1910) (upholding Michigan law requiring “all telegraph companies ... to receive dispatches from and for other telegraph companies’ line ... and transmit the same with impartiality and in good faith “); *W. Union Tel. Co. v. Sims*, 190 Ind. 651 (Ind. 1921) (upholding Indiana law requiring telegraph firms to deliver a telegram “with impartiality and in good faith”).

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media firms as common carriers. In fact, state laws have regulated telegraphs, which is a common carrier as well, in the precise way as H.B. 20 seeks to regulate social media platforms. The U.S. Supreme Court on numerous occasions has upheld those laws.

Plaintiffs evade the conclusion that social media firms can be regulated as common carriers by positing tests for common carrier status that are, to be blunt, invented for the purposes of this lawsuit. Their tests have no support in legal history or precedent.

Dated: November 22, 2021

Signed: /s/ Adam Candeub
Adam Candeub

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**APPENDIX J — Excerpts of Deposition of Neil
Christopher Potts, Filed November 22, 2021**

IN THE UNITED STATES DISTRICT COURT

For the Western District of Texas
Austin Division

Civil Action

No. 1:21-cv-00840-RP

NETCHOICE, LLC D/B/A NETCHOICE,
A 501(C)(6) DISTRICT OF COLUMBIA
ORGANIZATION, COMPUTER &
COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6)
NON-STOCK VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

Tuesday, November 16, 2021
Washington, D.C.

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NEIL CHRISTOPHER POTTS, pursuant to notice, the witness being sworn by BARBARA MOORE, a Notary Public in and for the District of Columbia, taken at the offices of KIRKLAND & ELLIS, LLP, 1301 Pennsylvania Avenue, N.W., Washington, D.C., on Tuesday, November, 2021, and the proceedings being taken down by Stenotype by BARBARA MOORE, CRR, RMR and transcribed under her direction.

[14]Q. Sure, go ahead.

A. Thank you. Okay.

Q. So this paragraph talks about a system of ranking content; correct?

A. That's correct.

Q. Why does Facebook prioritize training and experience for users that expose them to what they find relevant and meaningful?

A. It's a great question. It's something that we hear from users with that they want a meaningful experience on a platform: whether those are social interactions; things that they're interested in from the people that they follow; the pages or the people that they friend; the pages that they follow; the groups that they join; what content is more valuable to the individual.

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As you can imagine, the people that I am friends with in the groups that I follow may not be of interest to you and likewise, so we want to give people an experience that they've come to know and the power to build a community.

Q. When you say "valuable," does that mean more likely to use the site and engage on the things that Facebook is showing them?

[15]A. To find some value and experience, it could be anything. Not necessarily just with engagement but find value in the actual content that is presented to them.

Q. Well, how do users demonstrate that they find value in the content that's being given to them?

A. Engagement is one, so that could be either through comments, likes, sometimes sharings, so those are all things as well, but just reviewing the content and just -- we do run surveys as well to get direct feedback from users about the type of content so regardless of that level of engagement, we hear what users say they want.

Q. What percentage of the users utilize the survey feature on Facebook?

A. I don't have the number, unfortunately.

Q. Is it possible to get that number?

A. I can find out. I don't know.

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Q. Other than engagement and use of surveys, is there any other way that Facebook is able to tell whether users find content valuable or not?

A. Sometimes we get direct feedback, [16]direct feedback in a number of ways, including criticisms, including -- but also applause through articles or other, you know, think pieces. So that's one that we recognize as a way to, but primarily we look at the signals that we have a bit more fidelity in, try to deconflict anecdotal versus significant.

Q. When users interact more on their Facebook page based on the rankings, does that increase ad revenue?

MR. McCARRICK: Objection to form.

THE WITNESS: You need to repeat it. Sorry.

BY MS. CORBELLO:

Q. When users engage in the content that Facebook displays for them, does that increase ad revenue?

MR. McCARRICK: Same objection.

THE WITNESS: I don't have a direct kind of causation or direct line, so I wouldn't know.

BY MS. CORBELLO:

Q. So user engagement does not increase ad revenue for Facebook?

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MR. DISHER: Objection, form.

[17]THE WITNESS: I'm struggling a bit with the question, so I don't have -- I don't have metrics that indicate how that, how those things play out.

BY MS. CORBELLO:

Q. What's your struggle with the question?

MR. DISHER: Objection, form.

THE WITNESS: It's just the way that it's framed. If you could maybe reframe. It's just a little confusing to me.

BY MS. CORBELLO:

Q. Is there a concept that you're missing that I can explain a little bit better?

A. Well, it's partially your definition of engagement, and then are you asking if there is a direct correlation of one user engaging a content to ad revenue?

Q. No. So the more users engage in the content on Facebook, does that increase Facebook's ad revenue?

A. I don't have metrics on it. That's not my -- I'm not on the business side of the house.

[18]Q. Do you know the answer to that question or not?

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A. I do not.

Q. Paragraph 4 says that the rankings are unique to each user. Do you see where it says that?

A. I do.

Q. So how are rankings made by Facebook? Is it algorithms or human based?

A. The rankings are a combination of humans and algorithms. Humans can create the algorithms; humans also do a lot of the feedings of the algorithms, the machine learning, the AI, so not just the creation but the labeling of content that feeds into that. So with that combined with the automation, it's just a combination of how the rankings appear.

Q. So when it says, "Rankings are unique to each user," it's the combination of algorithms and humans that are making that determination for each user?

A. For the algorithm; correct.

Q. Is the algorithm -- are the algorithms that are designed to create these rankings, are these based on what it determines [19]based on training or any human involvement that each user is most interested in?

MR. DISHER: Objection, form.

THE WITNESS: Algorithm, repeat the question.

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BY MS. CORBELLO:

Q. So the algorithms that are used to create these unique rankings, are these essentially looking for what each user is most interested in based on data that Facebook has for them, past likes, past shares?

MR. DISHER: Objection, form.

THE WITNESS: So -- in part. So it's a bit -- it's a bit more complex. We have many algorithms that are news feeds including algorithms that moderate content, algorithms that demote content as well.

So we have -- we have a number of policies that we apply to content moderation. If there is something that would violate one of these policies, we would remove it. If there's something that we call borderline that runs up against the policy but we haven't made a [20]decision on, we would demote that.

So the ranking does take into account what you have liked, what you have engaged with, but it's also subject to those other measures.

BY MS. CORBELLO:

Q. So let's say a piece of user-generated content comes in, putting aside any algorithms, let's say it doesn't violate any policies by Facebook and it's just a nice piece of user-generated content, is the way it works that that content is essentially ranked for a user who would be interested in seeing it based on past behavior by that user on Facebook?

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MR. DISHER: Object. Form.

THE WITNESS: In part. Similar content that also we have signals on other users are engaged.

BY MS. CORBELLO:

Q. So it's based on both what the user likely engages in and other users like that user might engage in. Is that fair?

MR. McCARRICK: Objection to form.

THE WITNESS: In a nutshell. To maybe clarify that point, your user, your [21]individual user, the friends, the pages, the groups that is going to be the majority, I think is around 87 percent of the signal comes from that subject to those other things that we talked about: content moderation, algorithms, demotion of algorithms. But we also take signal on other issues, for example, sharing of the link, just kind of broad sharing of the link or sharing, you may have seen this in your Facebook or Instagram feed, the sharing of Oh, I got Jordans or I've got Ray Bans, that type of stuff making sure that if it's a repeated sharing that looks like spam, that we're also taking appropriate actions and things like that.

BY MS. CORBELLO:

Q. Let's go to paragraph 8, which is on the same page. Do you want to take a second to read it. I think it goes down to the next page.

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A. I appreciate it, thank you.

Q. Do you see the second sentence there, "People will not use Facebook if they not physically safe"?

[22]A. Yes.

Q. What's your basis for this knowledge?

A. I don't have direct feedback, I don't have hard data but I've been in a number of conversations with civil society members, the public at writ large where they've communicated that. In fact, we've been the targets of a boycott on a number of occasions for people not feeling safe on the platform.

Q. Do you -- in your position as vice president of Trust and Safety Policy, do you receive direct user feedback?

A. Sometimes.

Q. From Facebook?

MR. McCARRICK: Objection to form.

Q. So users can fill out -- there's some sort of complaint system for Facebook, right, for users?

A. There are complaint systems.

Q. Do you receive those complaints that come in through the Facebook website?

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A. No, I do not.

Q. Do you review any of the user complaints that come in through Facebook?

[23]A. No, no, I do not.

Q. And so your knowledge for the sentence people will not use Facebook if they do not feel safe is based on anecdotal?

MR. DISHER: Objection. Form.

THE WITNESS: Yes. Clarify anecdotal. I've heard from people directly say to me it's anecdotal. I don't know if they would go through with it, but the difference between the complaint system, people either approach me directly, in person, they have email addresses, they have phone numbers, and they will call and they will lodge complaints that are outside of the Facebook complaint system.

BY MS. CORBELLO:

Q. And are there complaints that they won't use Facebook if they don't feel safe?

A. Yes.

Q. Are any of their complaints that they don't currently feel safe on Facebook?

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A. I have heard those.

Q. So when you talk about the anecdotal evidence you've heard of this, this sentence, are [23]you including both of those sentiments from users?

A. The sentiment that they would not use Facebook if they don't --

Q. Or they don't feel safe currently.

A. That's what they say. I have no way to prove their intent. I can't speculate on it if it's actually true, but that's what they felt.

Q. Do you have any other basis for your claim that people will not use Facebook if they do not feel safe?

A. That's my view.

Q. The next sentence, "Advertisers similarly will not advertise on Facebook if they believe it's not effective at removing harmful content, a content that violates our community standards."

Do you see that?

A. I do.

Q. What's your basis for that statement?

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A. I've been in contact with a number of advertisers. As I mentioned briefly, we've been a target of a boycott, I believe a boycott last year by advertisers where that that was one of their number one concerns.

[25]Q. Do you deal directly with advertisers as part of your position as vice president?

A. Not on a daily basis but on occasion I would.

Q. What are the occasions on which you deal with advertisers?

A. When one of our policies or one of our public policies -- not all of our policies are public -- but when that becomes an issue of scrutiny, I will hopefully explain how our policies, our intentions on enforcement of those policies to work with advertisers. But many advertisers also are just concerned with the platform broadly outside of an inflection point because they're worried about their brands.

Q. You said there was an advertiser boycott last year?

A. 2020.

Q. Have there been any other advertiser boycotts that you know of?

A. That is the one that I know of. You have to survey the advertisers. I don't know if they -- what started what they consider a boycott, but there was a known boycott in 2020.

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[26]Q. You said you talked to some of these advertisers on an ad hoc basis?

A. Correct.

Q. What are some of the concerns that they expressed to you?

A. Advertisers, especially their marketing offices, are highly concerned about their brand and the brand appearing next to content that they find to be objectionable.

Now, objectionable content for Facebook may not actually violate, but they are also very, very I guess focused on content that does violate or perceived to violate our policies that we haven't been able to enforce against.

So for any type of brand safety, if you will, the advertisers who invest obviously a lot of their resources into Facebook want to ensure that the platform is one that is safe.

Q. And so these are past concerns that the advertisers have expressed?

A. I guess it's hard to speculate for me on is it past or future. They generally are talking about past events to inform future spend.

Q. So is it fair to say that there has been content presented on Facebook that advertisers [27]did not agree with in the past?

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A. Yes.

Q. Content on Facebook that advertisers believe harm their brand has been present in the past?

A. If I can rephrase that to content that they would not -- they would not want their brand to appear next to.

Q. That has existed in the past on Facebook?

A. They have made the argument.

Q. Are you involved with anything to do with advertiser retention?

A. I'm not -- I don't know what that is. So I mean, I know what the words mean, but I don't know that that's a team that we have. So no, I'm not directly involved.

Q. So when an advertiser -- some of the examples you gave when an advertiser starts saying that they don't like their brand being next to a certain piece of content, they might walk, who deals with that at Facebook?

A. We have a full, what we call the business operations team. So it's a team of what we call global management services, who holds [28]partnerships whose main focus is on advertiser support.

Q. That's who would handle any sort of advertiser threat to leave the platform?

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A. That team, they are the main interface with advertisers.

Q. Who is the head of that team?

A. Our current chief business officer is Marne Levine.

Q. Can you spell that first name for me.

A. Sure. M-a-r-n-e.

Q. Have you ever -- other than the boycott you told me about, have you ever come across another advertiser who stopped using Facebook due to the concerns we've talked about?

A. Personally, no.

Q. Are you aware of where those advertisers would go if not using Facebook?

MR. DISHER: Objection to form.

MR. McCARRICK: Objection to form.

THE WITNESS: I can't speculate. I'm not their CMOs or investment ops.

BY MS. CORBELLO:

Q. No advertiser or rep of an [29]advertiser has ever told you where they might go alternatively to using the Facebook platform?

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A. They never told me directly. I haven't asked.

Q. The last sentence of paragraph 8, people and advertisers have stopped using Facebook due to these concerns?

A. Yes.

Q. I know we talked about the boycott.

What are the other -- what other personal knowledge do you have that forms the basis of this statement?

A. There's a lot of -- there's a lot of public reporting, and I'm taking those public reports as being accurate of people, you know, hashtag Delete Facebook, which is a kind of a known trend that appears routinely. The advertiser boycott.

There's also a civil rights boycott led by an organization called Color of Change where I don't understand how they would prove who is deleting Facebook or not. But that is one of the tenets that you delete Facebook to join that boycott.

Q. Why does that group ask its members to delete Facebook? What was the basis, if you [30]know?

MR. McCARRICK: Object to form.

THE WITNESS: I can't speculate on all the reasons why. Publicly they claim that Facebook has hate on the platform.

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BY MS. CORBELLO:

Q. You don't have any personal knowledge as to the fact that the members of this group don't feel safe and so they delete Facebook because of that?

A. I can't speculate to someone's emotion. I can tell you what they've told me. I can't speculate to if it's actually true.

Q. What is the name of this group?

A. Color of Change.

Q. Color of Change?

A. You yes.

Q. Have you spoken to anyone with this group?

A. Yes.

Q. And what have they told you is their basis for leaving Facebook?

A. We have too much hate on the platform. That's in a nutshell.

Q. Anything else?

[31]A. They have a myriad of like smaller lists of specific content, but I can't recall those now.

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Q. The hashtag Delete Facebook that you mentioned a moment ago, do you know the basis for those users' reasons for wanting to delete Facebook?

MR. McCARRICK: Objection to form.

THE WITNESS: I can't speculate on all of it, but similar to the Color of Change, what they publicly say on Twitter is Facebook has hate on the platform.

BY MS. CORBELLO:

Q. All of these that use the hashtag Delete Facebook say that?

A. I can't -- I have not done a survey of all the users who have said that. So I don't want to attest to something I wouldn't be certain on.

Q. So you aren't able to say sitting here today why people are using the hashtag Delete Facebook?

MR. DISHER: Objection to form.

THE WITNESS: I can't say why all those people are doing that.

[32]BY MS. CORBELLO:

Q. Let's go to paragraph 9 if you want to take a second to read that one.

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A. Sure, thank you.

Q. On page 4.

A. Yes.

Q. The first sentence, to me that reads that essentially Facebook's goal is to foster an open debate sort of forum. Is that correct?

MR. DISHER: Objection. Form.

THE WITNESS: Facebook's mission is to give people the power to build community. So to the extent that giving people voice which is important, freedom of expression is a human right, yes. We want to foster a platform for expression.

BY MS. CORBELLO:

Q. How many people use Facebook currently?

A. The family of action services has approximately 3 billion, I think Facebook is around 2.8 billion, but I don't know the exact numbers for November. Those are global numbers, obviously.

Q. That was going to be my next question. Explain to me a little bit more what [33]that means, give people the power to build community.

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A. Sure. It's core to the mission of how markets set division for Facebook, give people a power of voice to connect. So whether that's connecting through individuals, friends that you may friend, really, I think one of the things I'm most proud of on Facebook is the work that we do in groups to allow groups to thrive for people who would otherwise not have -- not be able to connect with people that have like interests or like lived experience.

For example, there was a group that works on disability, providing channels for those who are disabled. For COVID you can imagine how difficult it is for people that cannot otherwise be mobile enough to do errands, but in a world where it's very, you know, essential workers are very strapped and having people actually come into contact directly with individuals.

I've seen reports where in feedback, anecdotal, these are individuals with experience but saying that those groups were lifesavers, allowed them to connect to third parties, essential workers that were able to step in and provide [34]services that sometimes the governments cannot provide.

Q. So it sounds like Facebook operates in an essential way for a large majority of the public. Is that fair to say?

MR. McCARRICK: Objection to form.

THE WITNESS: You'd have to define "essential." For that one person, for that person where -- whose story that I happen to be familiar with and by reading, it was very important.

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Essential maybe has other connotations.

BY MS. CORBELLO:

Q. Well, you said Facebook does things that certain governments can't do; correct?

A. I didn't say certain governments can't do. I said they were stepping into places where governments were not acting. I'm not sure what the government can or can't do.

Q. Okay. So give some examples where you've seen that happen.

A. Seen what happen?

Q. Facebook stepping in where governments weren't acting.

A. That's one example that I have.

[35]Q. Do you have any others?

A. I would have to really kind of sit down and do long thinking about it. Nothing comes to me.

Q. How does one become a user on Facebook?

A. You can sign up on Facebook if you're over 13. If you're over 13 and you're not a certain class of person -- and I can go into those, those are people with specific

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criminal histories, child sexual abuse material, providers or those that traffic in terrorist, those things.

You can go to your Facebook.com, sign up, agree to the Terms of Service. Attesting that you're over 13 as well and then create your account.

Q. Is it fair to say you need a birth date, a name and a valid email address to sign up for Facebook?

MR. DISHER: Objection to form.

Q. Can you say that again?

A. You would need a real name, a name, our policies dictate a name that you are known by so an authentic name in the sense of an email address or a phone number and a -- some I guess [36]access to it. Like you have a computer, phone or something of that nature.

Q. Any other obstacles to becoming a user on Facebook other than the ones we just discussed?

MR. DISHER: Objection to form.

THE WITNESS: Obstacles, obstacles from whom, I guess.

BY MS. CORBELLO:

Q. I guess just information that Facebook needs before it allows you to be a user on its platform.

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A. I'm not positive. I'm not positive. It's not my sign-up, that kind of portfolio is not in my portfolio, so I'm not exactly sure if there are other additional things that people have to attest to, agree to on those sign-ups.

Q. You mentioned a second ago that there is some kind of -- is there an alternative screening for people with criminal backgrounds, terrorist links?

A. Not an alternative screen per se. We do keep -- for known people or people who have been known to be convicted of child sexual assault or sexual assault broadly, sexual assault broadly, [37]where we can find and have fidelity and information provided. So convictions, if the state of Texas convicts someone, convicts John Smith and John Smith's name is on the registry, that person would not be allowed.

Similarly for people who are affiliated with terrorist organizations, if you are bin Laden, for example, if he were alive, Osama bin Laden, signing up for that, we would not allow that.

Q. Is that a media blockade, you're denied entry at the door, or is that something where Facebook removes the profile after the fact?

A. It differs. I would say it differs. In many cases it's after the fact, that once we are alerted to it, we don't necessarily have a list of individuals, like we're not scanning a list of registry and kind of doing that comparison at the time of. But we were alerted to, so it's once we have knowledge of.

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Q. And so what information does Facebook use when it's checking those databases?

A. We generally use the open source database that we have. One point of clarification, a brief statement. For those known terrorists, we do prevent specific names from being created. So [38]you couldn't come on and like say I am Osama bin Laden, if unfortunately your name was actually that, you are not the terrorist, then there are like a number of steps you would have to go through to prove that, okay, you're not just trying to create a profile to create or represent the individual.

Q. Can that person who is unfortunately named Osama bin Laden just enter in a different name and create a user profile?

A. They could.

Q. And for the example of the child sexual predator, is that something you just search for by name, or do you utilize both their name and birth date, whatever they've signed up for?

A. That's correct. We use a number of signals, including their name, including other signals that we were able to derive, including a report upon them, that it's likely that this person has been convicted of child or not -- I don't want to say child, but a sexual offense.

Q. Does Facebook have any ability to screen between legitimate and illegitimate users that are signing up for Facebook?

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MR. McCARRICK: Objection to form.

[39]THE WITNESS: Can you define the legitimate, what does that mean?

BY MS. CORBELLO:

Q. Sure. So Facebook has many bots on its site at any given time; right?

MR. DISHER: Objection to form.

THE WITNESS: I don't think that's fully accurate, but -- that we have many bots, but "many" is kind of an ambiguous word.

BY MS. CORBELLO:

Q. Is it fair to say that Facebook can have millions of bots on its platform at any given time?

MR. McCARRICK: Object to form.

THE WITNESS: I'm also struggling a bit on the bots. I think what you're referring to maybe is fake accounts.

BY MS. CORBELLO:

Q. Yes.

A. Yes, we do have fake accounts on the site, and we stopped many of those at creation.

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Q. So how does Facebook manage to stop -- I'm going to use the terms again now that we understand what they are -- how does Facebook [40]manage to distinguish between legitimate and illegitimate accounts that are being made?

A. So real accounts versus fake accounts?

Q. Yes.

A. I'll use that. We use automation, a lot of automation that is informed by kind of human development to identify what signals of the fake account are. So that's creation dates, patterns of friends that you have, patterns of sharing that you create.

So everything from this seems that this, this one device created 10 accounts with very similar birth dates, you know, ranging from X, Y, Z, to their friending the same people or the same groups of people or doing a lot of friends that are unconnected.

So it's a little bit -- it would be very unique for a person, perhaps. In Washington, D.C. too, my first 40 friends are in, you know, globally, globally that while not dispositive gives a signal that there may be further investigation. Compiling all the signals and we make decisions.

Q. So it sounds like when Facebook is screening for fake accounts it's doing so after the [41]fake account has already made it on to the platform and started utilizing it in some way; right?

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MR. DISHER: Objection to form.

THE WITNESS: Actually, that's incorrect. We do a lot of screening up front as well. I'm sorry to give you some signals, but we do a lot of screening up front. Our latest transparency report actually mentions the number of fake accounts we remove at creation.

BY MS. CORBELLO:

Q. And so how does -- specifically as to the upfront creation of a user account, how does that screening work?

A. I don't have all the particulars. I gave you some of the ideas on name, dates, devices that they are created from, but I don't have all the particulars. I'm not an engineer.

Q. Who would know that information?

A. Our integrity teams broadly.

Q. And who is the head of that team?

A. The head of Integrity is a gentleman by the name of Guy Rosen.

Q. Does Facebook -- once someone has [42]created a user account and gained access to the platform, does Facebook treat all of those users equally in terms of applying its policies and terms and conditions?

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A. Yes. Yes, they do. There are some specific rules, some certain rules that have different applications, but broadly yes.

Q. The user-generated content is treated the same by your algorithms regardless of which user is generating that content?

MR. DISHER: Objection to form.

THE WITNESS: Maybe repeat the question.

BY MS. CORBELLO:

Q. Sure. The algorithms that are coming in contact with user-generated content as it comes on to the platform, are those algorithms treating that content the same regardless of the user that generates the content?

MR. DISHER: Objection to form.

THE WITNESS: I think it would be two similarly situated users, yes.

That's accurate.

BY MS. CORBELLO:

Q. What do you mean by "similarly [43]situated"?

A. I guess where I'm struggling is so pages get different treatment, individuals get different treatment,

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individuals vis-a-vis pages have different treatment. And -- but if you're posting -- I'm trying to make sure that we're talking apples to apples, people posting the same content, yes, that should be the same.

Q. That's what I was asking.

A. The factors there are also if you are, you know, perhaps if you're followed by a lot of people, a lot more people may see -- you know, you may be followed by many, I'm not followed by any, and so your post may be seen by more people than mine. But it would be treated the same as far as our policies.

Q. Let's go to paragraph 10. If you want to take a second.

A. Thank you. Yes.

Q. Do you see where it says, the first sentence that Facebook has developed robust policies and practices relating to content permitted on its service.

A. I do.

Q. Going back to what we were just [44]talking about, what are the specific policies and practices that are related to users getting on to Facebook?

A. This sentence is very much meant to describe our community standards. So those are the policies and abuse areas that we use to govern content. But within those,

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within those community standards as well we did discuss the -- those that are objectionable offenses, convictions, terrorists.

But also within that, I should be fair, there are others, spammers and scammers also fall under that as well. And as you can imagine, we have kind of robust signals on people. We use troll farms or spam farms to kind of create that type of content.

Q. Does Facebook currently have any algorithms or source codes that are used specifically to screen users and deny them entry before getting on to the platform?

MR. McCARRICK: Objection to form.

THE WITNESS: I'm not familiar on how each algorithm works in that sense.

BY MS. CORBELLO:

Q. Let's go down to paragraph -- well, [45]I'm going to kind of talk about 11 to 13 all together if you want to just --

A. Sure.

Q. -- review them all.

A. Thank you.

Q. So let's start with 11. Talk about the Terms of Service and community standards.

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A. Yes.

Q. Are these basically what Facebook lives by when it comes to content moderation on its platform?

A. Primarily, yes.

Q. What else does Facebook rely on?

A. I'd have to define the moderation. I think moderation means different things to different people. Moderation in these terms are, especially around community standards, are subsequently binary choices on moderation. Meaning

that we allow or remove. We also used algorithms to rank and prioritize.

We have rules that fall outside of those community standards on who can monetize certain type of content as well. Who can advertise. That does fall under community standards. But it's a very, very, I guess, broad term of moderation.

[50]A. One second.

That is correct.

Q. The way you described both the Terms of Service and the community standards in paragraphs 12 and 13, those are all dictated by Facebook only; correct?

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MR. DISHER: Objection to form.

THE WITNESS: Broadly, yes. There may be some attestations to, you know, to existing under current legal structure, but I don't know them offhand.

BY MS. CORBELLO:

Q. The second-to-last sentence in paragraph 13, it says Facebook's policies are designed to allow room for these types of expression. Obviously you're referring to the sentence right above.

A. Okay, yes.

Q. What policies specifically are you talking about in this sentence?

A. Our community standards. So those are the 22 abuse areas that I referred to earlier, and that covers a variety of issues ranging from the criminal, violence incitement, designated individuals and organizations according harm to the [51]objectionable things like hate speech to those that are more safety oriented, things like harassment and bullying, sexual exploitation, to intellectual property, to authenticity, the spam, scam, scammish behavior.

Q. Those policies that you talked about are more so about restricting certain expression; right?

MR. McCARRICK: Objection to form.

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THE WITNESS: They are to moderate the platform to ensure we have safety for our users.

BY MS. CORBELLO:

Q. So this sentence here where it talks about allowing room for types of expression, what are the specific policies that allow for that room?

MR. McCARRICK: Objection to form.

Q. As opposed to prohibit or restrict expression.

MR. McCARRICK: Objection to form.

THE WITNESS: The way that we view allowing people to talk to discuss these things in meaningful ways is to make sure that we're removing the harmful content. So by removing harmful content we [52]promote -- we're able to promote more conversations on positive -- strike "positive," but on content that people find to be valuable.

BY MS. CORBELLO:

Q. Okay. So this sentence was meant to essentially express that the policies restricting speech allow for more open speech?

MR. McCARRICK: Objection to form.

THE WITNESS: If I can take one second to explain the way that we think through our voice and expression.

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BY MS. CORBELLO:

Q. Sure.

A. Voice is one of our paramount tenets for these policies and the creation of these policies. The voice is embedded, so we look at things like safety, we look at things like dignity of the speaker, authenticity. We look at all these issues to ensure that by removing those things that would make people feel unsafe, removing the inauthentic actors from the platform, removing things that would attack someone's dignity, removing things that would maybe jeopardize someone's privacy, it allows the voice that is – [53]that we favor or excuse me, not necessarily favor, but that we would want to see on our platform, the community wants to see on the platform.

Q. Is the answer to my question yes?

MR. McCARRICK: Objection to form.

MR. DISHER: Objection to form.

THE WITNESS: Repeat the question.

BY MS. CORBELLO:

Q. Is this sentence essentially saying that removal or restriction of certain types of expression allows for more room for other types of expression?

MR. McCARRICK: Objection to form.

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THE WITNESS: Broadly, yes.

BY MS. CORBELLO:

Q. Let's take a minute to read paragraph 14 for me.

A. Sure.

Yes.

Q. I want to start with the second sentence, and then we'll go back to the first.

A. Sure.

Q. It says, "Facebook's artificial intelligence systems find more than 90 percent of the content they remove before anyone reports it."

[54]A. That's correct.

Q. What percentage of content is flagged versus what's removed?

MR. McCARRICK: Objection to form.

THE WITNESS: I don't have those, those numbers directly. Just one highlight. Something that can be flagged may also be removed or found by automation. So you will get sometimes overlap there, but your question specifically is what was flagged, but not removed?

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BY MS. CORBELLO:

Q. What's the percentage of content that's flagged versus what's removed.

MR. McCARRICK: Objection to form.

THE WITNESS: I don't have those numbers.

BY MS. CORBELLO:

Q. Well, let me -- so the sentence if you look at it a little bit more carefully, it says AI specifically finds more than 90 percent of the content that is removed.

So just speaking in very small numbers, if only 10 pieces of content are removed, that means [55]AI has removed nine of those pieces of content. But that doesn't say how much content has been flagged.

MR. McCARRICK: Objection to form.

THE WITNESS: It doesn't say that, though. That's not what that sentence means.

BY MS. CORBELLO:

Q. What does that sentence mean?

A. So the contents that we remove, we have a corpus of body of content, let's say 100 pieces that we may be able to identify proactively through our system, 95 percent of

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the pieces of content that we would remove, so say there's 100 violating pieces of content, we would be able to identify proactively 95 percent of those pieces of content before a user reports those to us.

It doesn't say -- I think what you're arguing is that the AI is now removing that content alone. There's another set of content that is violating. Do I understand that correctly?

Q. I guess my confusion with the sentence is that it's talking about total content removed, not content that has been flagged and then removed. So it's only if only 95 percent of [56]content has been -- 90 percent of the content that has been removed has been removed by AI, that doesn't tell me anything about what is overall flagged before it's removed. Does that make sense?

A. So yes. If I can take a couple seconds maybe to define and maybe better explain it. Bad on me for poor draftmanship.

If there are 100 pieces of content removed what we're seeing is that 90 percent, 90 were identified by AI of the hundred pieces of content removed. So all hundred pieces of content were removed. That sentence has nothing to do with -- I think what you're asking is is there other content on the platform.

Q. Is there content that is flagged but not removed on Facebook?

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A. Undoubtedly there's contents flagged by AI that was not removed.

Q. This 90 percent number is ultimately just the content that gets removed; correct?

A. That's the content that we believe violates our policy. So maybe it's a great point of clarification. You can flag anything on Facebook. If you say that I'm a big Knicks fan and someone says, Well, the Bulls are the best team of [57]the '90s no, I wouldn't flag that. It doesn't mean that it's actually violating our policies, but people can flag anything. We see that often.

Q. Sure. But does Facebook keep track of the number of flagged content versus the number of content actually removed?

A. I don't have the latest kind of figures on whether we can keep each piece of content flagged and how long we would do so.

Q. Who would have those numbers?

A. I'm not sure.

Q. So is it fair for me to read this sentence as not telling me how much content is flagged by either a user or Facebook?

A. Well, there's no aggregate number.

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It's just telling you percentage. Our community standards enforcement report will tell you that the numbers of content, the aggregate number of content that we have removed in that area, in using this number here you would be able to apply and say, Oh, you've moved a thousand pieces of hate speech. Oh, you did 90 percent identify it yourself through proactivity and through your automated system, so that means 900 were removed or identified by Facebook and another 100 came in from different [58]sources.

Q. So this 90 percent is not being applied to amount of content flagged?

A. We're going back and forth. The way that we also talk about it is the AI essentially flags content too. So the AI is flagging content.

It is talking about the amount, but it's always about the amount of content that we removed. Just because something is flagged doesn't necessarily make it violating. Even AI does not always flag violating content.

Q. So this 90 percent is content, but it's both been flagged and removed. That fair to say?

A. That is correct, yes.

Q. Okay. Let's talk about this paragraph, just kind of broadly.

A. Uh-huh.

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Q. It says, Facebook relies on automated and human review to enforce its terms and policies at scale across its global service.

Can you explain to me how that works?

A. That's great, because we were a bit discussing this now. Our automation is tremendous for helping us work at scale. We have, as I [59]mentioned earlier, two point X billion people on Facebook. They post billions of pieces of content daily. To do that we can only scale and enforce those policies with the use of automation, but automation is informed by human reviewers in many cases. So human reviewers may label content to train automation, but for certain areas, especially I'll give one example, something that's very heavily context-dependent like hate speech. The automation may not have a significant level of confidence to make certain calls.

So, for example, you may attack me with a slur and that would be found to be hate speech under our policies. I may use that same slur against myself or recount that you attacked me with a slur. When I do that, that doesn't violate a policy. That's a way that people express if they have a point for expression. I may try to reclaim the slur, reclaim the slur, and you see that through a number of communities.

So it's with that context where the machine learning, the automation can say, Hey, this looks like it may be violating, but I'm not actually certain that it's violating. I'm going to send it to a human reviewer and that we have

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processes to [60]do that. And then a human reviewer can take on additional contents and hopefully we're able to apply not just kind of broad context of our policies, but context of how things evolve in lexicons globally and then apply those rules and make sure that we're achieving the right outcome.

So let's do that number or do that area where we use automation and human review. There are certain policies that are very just, not just hate speech but require a very, very high amount of understanding of what's happening. For example, a statement about -- that statement that purports to be about, Oh, I want to kill all the Cowboys fans. Like is that actually real or are there some signals that oh, no, this person has signals that they have now, you know, gone out, purchased weapons, they are tracking towards AT&T Stadium, they are doing all these things. So you can get two very distinct outcomes.

So having human reviewers that are able to provide context and escalate where appropriate, we work with law enforcement on certain occasions, that is something that is important to us. So it's that combination that makes these things run.

Q. So how does Facebook become aware of [61]certain criteria that needs to be implemented?

MR. McCARRICK: Object to the form.

THE WITNESS: Criteria for the policies themselves?

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BY MS. CORBELLO:

Q. No. For the algorithm.

A. Define “criteria.”

Q. So well, let me put it this way.

A. Uh-huh.

Q. What are the different ways in which Facebook would become aware that there’s a piece of content that needs to be screened by either AI or human?

A. For those, those issues, the AI is working constantly across all of whatever is posted to Facebook. Everything that’s posted will eventually have a screen by our artificial intelligence. So that’s kind of the first step again.

There is a way that the automation which we call a classifier looks at certain signals that we try to understand the potential severity of a violation, the potential virality of a post and then the likelihood of something actually violating our

[74]MR. DISHER: Object to the form.

THE WITNESS: It’s hard to kind of like bifurcate or separate out this, because we worked so cross-functionally. It’s not as if one person would publish something.

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There wouldn't be cross-functional collaboration and communication with the teams. Through policy, through integrity, through operations, through the products themselves, so it's a little hard for me to make that.

There's just, you know, it happens to be one person who is -- this falls most likely in the portfolio. So, for example, if it's an issue about safety and perhaps suicide and self-injury, safety for a young woman on the platform, one of my team members would post about that, would generally post about that.

If it is about how the automated services worked, Guy Rosen likely would, but not always, but likely would post about that. So it's kind of hard to separate out, this person would only post [75]about that and you wouldn't be aware of it.

BY MS. CORBELLO:

Q. Okay. So there's not one person that everyone is just reporting their efforts to remove harmful content to, and that person is taking care of updating the community as you describe in this sentence?

A. No. No.

Q. You said your team provides some of these updates.

A. We do.

Q. How does it do that?

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A. When we see specific threats on our platform, we have either changed policies or we have responses, responses to specific issues. And we feel that the community would value or would be -- it would be valuable for our community to understand how we are treating issues.

So whether those are -- the coup in Myanmar, for example, whether it is suicide and self-injury, whether it was a foreign interference operation being run on Facebook to influence an election, we may take those times to report what we know and how we are going about either to resolve [76]it or we didn't.

Q. Did the team ever provide specific numbers as to number of pieces of content that have been removed under a certain category?

A. In certain cases, yes, we do.

Q. How do you value those numbers?

A. We work again in that cross-functional nature with our operations team, our data scientists, our integrity teams and others about whether those are removals or any action to be taken on this content.

Q. So which of those teams is giving you the numbers?

A. Broadly it's data science, but that's not always -- it's not always. Broadly yes, but not always.

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Q. Do you know how data science compiles those numbers?

A. I'm not a data scientist.

Q. Do you know if they count them out one by one?

A. I'm not a data scientist. I don't think it's that easy, but I'm not a data scientist.

Q. Do you know if they utilize any algorithms to determine the amount of content [77]removed under a certain category?

A. I do not know.

Q. Do you know what it costs the data scientists to provide you information such as number of pieces of content removed?

MR. DISHER: Objection to form.

THE WITNESS: I don't have line items on kind of cost or investment in that nature. I do know that we spent \$13 billion since 2016 on safety and security, and that's one part of that 13 billion, but I don't have like a line item breakdown.

BY MS. CORBELLO:

Q. Hypothetically let's say you were to call the data scientist -- is there a division name for it, or is it just data scientists?

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A. For these purposes data scientists.

Q. Hypothetically if you were to call the data scientists today and ask them for a specific number that they would generally be able to give you, you know, amount of content X removed in the past month, how quickly do you think they would get you that information?

MR. McCARRICK: Object to the [78]form.

THE WITNESS: It is extremely difficult to get any numbers with fidelity from our data scientists. We want data to be accurate in the numbers we present outward. We do release transparency reports now where I can say anecdotally I can't prove it, but they tell me and I take their word to be true, that they begin the next quarter's report the day after a quarter posts.

So if they were to post something today, they would begin crunching the numbers for the next quarter report tomorrow.

BY MS. CORBELLO:

Q. So the next transparency report, they are created by data scientists?

A. Again, it's a combination of the teams, policy teams, integrity teams, your operations team. They do feed information in in that process.

Q. And those transparency received are done quarterly?

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A. They are.

[79]Q. Are they done at any given time other than quarterly?

A. Not to my knowledge. I have never seen one.

Q. Are they done for any external partners or members of the public?

MR. DISHER: Objection to form.

THE WITNESS: We are very transparent. You can find those that are transparent.

BY MS. CORBELLO:

Q. Can they be requested by someone from the public other than on a quarterly basis?

A. I'm sure you can request them, but would we provide them? I don't think we would. Yes, we publish those quarterly.

Q. Going back to what we were talking about a second ago, new content criteria that comes up, maybe a new racial slur, a new terrorist group, do you have any knowledge as to how quickly the data scientists would be able to gather numbers on new criteria that has been flagged and removed?

MR. McCARRICK: Object to the form.

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THE WITNESS: I do not have [80]specific numbers. We try to be robust in our updates and swift, but I don't have specific numbers on how fast we can actually turn around a specific kind of subset of content or things like that.

BY MS. CORBELLO:

Q. Who would better be able to answer that question?

A. It would be a combination of our integrity and our operations. I think that the way that -- the frame of the question is that the data scientists we're referring to, they write the transparency report, they write on broad categories of reports, not necessarily on specifics.

To get, as you can imagine, get specific fidelity on very granular topics requires perhaps even more attention to deconflict. For example, we may have removed for, that's a violation of our hate speech policies. When in fact while that is true, it may not tell you information about which hate speech policy is violated.

And so I think what you asked for what exactly changed, what slur was used here, and that creates a level of just detail that we don't report on today because the burden would be extremely, [81]extremely high.

Q. Is there someone who is the head of the data scientists?

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A. There's someone, there are people that I know. I don't know who actually owns the, as you mentioned division, I don't know who owns the organization. It's slipping my mind. I just don't have the org chart in front of me.

Q. Go down to paragraph 16 for me.

A. Sure.

Q. Are you ready?

A. 16, yes.

Q. Yes. So this paragraph is talking about changes to policies in response to extraordinary situations. Right?

A. That is correct.

Q. How quickly did those changes happen?

MR. McCARRICK: Object to the form.

THE WITNESS: Are you referring to the specific situation that's flagged in Paragraph 16?

BY MS. CORBELLO:

Q. Yes. So let's start with the

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[110]during that period of time our appeals process had a significant lag if it was appealed or if the appeals were actually met.

In certain cases we would what we call auto-close and just say that essentially you use it as a signal that you disagree with a decision but not actually give you a specific decision on your appeal.

Q. This is one of the documents that you relied on in drafting your declaration; correct?

A. I believe that's correct, yes.

Q. And this was -- this is posted to Facebook's website currently; right?

A. I don't have -- I don't have the website in front of me right now. It was posted when --

Q. When you drafted your declaration, was it posted to Facebook?

A. Yes.

Q. And you drafted your declaration some time around this past summer, 2021, is that fair to say?

A. That's correct.

Q. Do you see at the very bottom [111]paragraph there, the first sentence starts out, "Once you ask us to

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take another look, your content will be removed again by Facebook usually within 24 hours”?

A. Yes.

Q. So currently Facebook is promising its users that it will review an appeal of content that’s been removed within 24 hours. Is that fair?

MR. McCARRICK: Object to the form.

THE WITNESS: I think the operative word there is “usually,” that we will hinge on. We aspire to do it within 24 hours, but to say that we always meet that mark for the number of reasons that I laid out, including some of these COVID impacts, is particularly difficult content, it may take longer to review as well.

BY MS. CORBELLO:

Q. Generally for just a run-of-the-mill appeal of content removed within 24 hours, usually Facebook will review a user’s appeal of that decision; right?

MR. DISHER: Objection to form.

[112]THE WITNESS: Run of the mill, we aspire to review it within 24 hours.

BY MS. CORBELLO:

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Q. Well, you're telling your users this on your website. Is it generally within 24 hours absent some exception, or is it, it will be 24 hours if we feel like it?

MR. McCARRICK: Object to the form.

THE WITNESS: It's definitely if we feel like it. We try to do it within 24 hours.

BY MS. CORBELLO:

Q. So that's the general practice?

A. We try to do it within 24 hours.

MS. CORBELLO: Marking this as defense Exhibit 4.

(Exhibit 4, document entitled I Don't Think Facebook Should Have Taken Down My Post, was marked for identification.)

Q. Going to Paragraph 18 of your declaration.

A. Sure.

Q. This paragraph is specifically about [113]a user's ability to curate their own Facebook page or any content that they see; correct?

A. That's correct.

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Q. This paragraph has nothing to do with the decisions that Facebook made in regards to a user's Facebook page or the content of its safety; right?

MR. DISHER: Object to the form.

THE WITNESS: We enable the tools -- not trying to be difficult, but we enable the tools that a user uses to select like who they would block, for example, or things that they would follow.

BY MS. CORBELLO:

Q. So you provide users the ability to make these decisions for themselves, is that what you're trying to say?

A. Correct.

Q. This paragraph isn't about the decisions that Facebook is making in regards to what a user can see or can't see?

A. That -- can you repeat that one more time.

Q. Nothing in this paragraph, there's [114]plenty of other paragraphs in this declaration about how Facebook moderates its content for users.

A. Correct.

Q. Is there anything in this paragraph about the decisions of Facebook or its algorithms or its humans are

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making in terms of moderating the content and displaying it for users?

MR. DISHER: Object to the form.

THE WITNESS: I guess the point may be that I'm hung up on a bit is that these are tools that people can use to help inform their news feed. They are still subject to the overall news feed, if that makes sense. So they're using tools to help curate their own news feed experience, but the news feed is still running, but, yes, they do have tools to curate their news feed experience.

BY MS. CORBELLO:

Q. And the curation of that experience by the user is what this paragraph is about?

A. Yes.

Q. Facebook allows users to, it says, choose a list of favorite friends, pages to feature, they can even block content from certain [115]users or pages and report content; is that right?

A. That is correct.

Q. Can you point me to the specific provision in HB 20 that does not allow what you describe in paragraph 18 to continue?

MR. DISHER: Objection to form.

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MR. McCARRICK: Object to the form.

THE WITNESS: Can I review?

BY MS. CORBELLO:

Q. Sure. It's tab 1. Defense Exhibit, I believe.

A. Maybe repeat the question.

Q. Sure. Can you point me to the specific provision in HB 20 that you believe would essentially prohibit what you describe in paragraph 18 from continuing to happen?

MR. DISHER: Objection to form.

MR. McCARRICK: Same objection.

BY MS. CORBELLO:

Q. Actually, let me put it this way:

Can you point to a specific provision in HB 20 that does not allow users to continue to curate their own news feeds on Facebook?

MR. DISHER: Objection to form.

[116]THE WITNESS: If we go to Section 143A.002, Censorship Prohibited, my understanding of the way that I read censorship in this context vis-a-vis the viewpoint of the user, the user's expression, et cetera, is that we will

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make certain decisions on this based off of the feedback that we receive from the users, so those signals that the users are giving us about what types of content they like to be surfaced or engaged with.

And if we make decisions that use that feedback, that may be read to the violating of the policies of discrimination against the viewpoint of a user.

I don't understand what a viewpoint means in this term. It's a pretty broad expression, but the way that our ranking algorithms work in concert, including with the way that people choose to curate and choose to try to curate themselves, these things aren't, as I was trying to explain earlier or the reason why I was hung up, they're not wholly [117]separate. They do work together and so these things would overlap.

BY MS. CORBELLO:

Q. Can you turn to the next page from where you were just reading from. There's a subsection B there towards the top of the page.

A. On page --

Q. It's the very next page from where you were reading.

A. Subsection, I'm sorry, B?

Q. Yes. It's under Section 143A.006 subsection B.

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A. Okay, yes.

Q. Just read it to yourself basically.

A. (Witness complies with request.) Yes.

Q. Does this change your testimony at all from a moment ago that Facebook is not allowed to continue to permit their users to curate their own content?

MR. DISHER: Object to the form.

MR. McCARRICK: Object to the form.

THE WITNESS: Again, we're using signals to help model what a user would [118]likely want to have appear in their feed.

So that may include specific things that you've already said that I don't want to see that, but also modeling towards things that are highly likely to be the same as that. We used earlier the example of I don't want to see Ray Ban, random Ray Ban spam ads in my feed. I may do that.

We would always use that to model also, you don't want to see random, you know, some fake Jordans ads, you don't want to see fake other types of material, you know, kind of goods presented in your feed. And we would make decisions likewise on those.

BY MS. CORBELLO:

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Q. So the example you gave of a user, you know, pressing block on a Ray Bans spam ad, what in HB 20 prohibits that from happening?

MR. DISHER: Objection to form.

THE WITNESS: Nothing prevents the user from pressing block. It is the downstream effects of how that would ultimately inform our news feed [119]algorithm, and it's important to also point out that the news feed is specific to each user, how that impacts that user's news feed experience, and we will make decisions based off of the user's feedback, indirect and direct feedback. We make those decisions to present them the -- present them the news feed that we believe that they want the most.

Here where you say about specific expression, I assume, but I don't know, but specific expression is very vague to me. Does that mean all content that falls in that category, or is it about a specific piece of like one piece of content that falls, that the user specifically pressed.

Those are the decisions that we would be forced to make.

BY MS. CORBELLO:

Q. When a user decides to block content, they press the, what is it, the radio button for block, does Facebook pop up a question as to, you know, why are you blocking this content, 28anything like that?

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[120]A. For certain types of content when you get feedback, it does present you with options. When you hide specific content, it does present you with options generally, but I can't speak to all instances and all versions of Facebook.

Q. Who would be able to speak to that?

A. I don't know offhand. Our UX designer.

Q. A what?

A. User experience designer. Sorry. Shorthand. The user experience designer that has the most up-to-date version of Facebook.

Q. Go down to Paragraph 22.

A. 22? On my declaration?

Q. Yes. Page 8 of your declaration.

A. Page 7? Oh, page 8.

Q. Yes. Eight at the top.

MR. DISHER: Eight at the top, seven at the bottom.

THE WITNESS: Yes.

BY MS. CORBELLO:

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Q. So paragraph 22 talks about one way in which HB 20 is -- would impact Facebook. Is that right?

A. I believe so, yes.

[121] Q. What specific provision of HB 20 are you referring to in paragraph 22?

MR. DISHER: Objection to form.

THE WITNESS: Section 143A.002.

BY MS. CORBELLO:

Q. Any other provisions?

A. That is the main provision that I focused on.

Q. Paragraph 23. Just let me know when you're ready.

A. I am ready.

Q. What part of -- what provision of HB 20 are you referring to in paragraph 23?

MR. DISHER: Objection, form.

THE WITNESS: Again, Section 143A.002, but I believe there is one other section. If you bear with me, please.

BY MS. CORBELLO:

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Q. Sure, take your time.

A. Here we go. I should read it in order, perhaps. So if we go to, I believe this is -- actually, I'm just going to stick with that chapter. I know there's a portion that says it talks about curation, but unfortunately I'm not [122]finding it right now.

Q. So you said previously 143A.002?

A. That is correct.

Q. Any particular subsection?

MR. DISHER: Object to the form.

THE WITNESS: Again, I think it's all-encompassing of that subsection A that begins with "The social media platform may not censor" is the main.

BY MS. CORBELLO:

Q. Paragraph 24 of your declaration, let me know when you've read that.

A. Sure. Yes.

Q. It talks there at the end about, it gives a few examples, white supremacist content, anti-Semitic conspiracy theories and other racist content.

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Is it your opinion that HB 20 does not allow Facebook to prohibit racist as a category on its platform as a result of that law?

MR. DISHER: Objection to form.

THE WITNESS: I don't understand what viewpoint means. There's no definition that I see for viewpoint. So it's hard for me to understand what a [123]viewpoint means.

Facebook, we want multiple viewpoints. We don't make rules or agnostic to someone's religion or agnostic to your political party, but we want to treat certain types of speech and potentially certain positions and viewpoints as very hostile.

If you're a terrorist, we don't want you. If you traffic in child exploitative images, we don't want you. If you're someone who traffics in hate broadly, if you're a scammer or spammer, we don't want you on the platform. We want to be able to moderate things of that content.

BY MS. CORBELLO:

Q. So is the answer to my question yes?

MR. DISHER: Object to the form.

THE WITNESS: Repeat the specific question and see if I can give you a yes-or-no answer.

BY MS. CORBELLO:

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Q. Is it your position that HB 20 would not allow Facebook to prohibit racist content as a [124]category if it would go into effect?

MR. DISHER: Object to the form.

THE WITNESS: I don't know what viewpoint means here. If viewpoint would mean that we would have to allow people who share racist, anti-Semitic conspiracy theories that would share a specific type of misinformation that could lead to imminent harm, that could share terrorist activity, then yes. Then that would prevent us from doing our job, and it would be -- it would undo our current moderation practices.

BY MS. CORBELLO:

Q. You're aware that HB 20 right now is currently set to go into effect on December 2, 2021; right?

A. I am.

Q. Do you have any personal knowledge as to whether Facebook believes it's going to have to remove racist content as a category that it moderates for as a result of HB 20 going into effect?

MR. DISHER: Objection to form.

MR. McCARRICK: Objection to form.

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[125]THE WITNESS: Again, the viewpoint definition here is at best vague if nonexistent, so it's hard for me to say.

I understand that if this law were to go into effect on the 1st that it would be extremely, extremely maybe impossible for us to comply. It would force us to change all of our systems to try to come into compliance.

We've spent billions of dollars, I mentioned earlier about 13 billion on this specific area since 2016, 40,000 people.

We have to -- I am sure invest nearly as much to be able to comply with all that would undo our systems in such a fundamental way.

BY MS. CORBELLO:

Q. And by "comply," you mean essentially take away racist content as a category of something that Facebook moderates for?

MR. DISHER: Objection to form.

MR. McCARRICK: Objection to form.

THE WITNESS: Could you repeat what the taking away was? I'm trying to [126]make sure I get the verbs and negatives correct.

BY MS. CORBELLO:

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Q. Sure. You talked about you're going to have to modify a lot of the systems if HB 20 goes into effect.

A. Correct.

Q. Would one of those modifications mean taking away, for example, racist content as a category that Facebook moderated for?

MR. DISHER: Objection to form.

THE WITNESS: Possibly. And much more, depending on, you know, what's the definition of viewpoint, viewpoint here is. That could be -- racist content could be content that violates and incites all the training that the algorithms have done over the years, all the training that the human reviewers have done all the years, our strong engagement built within and then broadly the safety of the platform.

So yes, all the things that we have built up as an infrastructure and guardrails to ensure that we have a safe [127] site would undergo massive, massive change to allow these types of content to it.

BY MS. CORBELLO:

Q. What -- what categories of content do you believe HB 20 allows Facebook to moderate for?

MR. DISHER: Object to the form.

MR. McCARRICK: Object to the form.

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THE WITNESS: Can I go back to --

BY MS. CORBELLO:

Q. Sure.

A. Under Section 143A.006, I think there are some carve-outs for specific, would be considered probably criminal sharing. So that would include sexual abuse. Some that -- it's listed here content that would directly incite criminal activity or consist of specific threats, but I don't see and I don't know if these are incorporated somewhere else. But I don't see definitions on what is considered to be inciting or what is considered to be specific in the threat categorization there. And then like the broad unlawful expression, which I don't know what that [128]refers to.

Q. So other than the carve-out you identified in 143A.006, are there any other categories of content that you believe HB 20 allows Facebook to continue to moderate?

MR. DISHER: Objection to form.

THE WITNESS: I think outside of those specific things, again, without an understanding fully of -- because I don't think it's defined -- unlawful expression broadly, it seems that all of our other abuse areas would be subject to, and then we would not be able to moderate content in those spaces up to and including. I think despite what you have here as criminal incitement to violence, perhaps, our

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definition is not one that's tied to the criminality or the Texas statutes on inciting violence.

BY MS. CORBELLO:

Q. How does Facebook make its money?

MR. DISHER: Object to the form.

THE WITNESS: We have a few revenue streams, but primarily through advertising.

[129]BY MS. CORBELLO:

Q. What's the percentage of funds that you receive for revenue that you receive from advertisers?

A. I don't have an exact figure.

Q. Is it above 80 percent?

A. I believe so.

Q. Is it above 90 percent?

A. I don't have an exact figure.

Q. So somewhere between 80 and 100 percent?

A. I believe so.

Q. Go to paragraph 26 for me.

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A. Sure.

Q. Let me know when you're done with that.

A. Sure. Yes, I'm done.

Q. Okay. It looks like this paragraph is mostly about the concerns that Facebook has with having to comply with the law that applies to Texans when they are a global company. Did I read that right?

MR. DISHER: Object to the form.

THE WITNESS: I think that it's complying with the law even for our

[154]report or broad posting as to how Facebook curates and targets content to users? Why is Facebook making that public information now?

MR. DISHER: Objection, form.

THE WITNESS: We would like to give people as much information to make informed decisions about how to use the platform.

BY MS. CORBELLO:

Q. If you can look just right below where we were just talking about, subsection B of Section 120.051.

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A. Uh-huh.

Q. Do you see that it says, “The disclosure required by subsection A must be sufficient to enable users to make an informed choice regarding the purchase of or use of access to or services from the platform”?

A. I do.

Q. Do Facebook’s transparency reports currently provide users sufficient information to make an informed choice regarding the platform they’re using?

MR. DISHER: Object to the form.

MR. McCARRICK: Object to the [155]form.

THE WITNESS: I don’t know what the definition of “informed choice” under the Texas law is. It doesn’t define it. I know what we try to do at Facebook. At Facebook we try to give users information to make those choices. Again, what I don’t understand or I can’t articulate here or maybe what is not articulated is what informed choice means to the state of Texas.

BY MS. CORBELLO:

Q. Well, as to how Facebook views it.

Does Facebook believe that it’s currently providing adequate information for users to make informed decisions?

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A. We believe that we're providing adequate information based off of our standards and our rules. I don't know if that complies with or would satisfy the elements of this statute.

Q. So going back to my question a few minutes ago, the first requirement of subsection A1, curating and targeting content to users, is it your testimony that the only burden with complying with that is simply Facebook being unaware of what [156]that means?

MR. DISHER: Objection, form.

THE WITNESS: That is not what I said. I also flagged that there may be like proprietary information depending on what is required from there.

BY MS. CORBELLO:

Q. What would be the other burdens of complying with subsection A1?

A. I think there are a few other burdens. One that jumps out to mind also is that in many of the spaces that we work to moderate content they are, quote/unquote, adversarial spaces where people will seek to game the systems that are placed upon them. Game the regulations to skirt enforcement. Broad enforcement, specific enforcement are seen as specific disclosures on certain ways or on ways that the system is used can also jeopardize the way -- the effectiveness of our content moderation abilities.

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Q. Are there any other burdens you can think of that would -- that Facebook could endure if it had to comply with subsection A1?

A. Broadly speaking just the investment of resources. I have no -- I don't know the exact [157]investment of resources. I know how detailed -- we were speaking to earlier about how the data is necessary -- the data needed to produce an enforcement to report in the time it takes to do so on transparency measures there. I would assume that investments would rival for other transparency issues.

Q. What does it cost to create the current transparency reports that happen quarterly?

A. Again, I don't have a specific line item that. I don't have a line item number, but I have the macro number, and that goes into that 13 billion where we are spending \$13 billion since 2016 on that specific place, including increasing the size of our company, measurably now 40,000 people working in that space, which is the majority of the company working.

Q. Has anyone done the math on how much money would have to be added to that 13 billion figure if HB 20 were to go into effect?

MR. DISHER: Object to the form.

MR. McCARRICK: Object to the form.

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THE WITNESS: I have not done the math. I haven't done the math. I can't [158]speak to what our finance teams have been able to calculate.

BY MS. CORBELLO:

Q. Who would be the best person to ask that question?

A. Our chief financial officer is David Weiner. But I don't think if he knows offhand either.

Q. Subsection A2, places and promotes content services and products including its own content services and products. What burdens would Facebook have to endure if it were to disclose the information in subsection A2?

MR. DISHER: Objection to form.

THE WITNESS: Again, these – this is part of -- it's very, I guess, attached to one. And this goes to – in my mind goes towards the ranking algorithms and how we prioritize and in certain cases deprioritize content within one's news feed, how we surface recommendations to an individual. All these things do have -- I'll start there, they have a level of proprietary business secret with that as well as -- and we've [159]seen this in a number of spaces too, as more information about the algorithm becomes available, people in an adversarial space may try to exploit the algorithm.

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Sometimes that is for harm, foreign interference, terrorist content. Sometimes it is for also harmful content, but maybe not as gray but like as spammers and scammers to get you to engage more likely to bait you into things, to drive you off of our platform to other platforms where more harmful activity can occur.

BY MS. CORBELLO:

Q. Maybe, let's take the time, let's do this. Subsections A1 through 5, we've talked about a few burdens as they relate to subsections 1 and 2. Would you say that those burdens we've talked about are the same for complying with subsections A3, 4 and 5 as well, or are there any additional burdens?

MR. DISHER: Objection to form.

THE WITNESS: Yeah. On 5 I really don't understand what we mean by "user [160]performance data." I think that definition would be important to understand before I can comment. It sounds very taxing on that. Broadly for 1, 2, 3 and 4, though, I think those are primarily the same at which the investments that we have made, the ways that we moderate content also potentially harming the safety of our users and the safety of the environment that we want to have on Facebook.

BY MS. CORBELLO:

Q. Any other burdens you can think of associated with having to comply with subsection A1 through 5?

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MR. DISHER: Objection to form.

THE WITNESS: If the subsections were to change the way that we moderate content and change the way that we can provide a safe environment for our users, it has the potential of driving users off the platform. We spoke about that earlier. It has the potential of driving advertisers from our platform, and we spoke about that earlier as well.

[161]BY MS. CORBELLO:

Q. Subsection A1 through 5 is about the disclosures that Facebook has to make; right?

MR. DISHER: Objection, form.

THE WITNESS: That is correct.

BY MS. CORBELLO:

Q. Okay. So is it your testimony that one of the burdens with having to disclose this information is that it will drive users away?

A. My testimony is that I don't understand what specific information about disclosures means in this context. If we are disclosing with such a level of specificity that people can then now subvert our policies where they can post more harmful content, the logical conclusion in my mind at least is that that creates an unsafe environment because now they have subverted our moderation systems which means users may not find it safe.

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They tend to go off, users go off, advertisers and their brand safety concerns, they would persist as well. And so that's where I have, you know, specific concerns. We have seen that in the past where groups of users have intended to subvert our systems, YouTube systems, other social [162]media platforms based off of transparent – about knowledge about how those systems work. So that level of specificity again really matters here.

Q. And I understand Facebook might think that there are secondary effects of having to comply with disclosures, but in terms of the disclosures themselves, having to gather this data and present it, what are the specific burdens associated with that?

MR. DISHER: Objection, form.

THE WITNESS: I think, as I think I've explained those, explained those again about the burden for actually gathering the investments needed to do so, the potential for harm that may come within disclosing this where those systems can be gamed.

BY MS. CORBELLO:

Q. Does the fact that users might leave the site as a result of any of these categories being disclosed, does that alter in any way Facebook's ability to report on any of these categories?

MR. DISHER: Objection, form.

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THE WITNESS: May I ask you to [163]repeat that question one more time.

BY MS. CORBELLO:

Q. Sure. Does the fact that -- let's just assume for the sake of this question that users might leave the platform as a result, secondary result of having to disclose this information, does that make any of this information impossible for Facebook to compile and disclose?

MR. DISHER: Objection, form.

THE WITNESS: I can't really comment on possibility. That's like a hard one, whether it's possible or impossible.

I do think it would be very difficult for us to, based off of what I said, without understanding what the specific information in this context means. It would be very, very difficult and burdensome for us to comply with the law.

BY MS. CORBELLO:

Q. Other than the transparency reporting that Facebook provides on its website, what other reporting obligations does it currently have?

[164]MR. DISHER: Object to the form.

THE WITNESS: May I ask about what subjects?

BY MS. CORBELLO:

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Q. Well, HB 20 requires the certain sorts of disclosures that we just talked about.

Are there any other laws or regulations that Facebook abides by that would require it to provide information regarding or related to content moderation?

MR. ALLEN: Object to the form.

THE WITNESS: In the context of moderation specifically, I'm not sure.

BY MS. CORBELLO:

Q. Are there any reporting requirements in relation to user retention?

MR. DISHER: Object to the form.

THE WITNESS: I'm not sure.

BY MS. CORBELLO:

Q. Are there any reporting requirements in terms of gathering users' data?

MR. DISHER: Object to the form.

THE WITNESS: I'm not a privacy lawyer, so I can't speak to what the requirements are.

[165]BY MS. CORBELLO:

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Q. Are there any reporting requirements as it relates to advertiser retention?

MR. DISHER: Object to the form.

THE WITNESS: I don't know. I also -- are you saying reporting requirements for Facebook or meaning a government's reporting requirements? I don't know either way, but I'm just curious.

BY MS. CORBELLO:

Q. Yes. Any sort of government, international or domestic.

A. I don't know.

MR. ALLEN: Object to the form.

THE WITNESS: I don't know.

BY MS. CORBELLO:

Q. Paragraph 30. Let me know when you're done.

A. Yes.

Q. What provision of HB 20 is paragraph 30 talking about? This is about the disclosure requirements; right?

A. Right, right.

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Q. I believe it's page 2 of the HB 20

[170]when we are transparent about our policies. We're very transparent, we include our community standards. It does not mean that those meet any standard that the state of Texas is holding out.

BY MS. CORBELLO:

Q. Is there a reason you didn't quote Section 120.052 subsection (b)(1) in Paragraph 30?

MR. McCARRICK: Objection. Form.

THE WITNESS: I can't recall.

BY MS. CORBELLO:

Q. Paragraph 31.

A. Yes.

Q. So the first sentence there talks about although Facebook's detailed policies are publicly available, the bill purports to demand even more.

What are you referring to when you say "purports to demand even more"?

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A. Sure. I'm looking for the specific section. I think, again, it goes back to the specifics of 120. I had a -- I wish I had a different -- underlining is making it a little difficult on my eyes to try to read it through, to try to go through, but I thought I recalled the [171]provision that it required specific, specific notifications also on instances. But those may be conflating two things at this point.

Q. Let's go to paragraph 32.

A. Sure. Yes.

Q. What's the basis for your claim that Facebook is required by HB 20 to disclose highly confidential or competitively sensitive business information?

MR. DISHER: Objection, form.

THE WITNESS: Under subsection 120.051 again, the public disclosure requirement, I believe the information that we would be required to disclose on it, information targeting, place and promoting content are all things that could be viewed as highly sensitive business and proprietary information.

BY MS. CORBELLO:

Q. Is that -- are you referring to the algorithms as the proprietary information, or is there something else that would be considered proprietary by Facebook?

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A. I'm speaking to the algorithms. [172]There may be additional proprietary information in regards to Facebook.

Q. We talked a little bit in this deposition about how the algorithms worked broadly; correct?

A. That's correct.

Q. Is what you told me considered proprietary information?

A. Broadly no, but, and I don't know if I know all the proprietary information. I'm not an engineer.

Q. In the subsection you pointed to, it says, "Algorithms or procedures that determine results on the platform."

Do you see that "or"?

MR. DISHER: In your declaration.

Q. In your declaration.

A. Yes.

Q. Did that "or" indicate to you that Facebook is required to provide its algorithms to comply with HB 20?

MR. DISHER: Objection. Form.

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THE WITNESS: I believe it is a non or it is an exclusive “or.” So it could be either at the same time [173] procedures that inform the algorithm. Again, I’m not an engineer so I don’t know how you would be able to necessarily derive, but I know that is definitely a concern.

BY MS. CORBELLO:

Q. Well, the discussion we had earlier was -- were those not about the procedures that determined the results on the platform?

MR. DISHER: Objection. Form.

THE WITNESS: There were some of the procedures but definitely not wholesome.

BY MS. CORBELLO:

Q. It wasn’t all the procedures; right?

MR. DISHER: Objection, form.

THE WITNESS: I do not know all the procedures.

BY MS. CORBELLO:

Q. But we did talk about some of the procedures that determine the results on the platform; right?

A. Broadly speaking, we spoke about some procedures.

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Q. Paragraph 33.

[174]A. Can I have a moment?

Q. Sure.

A. Yes.

Q. Going to the first bullet point in Paragraph 33, what is the substantial investment of time that would have to be done by Facebook in order to comply with this bullet point.

A. This is another example of without knowing exactly the specificity of what is required by the law on what the law is requiring the companies to provide the user, it's hard to explain.

Facebook currently gives a very, you know, broad violation type, you violated, you post something of hate speech, we violate it for hate speech. It may not go much further than that. The specificity required by the law is very detailed to include essentially what we may be colloquially almost a legal opinion on why this is violating. That would create immense burdens.

Q. Do you see the first sentence of paragraph 33 you say, "The bullet points below describe certain requirements under HB 20 that would require a substantial investment of time and resources to comply."

[175]That's what you attested to; right?

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MR. DISHER: Object to the form.

THE WITNESS: I did.

BY MS. CORBELLO:

Q. So having attested that these figurative bullet points are going to require substantial investment of time and resources, what in bullet point 1 would require more investment of time and resources?

MR. DISHER: Object to the form.

THE WITNESS: The time and resources it takes for us today to enact the procedures and the systems, again, go back to that 13 -- excuse me -- billion dollar number, go back to the 40,000 people. Any change in that is going to be a potentially very consequential, consequential change.

Predicting out that my experience with having changes inputted to gain more specificity on certain things, to have better clarity on, better clarity on abuse types, these things are issues that we have not been able to achieve because of what I have been told because the [176] resources are not available, we do not have the engineering capacity to do so, the investments may be too burdensome.

BY MS. CORBELLO:

Q. So how much more time and resources would be required for Facebook to comply with bullet point 1?

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A. I do not have a specific time or resource.

Q. For bullet point 2, how much time or resources would have to be invested into by Facebook in order to comply?

A. I don't have specific numbers invested of people nor resources. We explained through the CSCR in how that process works today, the incredible investment that team makes.

Q. For bullet point 3, how much time and resources would Facebook have to invest in in order to comply with bullet point 3?

A. Again, I think that would be substantial. As we spoke to the appeals process earlier, the current appeals process in some of the just created -- or excuse me, natural issues that have been inserted into the appeals process for us, a way of saying the COVID-19 pandemic and the [177]impacts that we have there, I don't have a specific number on how we would, the size of the workforce that we would need to build out to meet the structures of this.

Q. These three bullet points here, are these all tasks that you, Neil Potts, would be required to perform if HB 20 went into effect?

MR. DISHER: Object to the form.

THE WITNESS: Personally? I would not personally be required to perform it, but I work with a cross-functional manner with the teams on these issues.

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BY MS. CORBELLO:

Q. Are these bullet points ones in which the team that you are the vice president of be tasked with performing if HB 20 went into effect?

A. I'm struggling a bit to -- as you say "task," when you mean task, to execute, who was the -- how are you defining "execute" in that situation?

Q. Well, each bullet point talks about certain actions that Facebook would have to undertake under HB 20; right?

A. Yes.

[178]Q. Are any of these actions ones you describe in which your team would be taking in order to comply?

A. We work in a very cross-functional manner, so we advise, we seek input from external sources for those things that my team handles. We are not coders, we are not engineers. We do not necessarily build the product. That is another team. But those teams can't operate in a divorce completely bifurcated. You can't have a team build a product without knowing what they were doing. You can't have a team that has no coding experience go out and actually code a new version of Facebook.

Q. So this substantial investment of time and resources that you attest to is not solely those that would be invested by your team; is that right?

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A. It's for Facebook. It's for the Facebook's investment of resources.

Q. So given that these are investments of time and resources from people other than those within your team, who did you speak to in order to attest to these three bullet points?

A. Again, the group of integrity, integrity professionals, the engineers. Also the [179]operations of the human review team.

Q. You spoke to those two groups prior to this portion of the declaration being finalized?

A. Two of the leaders within those groups, yes.

Q. Did you speak to anyone else regarding these three bullet points before they were finalized?

A. I know I spoke to in-house counsel. I'm not sure if I spoke to -- I take that back.

I know I spoke to also members of my team on certain issues, but I'm not exactly sure what specific part, but part of the job.

Q. Paragraph 34 --

A. Sure. Yes.

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Q. -- talks kind of broadly about the burdensome requirement of HB 20. Are there any burdens that you have attested to in this declaration that are impossible to comply with as opposed to simply burdensome?

MR. DISHER: Objection. Form.

THE WITNESS: "Impossible" is such a unique word. What I think would be impossible is for us to comply with anything by December 1. I'm pretty [180]confident of expressing that it's impossible, we would not be able to change systems in that nature.

More broadly speaking, it would be such an undoing of the way that we moderate content, the way these systems have been built, the investments that have been made, whether it's a true impossibility or a practical impossibility, I'm pretty confident it's a practical impossibility.

Now, you may say that something is theoretically true if you spend 50 years trying to do it if you change the way that your company completely operated; perhaps I can't attest to that. I can't foresee the future.

For, I think I have the realm of both control over the teams that I work with, not only my team, the teams I work cross-functionally with. I don't see a way that we would actually be able to go forward with compliance in a meaningful way.

[181]BY MS. CORBELLO:

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Q. So are there any specific provisions that Facebook believes are just impossible to comply with in HB 20?

MR. DISHER: Objection. Form.

THE WITNESS: I think I covered them. So even going back to the declaration, whether it's the curating, the targeting, for all the reasons mentioned, the way that the algorithm works, even as I explained, where we have steps on transparency around reporting of removed -- even changes to that I think would be -- I don't think, I know would be impossible to comply with by December 1.

But I think it would be tremendous investments over time to actually have them in compliance in the out years, whatever those out years numbers are. It would take extreme, extreme changes to the way that we do business.

BY MS. CORBELLO:

Q. So you said that the things you discussed in your declaration, it sounds like the [182]position is that the burdens you described would be impossible for Facebook to comply with?

A. Again, 100 years from now, maybe not. For the time that I plan on being at Facebook, probably so. So whether I'm going to be at Facebook for 10 days, 10 months or 10 years, if we use 10 years, I think that we would not be able to comply in a meaningful way with these issues without undoing the whole way that we do business.

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Q. We've -- you've given me a few names of people that might have more specific answers to some of my questions. Is there anyone else at Facebook that would have personal knowledge of how content moderation works?

MR. DISHER: Objection. Form.

MR. McCARRICK: Objection to form.

THE WITNESS: Those names, I guess my manager knows broadly, although I may be more, have more knowledge of the specifics at this point. Her name is Monica Bickert.

BY MS. CORBELLO:

Q. Monica Bickert is your supervisor?

A. My supervisor.

Q. Is there anyone else you can think [183]of?

MR. DISHER: Objection. Form.

THE WITNESS: I think you have -- I think all the names that I've given are sufficient.

MS. CORBELLO: Let's take a quick break and then we'll wrap up.

THE VIDEOGRAPHER: We're going off the record. This is the end of media No. 2. The time is 12:38 p.m.

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(Recess)

THE VIDEOGRAPHER: We're back on the record. This is the beginning of media Unit No. 3. The time is 12:49 p.m.

MS. CORBELLO: Mr. Potts, you are relieved. Thank you so much for your time. Pass the witness.

MR. McCARRICK: I just have one quick question.

EXAMINATION BY

MR. MCCARRICK:

Q. Mr. Potts, could you look at paragraph 31 for me real quickly.

A. Sure.

Q. And do you see where it says, [184]"Moreover, although Facebook's detailed policies are publicly available, the bill purports to demand even more without guidance out"?

Do you see that?

A. I do see that.

Q. Do you recall counsel for AG asking you some questions about that?

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A. I do.

Q. And do you recall, you spent some time looking over the law; correct?

A. I did.

Q. Can I draw your attention to, it's the second page of the version I have, at least.

A. Sure.

Q. The section 120.053.

A. Correct.

Q. Bi-annual transparency report.

A. Yes.

Q. Can you read through that silently to yourself and let me know when you're done.

A. (Witness complies with request.) Yes.

Q. And so when counsel for the AG's asked you to kind of -- I believe that you have, I forgot the exact question, but I believe it's [185]something along the lines of what in the law are you referring to when it said, were you trying to recall Section 10.53?

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A. This is exactly. There are a number of things in I guess Section Number 2 from A through G that would be extremely burdensome, and quite frankly I don't believe that we have fidelity and information on, to the level of detail on how the law would require on how these things operate now.

It's important to realize that everyone's news feeds experience is curated through themselves, and that includes the ranking of content is exclusive and unique to the individual user.

So it's speaking of what other ways that content is deprioritized is one. Content removal is obviously, we are transparent about, but even going into global specificity perhaps, asked for by this subsection may be onerous, but really the deprioritization would be extremely, extremely difficult to quantify for the community of two point X billion users on any specific piece of content. And then the kind of broad any other action defining what the other actions would be is [186]also important.

MR. McCARRICK: Thank you,

Mr. Potts. I have no further questions.

EXAMINATION BY

MS. CORBELLO:

BY MS. CORBELLO:

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Q. Mr. Potts, look at subsection 2 of Section 120.053, subsection 2A.

A. Yes.

Q. Does Facebook currently provide any number of instances in which content removal occurred on its platform?

A. We do.

Q. Does subsection 2A require anything more than what Facebook already provides?

MR. McCARRICK: Objection to form.

MR. DISHER: Objection to form.

THE WITNESS: Potentially. You're asking for a legal activity, the definition of illegal activity pursuant to what, I guess, criminal statute would be important to understand as well. Further really the potentially violating where it says, if we're looking at subsection 2, potentially policy [187]violating content known to the platform. I guess all types of content are theoretically potentially violating. We talked about before about what a "Hello" post would look like, but without having thresholds, without understanding what that means in practice it could be extremely, extremely burdensome to provide any level of detail and specificity about all the contents posted to Facebook.

BY MS. CORBELLO:

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Q. But currently the details that Facebook does provide includes certain numbers as to categories of content and how many it's removed; right?

MR. DISHER: Objection, form.

THE WITNESS: We provide numbers on the content that we are able to identify for removal and the content that we then remove removed, yes.

BY MS. CORBELLO:

Q. What about subsection 2B, content demonitization, is that a number that Facebook currently provides in any sort of way?

[188]A. I don't have -- I don't know. I don't know.

Q. And deprioritization, did I understand your testimony that Facebook does provide that in any sort of number percentage currently?

A. That is my testimony. To clarify, I don't quite understand what deprioritization means here. We do rank content. We rank content for every individual we have on the platform for their news feed.

That prioritization does happen per individual per piece of content. I don't even know or understand the math that you would need to go through to be able to calculate that.

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Q. So in terms -- if it's per individual, if we're talking about that sort of prioritization, is that something that Facebook keeps in terms of aggregate numbers?

A. Deprioritization of content or specifically what one piece of content, how it's distributed to different people's news feeds?

Q. Yes.

A. I don't know.

Q. What about subsection 2D, the [189]addition of an assessment to content, is that something that Facebook currently does not keep any sort of data or numbers on?

MR. McCARRICK: Object to the form.

THE WITNESS: I want to be clear here that I'm not fully, fully aware of what that means in practice of the addition to the assessment. I do not believe we keep numbers on assessments of content, meaning broad assessment.

In a very kind of minute way was there a decision made on a piece of content the way one would object to saying assessment, is there something more, some type of deliberation over that with a detail, I don't know, I don't know numbers for either.

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BY MS. CORBELLO:

Q. Do you know how difficult it would be to get those numbers?

A. I don't know if those numbers exist. I think it would be extremely difficult absent just utilizing the broad brush that all content is subject to review on Facebook via automation.

**APPENDIX K — Excerpts of Deposition of
Alexandra Veitch, Filed November 22, 2021**

IN THE UNITED STATES DISTRICT COURT
IN THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Case No. 121-cv-00840-RP

NETCHOICE, LLC, D/B/A NETCHOICE,
A 501(C)(6) DISTRICT OF COLUMBIA
ORGANIZATION, COMPUTER &
COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)6
NON-STOCK VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

[14]A I don't believe I've ever spoken to anybody at
CCIA.

Q Okay. About anything at all.

A Ever.

Q What about anybody at NetChoice about anything
at all?

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A Not that I recall.

Q Okay. And to any of CCIA's members?

A I certainly have conversations with CCIA member companies --

Q Right.

A -- right?

But these are folks here in town working in a similar industry as me.

About the specifics of this declaration, I have had no conversations.

Q Okay. And just to be clear, about the specifics of the declaration, no conversations with any NetChoice members either?

A Correct.

Q Okay. Why -- why is Google not suing my client independently?

[15]MS. YANG: Objection. Form.

THE WITNESS: Can you rephrase the question so I can understand it better?

BY MR. LYLES:

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Q So Google has filed a declaration in support of a suit brought by the two trade associations, NetChoice and CCIA, against my client.

Why is YouTube not bringing its own lawsuit against my client?

A To be honest, I don't know the answer to that question. And -- and I fear I probably will have to say this too again today. I'm not a lawyer. So advising on legal strategy like that question is not my area of expertise.

Q But you -- you admit that your declaration contains a lot of interpretation of a state statute; correct?

A Correct.

MR. DISHER: Objection. Form.

BY MR. LYLES:

Q But as you said, you're not a lawyer; correct?

[16]A That is correct.

But in my role as director of government affairs and public policy, it is my responsibility to understand, generally speaking, how laws would impact the company. It is not my job to provide legal advice.

Q Understood.

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Could you turn to paragraph 5 -- 5 and 6 of your declaration, please.

A Sure.

Q So in here there's -- there's talk, in paragraph 5, about YouTube supporting the free flow of ideas. Again in paragraph 5, being as open as possible.

What are the -- what are the requirements to post on YouTube?

MS. YANG: Objection. Form.

THE WITNESS: Could I just ask you to clarify?

So YouTube has a terms of service we require users to comply with. Those terms of service govern whether you're able to post on [17]YouTube or not. But you tell me if there's something more specific you're looking for.

BY MR. LYLES:

Q So if a person wanted to post something on YouTube, what would that have to -- have to do as a practical matter?

MS. YANG: Objection. Form.

THE WITNESS: So my understanding is they would have to have a Google account, and they would have to meet the requirements of our terms of service.

BY MR. LYLES:

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Q So is that -- do they self-certify that they meet the requirements of your terms of service, or do you -- does Google check whether they meet the terms of service?

MS. YANG: Objection. Form.

THE WITNESS: So I have actually never posted on YouTube. But my understanding is that you are given an opportunity to review our terms of service and then an opportunity to affirmatively agree with them.

[18]Q And that's all that needs to happen?

A I think we're getting out of my depth here. But my understanding is that is what is required.

Q So if somebody represents online in that process that they comply with the terms of service, is there an immediate check by you-all, or does the account just open?

MR. DISHER: Objection.

MS. YANG: Objection. Form.

MR. DISHER: Form.

MS. YANG: Objection. Exceeds the scope of the deposition as allowed in the Court's order dated November 2nd, 2021.

MR. LYLES: Could you explain that objection, please?

We're talking about -- paragraph 5 and 6 talk about

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how YouTube is open to the public. It's as open as possible. So I'm trying to tease out what that -- what that openness involves.

MS. YANG: Counsel, the Court's order allows the scope of the deposition to be the [19]information contained within the declaration. You directed the witness to paragraph 5 which speaks to the openness of YouTube, as you're saying right now.

However, your question pertains to the check of information or communication that the user provides to YouTube at the time of signing up, as I understand your question, which I find to exceed the scope of the declaration.

MR. LYLES: Okay. So I find it to be exactly in line with seeing what this "open as possible" means.

So are you instructing the witness not to answer the question?

MS. YANG: I am not. I'm stating the basis of my objection on the record. The witness may answer.

MR. LYLES: Okay.

MR. DISHER: I'll also object to mischaracterizing the declaration, but go ahead and answer.

THE WITNESS: So let me try and tackle this a different way.

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[20]Over 2 billion people, distinct individuals, every month visit YouTube. I think that -- that is -- that fact recognizes that this is a place where -- of openness where many voices, many different individuals come to share ideas, creativity, et cetera.

BY MR. LYLES:

Q Okay. And in terms of my question whether Google or YouTube checks if the -- you know, the users saying they comply with the terms of service is true or not, is there a check or is there not a check?

MS. YANG: Objection. Scope.

MR. DISHER: Objection. Form.

THE WITNESS: I'm sorry. I think -- I think we're just outside of my area of expertise here.

I am not entirely sure what happens on the back end once a user accepts our terms of service.

BY MR. LYLES:

Q Does the account open, then?

[21]A Yes, that is my understanding. The account opens.

Q Immediately upon accepting terms of service?

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MS. YANG: Objection. Scope.

THE WITNESS: That is my understanding.

Now, to be clear, there are limitations that exist about how the service can be used depending on, for example -- this is just one that I'm familiar with -- if you are a new creator, you are not allowed to immediately livestream.

Livestreaming poses unique risks to the platform, to our users, to our community. So that would be a privilege that is not immediately available to you upon opening an account.

BY MR. LYLES:

Q Okay. But you could post other content?

A I believe so, yes.

Q Okay.

MR. LYLES: And just to go back to these objections, any objection beyond leading or form is in violation of Western District Rule 30(b); so [22]please limit all your objections accordingly.

BY MR. LYLES:

Q In paragraph 6, you talk about harmful content on YouTube makes it less open, not more.

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A Uh-huh.

Q Could you explain that, please?

A Sure.

So we want YouTube to be a space where people -- our users, our creators -- are free to express themselves. There are certain types of harmful content that make people feel less comfortable expressing themselves.

So, for example, hateful content about people's gender or people's race or people's religion would make YouTube a less open place rather than a more open place.

(Veitch Deposition Exhibit 2 was marked for identification and attached to the transcript.)

BY MR. LYLES:

Q I'm going to hand you what's marked as defense Exhibit --

A Got it.

[23]Q -- Number 2.

It should be Bates-stamped 69, but they got -- in your production, but they got cut off.

I don't know. Do you want to turn to it just so you can -- the tab --

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MR. LYLES: What's the tab again?

MS. CORBELLO: It's 17.

BY MR. LYLES:

Q Tab 17.

MS. YANG: I apologize, Counsel. I don't think tab 17 corresponds to the document that I'm looking at.

MS. CORBELLO: No. It'll be in there, but it's -- all the Bates stamps were too low in the document; so they got cut off.

It's about maybe a third of the way in.

MS. YANG: Thank you. I'll search for it.

MS. CORBELLO: Yeah.

MR. DISHER: Is this the document titled "Free Speech and Corporate Responsibility Can Coexist Online"?

[24]MR. LYLES: Yeah.

MR. DISHER: Thank you.

BY MR. LYLES:

Q So who's Susan Wojcicki?

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A Susan Wojcicki is the CEO of YouTube.

Q Okay. And can you go down to the third paragraph in that first page, please?

A Sure.

Q Do you see where it says “YouTube makes information available to anyone with an internet connection”?

A Yep.

Q Is that a true statement, in your view?

MS. YANG: Counsel, I don’t mean to interrupt.

Can we give the witness an opportunity to read the document?

MR. LYLES: Yeah.

THE WITNESS: Sure.

So, Mr. Lyles, to return to your question.

Generally speaking, I believe this is a [25]true statement.

BY MR. LYLES:

Q Okay. So would it be fair to say that the barriers to

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entry to see information on YouTube are only having an internet connection?

A I am sure there are novel reasons what -- that would make for barriers to entry. But, generally speaking, I believe that the information available on YouTube is available to those with an -- with an internet connection, yes.

Q Do you need an account to view the information on YouTube?

A You do not. There is a logged-out experience that is available to people to come to YouTube and view YouTube without a Google account.

Q And to enjoy that logged-out experience, do you need to make any representation about complying with Google's terms and conditions?

A I want to be sure that I'm being accurate with you.

I don't believe so, but I am not certain. But I believe if you come to YouTube as -- under [26]a -- you know, with that logged-out experience, you will not have all the privileges of YouTube available to you.

For example, as we discussed before, you will not be able to upload content. You will not be able to be a creator. But you would be able to view content available on YouTube that way.

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Q Okay. So you said there were -- there were activities in YouTube that you could not engage in just by creating an account; right? That you needed to do more --

A For example, the --

Q -- in order to livestream.

A -- example about livestreaming. Yep.

Q What more would you need to do to be able to livestream?

A I -- I believe the standard for livestreaming is you have to have had an account for a certain period of time. You have to have a certain number of followers. You have to -- to summarize, have a good track record of not abusing the platform.

[27]And there are specific requirements that I don't recall exactly what they are.

Q What about being able to monetize your content?

A Sure.

Q Well, first, can you describe what that -- what it means to monetize content on YouTube, please?

A Sure.

So YouTube is unique in that we share the majority of our advertising revenue with the creators who create the

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content. So it's a 55/45 revenue share split with 55 percent of that revenue going to creators who are part of what's known as the YouTube Partner Program, or YPP.

Those creators have met additional standards, as you note, and are eligible for monetization on our platform -- eligible to receive that portion of the revenue share of the advertisements that appear on their content.

Q Okay. So can I gather from paragraph 5 -- if you could go back and look at that [28]again, your declaration.

A Yep.

Q Okay. Actually, let's go to -- let's go to paragraph 10. Sorry about that.

This is where H- -- it says -- you say: "HB20 would eliminate much of our ability to make these kinds of choices." I'm not going to read the whole thing.

But can I gather from 10 that YouTube prefers to its platform to be as accessible as possible?

MS. YANG: Objection. Form.

THE WITNESS: YouTube -- YouTube -- freedom of expression is a fundamental value for YouTube. So is responsibility. Every day we are trying to balance those two sometimes competing dynamics of freedom of expression and responsibility.

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We want to allow for the maximum amount of content that -- that is consistent with that freedom of expression value but not -- but is not inconsistent with our responsibility to our users, [29]to our creators, and to our advertisers.

BY MR. LYLES:

Q So where -- I just heard that you balance freedom of expression with responsibility, and then something about your obligations to your advertisers; is that --

A Well, I think you have not entirely summarized my thought there, but that was part of my thought. Sure.

Q Okay. How does YouTube make its money?

A YouTube makes its -- YouTube primarily makes its money by advertising revenue.

Q And how does that work? if you could just explain --

A Sure.

Q -- the process.

A So, generally speaking, advertisers -- large companies around the world, some of the best known brands, spend money to have their advertisements appear alongside the user-generated content that appears on our platform.

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To be clear, there are other smaller [30]revenue streams for YouTube, but that is the largest revenue stream.

Q How does user engagement play into advertising?

MS. YANG: Objection. Form.

THE WITNESS: Could I just ask you to rephrase that so I make sure I understand your question?

BY MR. LYLES:

Q So how do advertisers decide, like, where they're going to ask YouTube to place their ads?

A Sure.

So advertisers have a wide range of controls about what sort of content they want their advertisements to appear -- to appear on. And they can be -- they can be sort of general or reasonably specific about the type of content they want their advertisements to appear alongside.

Q And does YouTube recommend this content to users that the advertisements appear alongside?

A YouTube recommends content to our users, and some of that content may be -- may have [31]advertisements appear alongside it, yes.

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Q How do you understand the term “user engagement”?

A I actually don’t understand that term.

That’s not necessarily a term we use at YouTube. So maybe you could define it for me.

Q Okay. So YouTube recommends content to its users

--

A Correct.

Q -- is that correct?

A That’s correct.

Q And what guides those recommendations?

A Oh, sure.

So we want to recommend content to our users that they will love, new content that they will enjoy, content that they might not otherwise discover.

There’s three general baskets of signals that we use to determine what content to recommend to any user. So the first is about the user themselves. What -- what sort of content have you watched before. What are your general interests. [32]What channels do you subscribe to.

Second are general context clues about a user. So less specific than to you, Mr. Lyles, in particular. But where in the world are you. What language does it seem that you speak. What time of day it is.

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And then the third are signals we pick up about the individual content itself. As I began, we want to recommend content to our users that users will love. So we like to recommend videos that not only have gotten a lot of watch time on our platform but, for example, are watched from beginning to end, which is a signal to us that users started that video and then sufficiently enjoyed it to continue watching it. Or videos that have gotten a lot of likes on them. Another signal that this is the kind of content that users enjoy.

Q So part of the feedback that shows you you're recommending the right thing to the user is some action by the user?

A Sure. By both that user and by other users as well.

[33]Q Okay. Clicks, for example, would be one.

Would that be --

A So --

MS. YANG: Objection. Form.

THE WITNESS: I'm actually going to disagree with you there, because, as I said, clicks are a very imperfect measure of whether users actually like that content.

BY MR. LYLES:

Q Okay.

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A A better measure is did you click and then continue to watch the video all the way through.

Q Okay.

Okay. And would it be fair to say that YouTube strives to give users -- or recommend to users the kind of content that results in those -- those types of actions? Clicking on a video and watching it all the way through.

A There is some -- some additional nuance probably required there, which is that, on certain subjects, we want to index in the direction of [34]authoritative information even over engagement.

So, for example, on a subject like COVID -- obviously, very relevant right now -- the most sensational video, the video that gets the most views that is watched the most might not actually be the most useful video for our community. And so on subjects like COVID, on subjects like news, politics, we also index toward authoritative content.

Q Okay. But indexing toward engagement is also something you do?

A Well, to be clear, on those subjects we will index toward authoritative at the -- at the sacrifice of engagement.

Q Okay.

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A But engagement is, as you are accurately pointing out, an important signal, that this is the kind of content that users love and that other users may love as well.

Q Are there areas in which engagement is the primary form of -- the primary priority in recommending content?

[35]A So I just want to make sure I'm entirely accurate here. And we've started to use engagement in a -- in a particular way. So maybe if you could define for me how you're using it. Because, again, you know, number of views does not necessarily equal engagement.

Q Right.

Okay. So, for instance, you said that a better -- a better metric for engagement was whether somebody clicks on the video and watches the whole thing.

A Yep.

Q So are there areas where those concerns are paramount over whether the content is authoritative or not?

A There are -- there are subjects in which authoritative isn't a metric that we use; right? I mean, if it's a video about skateboarding, there is no sort of authoritative -- you know, just to pull that ex- -- there is no authoritative source on skateboarding. We're not going to look for -- we're not going to index toward authoritativeness on [36] skateboarding.

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So on that content on skateboarding, whether users are watching it all the way through, whether they're clicking the "like" button, whether they're sharing it with other people, that would indicate to us that that's content about skateboarding that other users would enjoy. We would recommend that content to other users.

Q You spoke earlier about how you balance freedom of expression against responsibility.

Do you also balance it against the engagement concerns we were talking about?

MS. YANG: Objection. Form.

THE WITNESS: So I think we're aligning sort of two concepts here. And maybe if I could just take a big step back.

So when we talk about YouTube, we often talk about it in the context of the four R's. And I believe this is discussed in my declaration.

So remove what content is -- what content lives on YouTube and what content cannot live on YouTube. Remove -- raise what content we -- what [37]authoritative content we elevate to our users. Reduce what content we do not recommend to our users. And then reward, as we discussed monetization for our creators.

When we talk about that balance between responsibility and freedom of expression, we're often talking about it in

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that context of the remove conversation. What content can live on our platform and what cannot.

So I just don't want to confuse that with the idea of recommendations and what content we raise up versus what we reduce.

BY MR. LYLES:

Q Okay.

A But you tell me if I didn't answer your --

Q So --

A -- question.

Q Yeah.

So putting aside the stuff that gets taken away --

A Sure.

* * *

[46]other platforms?

MS. YANG: Objection. Form.

MR. DISHER: Objection. Form.

THE WITNESS: I'm not an expert on how other platforms work. But I do believe that some other platforms

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take what is called a speaker-based approach where there are different rules for different speakers.

There are no different rules for different speakers on YouTube. All speakers are treated equally. Whether you are a president of a country or a democratically elected representative versus John Q. Public, all creators are treated the same on YouTube.

BY MR. LYLES:

Q Okay. Has Google received subsidies from the federal government?

MR. DISHER: Objection. Form.

THE WITNESS: I am -- I do not know the answer to that question.

BY MR. LYLES:

Q Has Google received subsidies from any [47]state government?

MR. DISHER: Objection. Form.

THE WITNESS: I do not know the answer to that question. That is not within the scope of my work.

BY MR. LYLES:

Q Has Google received any benefits from the federal government?

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MR. DISHER: Objection. Form.

MS. YANG: Objection. Form.

THE WITNESS: Could you define what you mean by “benefits”?

BY MR. LYLES:

Q So, for example, an absence of regulation, would that be a benefit that Google has received, in your view?

MR. DISHER: Objection. Form.

MS. YANG: Objection. Form.

THE WITNESS: I -- I don't want to argue law with a lawyer. But an absence of regulation does not seem to me to be a benefit.

[48]BY MR. LYLES:

Q So have you heard of the Communications Decency Act, section 230?

A I have, yes.

Q And section 230 insulates a company like Google from liability for content posted by third parties?

A For user-generated content. Correct.

Q Do you see that as a benefit that Google enjoys?

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MS. YANG: Objection. Form and exceeds the scope.

THE WITNESS: I don't see that as a benefit. I see that as a law enacted by Congress that has been essential to having a free and open internet here in the United States that all citizens have benefited from. It is not a benefit for any particular company.

BY MR. LYLES:

Q If that 230 protection went away, would that significantly change the way YouTube did business?

[49]MS. YANG: Objection. Form and exceeds the scope.

THE WITNESS: If section 230 went away, it would -- it would radically change the internet in the United States of America. By extension, that would certainly also impact YouTube.

BY MR. LYLES:

Q And you're aware that section 230 doesn't protect newspapers, for example?

MS. YANG: Objection. Scope.

MR. DISHER: Objection. Form.

THE WITNESS: That is actually not my understanding of how section 230 works. I believe that there are some

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potential portions. For example, if a newspaper had a comments section online, that would be covered by -- by section 230.

BY MR. LYLES:

Q But it's your understanding that it would only apply to online comment sections?

MS. YANG: Objection. Form and exceeds the scope.

THE WITNESS: No, that's not what I said.

* * *

[58]MR. LYLES: Yeah. Sure.

BY MR. LYLES:

Q All right.

A Yep.

Q Ms. Veitch, could you go to -- please, to paragraph 7 and 8 of your declaration.

A Yes, sir.

Q So 7 begins: "These beliefs and values drive the decisions we've made in building YouTube."

Could you just recap those values again?

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A With apologies. I'm just going to refresh --

Q Yeah. Sure. Sure.

A -- my recollection on this portion of the declaration.

So when I refer here to beliefs and values, among concepts I'm referring to are that the internet -- a free and open internet is a source of information and creativity; that freedom of expression is a core YouTube value but so is responsibility; and that we continually try to strike that right balance between freedom of [59]expression and responsibility.

Q Are there other values that YouTube tries to foster on its platform?

A Those are very overarching general values. And I think most of our community guidelines would fall under that rubric, obviously, with more specificity.

Q Are there any other -- I mean, can you just provide some examples of other values YouTube tries to foster on its platform?

A I think, generally speaking, you can say the balance between freedom of expression and responsibility is the overarching value under which we determine what content is available on our platform.

Q Can you get any more specific than that?

A I cannot.

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Q So would those decisions as to more specific values -- are they taken on an ad hoc basis?

A Content moderation is not taken on an ad hoc basis. It is made according to our community [60]guidelines which are publicly available.

Q So to go -- to find more specific values that YouTube fosters on its platform, one should look at the community guidelines?

A Community guidelines govern what content is allowable on our platform and what is not. Those are a more specific form of YouTube's overarching values.

YouTube's mission -- let me add this since I don't believe I said this previously. YouTube's mission is to give everyone a voice and show them the world. Again, that's -- we do that by balancing freedom of expression with responsibility. Those are the core values.

Q And are those core values reflected in YouTube's editorial judgments about what it puts on its platform?

A I'm sorry. Could you ask that question again? I'm not sure I'm following.

Q Okay. Let me try to figure out another way, then.

So the core values you just described, [61]are those reflected in the editorial judgments YouTube makes in crafting the content moderation on its platform?

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A Those core values inform the crafting of our community guidelines which determine what content is allowable on our platform and what is not.

Q Okay. Is YouTube expressing its core values in the way it moderates content?

A Yes. I believe it is, yes.

And as we have discussed previously, those values exist and those community guidelines exist without specificity toward any individual creator, toward any particular, for example, political viewpoint. But they are overarching values about what we want our platform to look like.

Q Okay.

MR. LYLES: I'm handing the witness what I've marked as Defendant's Exhibit Number 3.

(Veitch Deposition Exhibit 3 was marked for identification and attached to the transcript.)

* * *

[66]BY MR. LYLES:

Q These concerning incidents of YouTube's recommendations, are these examples of YouTube engaging in editorial discretion?

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MS. YANG: Objection. Form. Objection. Scope.

THE WITNESS: As we've discussed today, there is an enormous amount of content on YouTube: 500 hours uploaded every minute; volume of content growing exponentially.

We consistently endeavor to get it right both in terms of what content is available on our platform, making sure that it complies with our community guidelines, and in terms of the quality of the content that we recommend to our users.

Getting it right, trying -- continuing to endeavor to get it right is important to earn the trust of our users, our creators, and our advertisers.

But also given the scope, the volume of the content, we don't get it perfect. In fact, as you and I have discussed today, .17 to .19 percent [67] of views of content on YouTube are on content that violates our community guidelines. So that's a -- so that's a piece of data that we make public ourselves suggesting that we don't always get it right. But we continue to try.

We also continue to do better. If you look at that data point of the violative view rate, if declines over time, over a period of many years. And we want to be held accountable to continuing to reduce that number.

But I do not want to suggest to you today that we always get it 100 percent right.

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BY MR. LYLES:

Q When you don't get it right, is that an expression of YouTube's editorial discretion?

MR. DISHER: Objection. Form.

Go ahead.

THE WITNESS: With respect, sir, I just don't -- I don't understand the -- the -- those -- what feel to me to be two very distinct concepts --

BY MR. LYLES:

Q Okay. So let's --

[68]THE WITNESS: -- being put together in the same --

MS. YANG: Counsel --

MR. LYLES: Sorry.

THE WITNESS: -- question.

MR. LYLES: Yeah. Got it.

MS. YANG: -- let's not interrupt the witness.

MR. LYLES: Excuse me.

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BY MR. LYLES:

Q If we go back to paragraph 7 again where you talk about the “editorial judgments we have made in crafting the content moderation tools and policies.”

So these editorial judgments are the same things that result in not getting it right some of the time. Is that fair to say?

MS. YANG: Objection. Form.

MR. DISHER: Objection.

THE WITNESS: So there is both our error rate, our not getting it right, and enforcing our policies and recommending our content. There is [69]also a continuing effort by us to refine our policies, to adapt our policies over time.

So, for example, with COVID, as global understanding -- as the understanding of health authorities has evolved over time, our policies have changed. So I don't want to suggest to you that YouTube's policies, our editorial judgments, exist carved in stone. They do not. They evolve over time.

BY MR. LYLES:

Q Okay. But the not getting it right, when that happens in a certain temporal context, at that time, that not getting it right was a result of YouTube's editorial judgments at that time?

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MR. DISHER: Objection. Form.

MS. YANG: Objection. Form.

THE WITNESS: Sure. It is -- well, I just -- so allowing a piece of content -- a piece of content that appears on our platform that violates our policies but is, nonetheless, on our platform may never have been reviewed by either human or machine. So there may have been no judgment made [70]around that individual piece of content. So I just want to make sure I'm answering you accurately.

BY MR. LYLES:

Q Okay. Well, we can just -- we can just leave it at that.

Thank you for your patience --

A Thank you.

Q -- with that line of questioning.

A And yours as well. Thank you for your patience.

Q Let's move on to paragraph 18 of your declaration, please.

Here you talk about how many channels or accounts YouTube has removed and provide some reasons for that.

How did you get that information?

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A This -- this data is directly from our community guidelines enforcement report, which is -- we make public on a quarterly basis.

Q Okay. And how does it -- how does it make it into the report? I mean, who -- who finds it?

[71]A Sure.

That -- that is a -- I'm sure a fair question but, really, outside of my area of expertise.

So there are things that happen back of house in terms of tracking, the removal of content, the removal of videos, the removal of comments that form these numbers. But I'm not involved in the quantifying of these metrics.

Q Who would know? Like, units and names, please.

A Gosh. There -- well, so our vice president of trust and safety, which is responsible -- our trust and safety organization is responsible for the enforcement of our community guidelines. That is -- that's a large organization that involves -- that -- there are both content moder- -- content moderators in that organization. I assume there are probably also data scientists that do this sort of data tracking. And our vice president of trust and safety is an individual named Matt Halprin.

[72]Q Okay. Is there a set of documents that would answer that question as well?

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A There may be, but I don't know.

Q Okay. And would Matt Halprin be the person that would know?

A I am trying to give you the person who is most likely, in my estimation, to under- -- to understand all the pieces, all the inputs --

Q Right.

A -- that lead to the community guidelines transparency report, and that would be Matt Halprin. Matt Halprin leads that organization.

Q Okay. Thank you.

How -- are algorithms responsible for the moderation that you talk about in 18 in terms of removal?

A Sure.

Some- -- some- -- sometimes the source of first detection of violative content are machine learning systems or algorithms.

Q What -- what percentage of the times of detection, do you think?

[73]A You know, I know that piece of data is in our community guidelines transparency report. I don't have it off the top of my head.

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Q Is it more than 50 percent?

A Yes.

MS. YANG: Objection. Form.

BY MR. LYLES:

Q Is it more than 70 percent?

MS. YANG: Objection. Form.

THE WITNESS: I -- I believe it is both more than 50 and 70 percent. But, again, that exact figure is available -- publicly available.

BY MR. LYLES:

Q So the -- it's the vast majority. Would that be --

MS. YANG: Objection.

BY MR. LYLES:

Q -- fair to say?

MS. YANG: Form.

THE WITNESS: I --

BY MR. LYLES:

Q Okay.

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[82]BY MR. LYLES:

Q So let's start with comments.

What percentage of flagged comments were removed during this period?

A So I just want to make sure that we're using the term "flag" in the same way.

Usually when YouTube talks about flags, we mean content that was flagged to us by users.

Q Okay.

A So there is, you know, definitionally, a human involved. So I think that's different from how you are using the word flag.

Q Okay. Does AI ever flag content?

A So --

MS. YANG: Objection. Form.

THE WITNESS: As you and I previously discussed, there are situations in which machine learning systems both make content moderation decisions based on our community guidelines, and there are situations in which machine learning systems refer pieces of content for human review.

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[83]BY MR. LYLES:

Q Are you -- are you aware of the percentage of those machine learning referrals to human review that result in a removal?

A I am not. And I -- I do not believe that that is a piece of data that we make public.

Q Who would have that data at Google or YouTube?

A Again, the removal of content, according to our community guidelines, is a function that is the responsibility of our trust and safety organizations. So, again, the vice president of trust and safety, Matt Halprin --

Q Okay.

A -- is responsible for removal of content whether by machine or by human.

Q Okay. What about the material flagged by users? What percentage of that actually ends in removal?

A I think that actually may be a data point we make public. I don't have that data point top of mind.

[84]But what I will say is that we actually find user flagging to be a relatively inefficient source of -- source for detecting violative content. What we see often is that users flag content that they just don't like, for whatever reason.

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I think the most flagged content in all of time on YouTube is a Justin Bieber video which is not violative of our policies but, perhaps, reflects --

Q Right.

A -- individual opinions of Justin Bieber.

Users are not experts on our community guidelines; so it's hard for them to determine what content violates our community guidelines with a high degree of accuracy.

Q Okay. But users -- or those with accounts anyway -- have committed themselves to the community guidelines -- correct? -- when they sign up?

A They have, yes.

Q Okay. Is Matt Halprin also the person that would know about the percentage of user-flagged [85]content that is removed?

A He would, but I think that is -- I hope I'm not misleading you, but I think that is a -- publicly available in our community guidelines enforcement report.

Q Okay. When you say in paragraph 18 that something is removed, does that mean entirely from publication or just from the view of certain users? Or what is -- what does that actually mean?

A Yeah.

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So when we use the term “remove,” we mean we remove that -- we endeavor to remove it entirely from our platform. We have machine learning systems that recognize copies of the same pieces of content. And so if one particular video was removed, we endeavor to remove all copies of that same content.

I will point out that there are those who seek to evade those systems, and so it is possible for similar but not exactly the same pieces of content that should be removed to escape detection.

But we endeavor to remove -- “remove” means that content is no longer available on our

* * *

[94]have any specific reports that I recall. But it makes sense to me, given the scale of YouTube, that there have been incidents of YouTube recommending content that violates our policies.

MR. LYLES: I’m going to hand the deponent, Counsel, a -- an article behind tab 30.

(Veitch Deposition Exhibit 4 was marked for identification and attached to the transcript.)

MS. YANG: Just for clarity, this is a document titled “Mozilla Investigation: YouTube Algorithm Recommends Videos that Violate the Platform’s Own” -- “Very Own Policies”?

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MR. LYLES: Yes. That's it.

And I'm sorry. I will -- well, never mind. There was no Bates number because Google did not produce it; so it was not going to be cut off.

MS. YANG: Yeah. That's correct. Google did not produce --

MR. LYLES: Yeah.

MS. YANG: -- this document.

MR. LYLES: Yeah, could we go off the record while you familiarize yourself with that.

[95]Is that okay, Counsel?

MS. YANG: Yes.

MR. LYLES: Okay.

THE VIDEOGRAPHER: We are going off the record.

The time is 11:30 a.m.

(Off the record.)

THE VIDEOGRAPHER: We are back on the record.

The time is 11:33 a.m.

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BY MR. LYLES:

Q So my reading of this report is that YouTube -- there have actually been instances where YouTube recommended content that violated its own community guidelines.

Were you aware of this report until just now, Ms. Veitch?

MS. YANG: Objection. Form and scope.

THE WITNESS: I -- I generally recall the release of this report over the summer. I -- if you had asked me about it without the benefit of having reviewed this exhibit, I couldn't have recalled the [96]details of it. But I'm generally -- I remember.

BY MR. LYLES:

Q Do you take issue with the conclusion of this report?

MS. YANG: Objection. Form. Objection. Scope.

THE WITNESS: Well, I would just ask for clarification there, because I -- I do not take issue with your characterization two questions ago, which was that there have been instances in which YouTube has recommended content that violates our own policies.

As I said --

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BY MR. LYLES:

Q Okay.

A -- minutes ago, I thought that was probably likely to have happened given YouTube's scale. But if there are other conclusions that you want my opinion on, I would ask you to share them with me, and I can take them one at a time.

Q Yeah. No. That was -- that was it.

A Okay.

[97]MR. LYLES: And we can -- we can take our break now.

THE WITNESS: Okay.

MS. YANG: Thank you, Counsel.

THE VIDEOGRAPHER: We are going off the record.

This is the end of media unit number 2.

The time is 11:34 a.m.

(A recess was taken.)

THE VIDEOGRAPHER: Back on the record. This is the beginning of media unit number 3.

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The time is 12:06 p.m.

MR. LYLES: This is 31, Counsel, that I'm about to hand the witness.

I'm handing the witness Defense's Exhibit Number 5.

MS. YANG: So, Counsel, this is the document titled "Our Recommendation to YouTube," and it was also not produced by Google.

MR. LYLES: Exactly.

And I just handed it to the deponent and

* * *

[106]THE WITNESS: When you say "users" there, do you mean creators?

So the creators of the content -- their content -- their video content has been removed --

BY MR. LYLES:

Q Yes.

A -- but they disagree with that conclusion.

Q Yes.

A Okay. So when a piece of video content is removed from YouTube, the creator receives an email, in most

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cases. In -- I think in a few very egregious cases, this is -- this does not hold true. But, generally speaking, when content vid- -- a piece of video is removed from YouTube, the creator receives an email notifying them that their content has been removed and citing the portion -- the relevant portion of our community guidelines.

They are given an opportunity to make an appeal via a link that is in that email they have received. They click on that link. They make their appeal. That decision is then reviewed by a human.

[107]And as you and I have previously discussed, the number of appeals and then the number of appeals sustained or overruled is a data point -- data points we make public.

Q And how quickly does YouTube make a decision after the appeal is submitted?

A I don't think there's a specific time associated. And that's because sometimes these decisions are really nuanced and require a great deal of scrutiny, and we want to get it right. We want to get it right in the first case. We also want to get it right when creators make appeals.

So I don't think there's a particular time associated. We want to move expeditiously.

Q Is there, like, an aspirational deadline or anything?

A Not that I'm aware of.

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Q Do you know how many outstanding appeals there are now?

A I don't, no.

Q So there's no deadline for closing appeals?

[108]A Not that I'm aware of. But, again, given that every quarter we make public the number of appeals and the decisions, I think we endeavor to reach an expeditious decision on those appeals.

Q So would appeals be -- all open appeals be closed by the end of the quarter at the latest?

A No. I -- I'm not suggesting that. And I don't think that's reasonable; right? A -- hypothetically, an appeal could come in at 11:59 on the -- you know, before a quarter closes.

I think appeals are handled as they come in, and we want to make a decision expeditiously.

Q What specifically in HB20 -- let's -- do you have HB20 -- or -- excuse me. I'll give you a copy.

A I'd love a copy.

Q I'm giving the witness a copy of HB20 and marking it as --

A Thank you.

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Q -- Exhibit Number 5 [sic].

(Veitch Deposition Exhibit 6 was marked for identification and attached to the transcript.)

[109]BY MR. LYLES:

Q So could you go to section 120.003 [sic], please, Ms. Veitch.

MR. LYLES: Okay. Let's -- actually, we need to remark that as number 6, if that's okay.

THE WITNESS: Sure.

MR. LYLES: Remarking HB20 as Exhibit 6.

THE WITNESS: Sorry. Where am I going, Mr. Lyles?

BY MR. LYLES:

Q To 120.0 -- 120.103, please.

A Oh, yep. I'm good.

Q So what specifically in that section, 120.103, would require you to act differently than it currently does where a user disputes their content being removed?

A Sure. Just -- give me just a moment to recap my --

Q Yeah, please.

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A -- memory of this.

MR. DISHER: Exhibit 6 is HB20?

THE WITNESS: Yep.

[110]MR. DISHER: I'll object to the form of that question.

THE WITNESS: Okay. So when you and I have been talking about the appeals that are -- the appeal system that's available to our creators, I have been careful to make clear that I'm referring to a piece of video content in the appeal that's available via a piece of video content.

The same notification and appeals are not available to our users based on comments. So our users are not notified when a comment that they would make on a video is removed. And I'm also -- I don't believe there is an appeals process for the removal of a comment.

BY MR. LYLES:

Q Okay. All right. Thank you for that clarification.

So as far as the burden is concerned, what's -- what would that section require you to do differently?

A So --

MS. YANG: Objection. Form.

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[111]THE WITNESS: So just on that particular concern I raised there, I think my declaration includes the number of comments removed quarterly. That's certainly available in our quarterly community guidelines enforcement transparency report. I believe that number is greater than a billion comments quarterly.

And so my understanding, as a layperson, of the -- of what would be required to comply with this section is, for example, more than a billion more notifications than we currently do in establishing an appeals process for comments that we do not currently have.

BY MR. LYLES:

Q Okay. What about for videos that are -- whose removal is disputed by users?

A So I'm going -- and, again, you know, apologies being the non-lawyer in the room here, but my understanding of this provision is that it would require that the user be notified for the reason for the content removal.

And while we do provide general [112]explanation of the reason for our removal, we -- there are specifics that we do not include. And one of the reasons that we avoid sometimes being very specific is we do not want to give the bad guys a road map for how to evade our policies.

So where our community guidelines sometimes speak in generalities, it is a strategic decision to not be more specific, to not provide that road mad to those who want to evade our policies.

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So providing a level of specificity is also something we may not currently do.

Q Can you move on to 35, please, of your declaration.

A Okay.

Q What -- this paragraph talks about YouTube blocking and removing hate speech that violates its community guidelines.

What -- what part of HB20 would prevent YouTube from blocking or removing hate speech?

MS. YANG: Objection. Form.

THE WITNESS: So I'm -- I don't know, off [113]the top of my head, what particular provision of HB20. But my understanding is that HB20 does not define, in law, viewpoint.

And so there are a huge number of viewpoints that we would find loathsome that are currently in conflict with our community guidelines that HB20 would prevent us from removing from the platform.

BY MR. LYLES:

Q And is it your position that those could not be removed based on their falling within a certain content definition?

MR. DISHER: Objection. Form.

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MS. YANG: Objection. Form.

THE WITNESS: I'm sorry.

BY MR. LYLES:

Q So --

A I'm not following your question.

Q -- hate speech, for example, that -- do you believe that could be considered just a category of content as opposed to viewpoint?

MR. DISHER: Objection. Form.

* * *

[118]A Yep.

Q What in HB20 will keep YouTube from enforcing critical standards designed to prevent the degradation of user experience?

A Sure.

So just to return to the example that you and I discussed earlier, content that expresses the viewpoint that one race is smarter than another race we believe would lead to the degradation of users' experiences on our platforms.

Being exposed to that sort of hateful content does not reflect the community we want to create, the kind

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of community where, you and I have discussed earlier, our users, our creators have a sense of comfort in their freedom of expression, their ability to be themselves.

So that's -- those sort of hateful sentiments we believe would degrade our users' experiences. And I think -- as I state here, I think that is especially true for children.

Q And in terms of users' safety, including children, what in HB20 would prevent you from [119]ensuring that?

MR. DISHER: Objection. Form.

THE WITNESS: Again, I think hateful speech, speech such as the example I've previously given, impacts the safety of the diverse populations, the 2 billion people monthly who visit YouTube.

BY MR. LYLES:

Q Okay.

A And maybe could I be one -- give one more --

Q Yeah.

A -- specific point here?

We spent a lot of time today focused on removing content, it being violative or not. And that's appropriate. That's where conversations about YouTube often go.

But as we've also discussed, there are a lot of other tools that YouTube has for how we treat content. One of

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those tools, as you and I have previously discussed, is age-gating content. There's some content that we want to leave on our [120]platform but also make not available for our younger viewers.

My understanding of -- of how HB20 works is that it also -- it applies equally to our ability to remove content as it does to use these other tools as well, such a demonetization, such as reducing recommendations, such as age-gating content.

So you could imagine that there is content that is appropriate for older users but is not appropriate for younger users because of viewpoint, and this would limit our ability to age-gate that content.

Q What specifically in HB20 prohibits YouTube from creating content moderation policies?

MR. DISHER: Objection. Form.

THE WITNESS: So my understanding -- and I would have to review this document again -- is that there is a de minimus amount of policies allowed for what content -- for the creation of policies around what content is allowed and not. But it is far narrower than the universe of policies [121]we currently have for what content is available on our platform and not.

So as we've discussed already, viewpoint is something that we could no longer make content decision --

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moderation decisions around. It is -- we could no longer have community guidelines around viewpoint.

And it is my recollection that that -- that it is directly expressed in here that we could not moderate content around viewpoint.

BY MR. LYLES:

Q Is it YouTube's position that there should be no state regulation limiting its flexibility to moderate content?

MS. YANG: Objection. Scope. Objection. Form.

THE WITNESS: So that's an interesting question. I'm just thinking this through in real time, Mr. Lyles.

So it is not YouTube's position that governments should not reach their own conclusions about what content should be legal and what content

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[130]YouTube, was available to them. The privilege of monetization had just been revoked from them.

BY MR. LYLES:

Q Right. Right.

A So I -- I believe that during that period in which their monetization privileges have been revoked, they

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were not advertising, would not be appearing on their content, they would not be receiving a revenue share of that advertising, and so I do not believe they would be compensated for that interregnum. But I'm not -- I don't work on the commercial arrangements with our creators.

Q Okay. Who would know that at YouTube?

A We have an entire partnerships team that works directly with creators all around the world.

Q Who is in charge of that?

A So Robert Kyncl is our chief business officer. He's responsible for the partnerships team that works directly with our creators.

Q Okay. Thanks.

A Also with our advertisers.

Q Okay. What percentage of user views on [131] YouTube are driven by recommendations?

A So I think the most current data point that we have on that is dated at this point. I think it's from 2018. So I'm happy to share that data point --

Q Yeah.

A -- while stipulating that it's dated.

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I believe in 2018 that data was about 70 percent of views are driven by recommendations.

I do not know a more update data point there.

Q Do you know when there's going to be a new data point?

A I do not.

Q Do you know who would know that?

A So the -- the responsibility for recommendations on the YouTube platform falls under Neal Mohan, who I think we previously discussed --

Q Oh, right.

A -- is our chief product officer.

Q Okay. Is it possible for YouTube users to opt out of recommendations?

[132]MS. YANG: Objection. Form.

THE WITNESS: So it is possible for users to have control over the factors that go into their recommendations. So, for example, as you and I previously discussed, the channels you subscribe to or the videos you've previously watched or things you've previously searched for on YouTube are a factor in our recommendations.

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Each of those factors that I just mentioned you can delete from your personalized recommendations. So you -- you know, let's say you go search for, to an earlier example, skateboarding. Now we're recommending to you a lot of skateboarding videos. Your interest in skateboarding was waning. You can simply go back and delete skateboarding as a search term that we would use to inform your recommendations.

An individual video that you watched you can delete from your search history so it no longer informs your recommendations. Recommendations appear on our "watch now" and "up next" pages. They appear for logged-out users -- so for users about [133]whom we have no information or de minimus information.

So recommendations will continue to appear in those places, but you control how personalized they are to you, you can have this logged-out experience in which they are not personalized to you at all. And the signals that we use to inform your recommendations, you can also control as well.

BY MR. LYLES:

Q So if you're logged out, you don't get personal recommendations?

A Correct.

Q Not based on search history?

MS. YANG: Objection. Scope.

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THE WITNESS: Correct. We don't -- we -- we wouldn't know your search history. There -- even if you're logged out, there are some contextual clues that we have about you: Your IP address so that you're -- you're in the United States, what time of day it is.

So there are some contextual clues that [134]we have that we would use, but they are not personalized to you, Mr. Lyles, based on your past watch history, past interest, past searches, channels you subscribe to. We don't have that information if you are logged out.

BY MR. LYLES:

Q But they're personalized due to some of these contextual things?

A Correct.

MS. YANG: Objection. Scope.

BY MR. LYLES:

Q Okay. So is there -- is there any way to view content on YouTube without it being a recommendation personalized to you in some sense?

MS. YANG: Objection. Form and scope.

THE WITNESS: Absolutely. I could send you a video and say, "Mr. Lyles, you will love this skateboarding video." And you would go to YouTube, and you would

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watch that video without any interference between our direct relationship of me sharing that video with you by YouTube. That would --

[135]BY MR. LYLES:

Q All right. So it would be like a recommendation in the classic sense.

Just kidding. Okay.

A Alexandra Veitch, private citizen, recommending to you --

Q Right.

A -- private citizen, yes. Correct.

Q Okay.

A It may be worth noting that we want users to find new content that they will love. We want creators to have the benefit of finding new audiences. We recommend a huge diversity of content. And we find, generally speaking, that our users like our recommendations.

Q Has YouTube received any communications from the federal government about how it perpetuates racist stereotypes?

MS. YANG: Objection. Scope.

THE WITNESS: I don't think I know the full range of communications that YouTube has received from the

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federal government. But what you [136]just said does not ring any particular bells for me. Maybe you'll provide me more information.

BY MR. LYLES:

Q So you have not been privy to a communication from, say, the Senate that YouTube perpetuates racist stereotypes?

MS. YANG: Objection. Scope.

MR. DISHER: Objection. Form.

THE WITNESS: So I hate to ask you to have to be more specific. We receive a lot of inquiries from, for example, the Senate. Certainly any inquiry -- any formal communication that we receive from the Senate during my time in my role I would have reviewed. But that -- that's quite a volume. So I will just need to be a little refreshed.

BY MR. LYLES:

Q Okay. But it doesn't ring any bells, as you said?

MS. YANG: Objection. Scope.

THE WITNESS: Could you just repeat the phraseology, that specific --

[137]BY MR. LYLES:

Q Right.

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Okay. Has -- has YouTube received any communications from the Senate stating that it perpetuates racist stereotypes?

MS. YANG: Objection. Scope.

MR. DISHER: Objection. Form.

THE WITNESS: I think it's certainly possible, but that is not ringing any specific bells for me.

BY MR. LYLES:

Q Okay. Could you explain how YouTube's algorithms work with regard to the way in which you provide search results to the user?

A Sure.

So -- and, generally speaking, recognizing that I have a liberal arts degree, I'm not a computer scientist, but just like is the case with Google search, we want to provide our users with search results that accurately speak to what they are searching for. In certain cases, we also want to index those results in the direction of [138]authoritative.

So, for example, if you come to YouTube and search for COVID-19 vaccine, we want to provide you with content that's authoritative based on local and global health authorities about the COVID vaccine. But -- and similarly to what we discussed earlier, we want to provide content that other users enjoy. They've shown us that they enjoy it through a variety of signals, and so relevance to the

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query, in some cases, authoritativeness, and content that users will enjoy.

BY MR. LYLES:

Q What about ranking of advertisements?

MS. YANG: Objection. Scope.

BY MR. LYLES:

Q How does -- how do you --

A I don't know what you mean by that.

Q How does YouTube's algorithms determine how you rank advertisements that users are presented with?

MS. YANG: Objection. Scope.

THE WITNESS: So advertisements come in a [139] couple forms on YouTube. There are static ads. There are also video ads that appear appended to individual pieces of content either before, during, or after you watch that individual video.

But I don't know in great detail how we, you know, determine that this particular Procter & Gamble ad appears on this particular piece of content.

But the advertisers do have some controls, but they don't hand-select individual pieces of content to have their advertisements appear on.

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BY MR. LYLES:

Q How do you determine how often an ad appears in, say, a video?

A Oh, we --

MS. YANG: Objection. Scope.

THE WITNESS: Yeah, we're rapidly getting out of my area of expertise here.

But ads are charged on what we call a CPM, or cost-per-thousand basis. So advertisers pay us per -- per thousand views.

[140]And so I assume there's some correlation between what the advertiser wants in terms of exposure and -- and how that -- how many times that ad appears.

BY MR. LYLES:

Q Okay. So the advertiser -- or YouTube would get paid more by the advertiser the more the ad is viewed; is that correct?

MS. YANG: Objection. Scope.

THE WITNESS: Generally speaking, yes.

I am sure --

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BY MR. LYLES:

Q Okay.

A -- there is some nuance to the advertising business with which I am not familiar.

But, generally speaking, as is the case on linear TV as well, the more an ad is viewed, the more the advertiser pays for that privilege.

Q Okay. Do users have the ability to modify the way their search results in YouTube appear to them?

MS. YANG: Objection. Scope.

[141]THE WITNESS: I mean, largely, no, though, there are some user controls around language, for example. You know, if you want your search results in French, you can control the language of your search results.

But, generally speaking, no. Search results are based on our conclusions.

BY MR. LYLES:

Q Okay.

A Not a user's conclusion.

Q Okay.

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MS. YANG: Counsel, we are nearing the hour mark.

Is this a good time to take a quick break?

MR. LYLES: Yeah. Yeah.

THE VIDEOGRAPHER: We are going off the record.

This is the end of media unit number 3.

The time is 1 p.m.

(A recess was taken.)

THE VIDEOGRAPHER: We are back on the

* * * *

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**APPENDIX L — Excerpts of Deposition of
Carl Szabo, Filed November 22, 2021**

IN THE UNITED STATES DISTRICT COURT
IN THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Case No. 1:21-cv-00840-RP

NETCHOICE, LLC, D/B/A NETCHOICE, A 501(C)(6)
DISTRICT OF COLUMBIA ORGANIZATION,
COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)6 NON-STOCK
VIRGINIA CORPORATION

Plaintiffs,

v.

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

Defendant.

[62]A That is correct.

Q Is this list in paragraph 4 current, or have any members been added or removed from this list?

A To the best of my knowledge, this list is accurate.

Q So when we were talking earlier about conversations with members regarding HB20, are these the members,

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this list here, who you were talking about?

A When I use the term “NetChoice members,” am referring to the members in this list. Q When those conversations with these members took place about HB20, did any of these members express opposition to bringing this lawsuit that we’re all here for?

A To the best of my knowledge, every member with whom we spoke to about HB20 raised concerns about how this law going into effect would impact their ability to engage an editorial discretion.

Q Did any of these members ask NetChoice not to bring this lawsuit on their behalf?

[63]MR. DISHER: Objection. Form.

THE WITNESS: I believe answering the question would violate my NDA with these businesses.

BY MS. CORBELLO:

Q This list here in paragraph 4, which of these members does NetChoice contend will be affected by HB20?

MR. DISHER: Objection. Form.

MS. CORBELLO: What’s the basis of that objection, Todd?

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MR. DISHER: Calls for a legal conclusion.

BY MS. CORBELLO:

Q Go ahead and answer.

A Due to the vagaries of the definition of “social media” in HB20, many of the members listed here may or may not be covered.

Likewise, because they must have 50 million monthly active users, I cannot for certain tell you which of these members is or is not covered by HB20.

Having said that, I can say certainly [64]that at least YouTube, which is a subsidiary of Google, Facebook, and Twitter would be covered by HB20.

Q A little while ago, you gave me your own definition of social media platform.

Do you remember that?

A I do remember giving you a definition of social media platform.

Q Putting HB20 and its definition of social media platform aside for a second, which of these members listed in paragraph 4 do you believe fall under your definition of social media platform as you discussed it with me earlier?

MR. DISHER: Objection. Form.

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Go ahead.

THE WITNESS: Airbnb, Alibaba, Amazon, AOL, DJI, DRN, eBay, Etsy, Expedia, Fluid Truck, Google, HomeAway, Lime, Nextdoor, Lyft, Oath, OfferUp, PayPal, Pinterest, StubHub, TikTok, TravelTech, Turo, Twitter, Verisign, Vrbo, Waymo, and Yahoo would all be covered under my definition of social media platform.

[65]BY MS. CORBELLO:

Q Did you mean to not mention Facebook in that list?

A I did not -- I intended to mention Facebook in that list.

Q I might have just missed it, but I just wanted to clarify. Facebook is a part of the list you just gave; right?

A That is correct.

MR. DISHER: And to clarify, you said "DJI"?

THE WITNESS: Yes.

MR. DISHER: And this says "DII."

THE WITNESS: That is a typo.

MR. DISHER: Okay.

BY MS. CORBELLO:

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Q Oh, okay.

MR. DISHER: Thank you.

BY MS. CORBELLO:

Q So the DII that comes after AOL in paragraph 4 is meant to say DJ, as in James, I?

[66]A Correct.

Q I still don't know what it's -- Do all of these members moderate their user-generated content in the same way?

MR. DISHER: Objection. Form.

THE WITNESS: These members engage in content moderation and their editorial discretion in the way that they see is best for promoting their viewpoints and the interests of their users and their advertisers.

BY MS. CORBELLO:

Q So is your answer, no, the members do not moderate content in the exact same way?

A Members engage in their content moderation in ways that they think is best for their users, their advertisers, and promoting their viewpoints. Sometimes that content moderation will be similar; sometimes that content moderation will be different. Sometimes the methods of enforcement are similar; sometimes the methods of enforcement are different.

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[67]BY MS. CORBELLO:

Q Do you understand which members are different from one another versus which members are similar?

MR. DISHER: Objection. Form.

THE WITNESS: You are speaking with regard to their engagement and content moderation?

BY MS. CORBELLO:

Q Yes.

A I am familiar with ways in which members are similar with regard to their content moderation and ways in which they are different with regard to their content moderation both in what they engage in content moderation as well as the manner in which they engage in content moderation.

Q Do all of these members listed in paragraph 4 have the same policies regarding content moderation?

A Members listed in paragraph 4 may have similar or same content moderation policies and enforcement mechanisms, and they may have similar -- or different content moderation policies and [68]different enforcement mechanisms.

Q So is the answer to my question, no, all of the members listed in paragraph 4 do not have the exact same content moderation policies?

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A To the best of my knowledge, the members listed in paragraph 4 engage in the content moderation they think is best for their users that express their viewpoints. And they maybe and sometimes are different.

Q Do all of your members listed here in paragraph 4 use AI in any way -- we don't need to get into specifics -- but in any way to moderate content on their platforms?

A Can you explain what do you mean by "AI"?

Q Sure.

Do any of these members have algorithms that interact with user-generated content once that content is generated in order to moderate the content for its platform?

MR. DISHER: Objection. Form.

THE WITNESS: Many of the members of NetChoice use algorithms written by their employees [69]and sometimes people they hire to enforce and engage in the content moderation decisions that are made in an effort to promote their editorial discretion and their viewpoints.

BY MS. CORBELLO:

Q Do any of the members exclusively use humans to review user-generated content?

A I do not know.

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Q Do any of these members exclusively use AI or algorithms in order to review user-generated content?

A I do not know.

Q Have any of these members shared the substance of the algorithms we've been talking about with NetChoice?

MR. DISHER: Objection. Form.

THE WITNESS: NetChoice members have shared with us the content moderation guidelines, the editorial discretion, and the viewpoints that they use in the creation and development of the algorithms.

[74]about it.

A Okay.

Q I want to point you to -- it's on page 4, still on paragraph 5, subsection i there where you talk about --

MR. DISHER: Page 3 of the document.

THE WITNESS: Thank you.

MR. DISHER: Page 4 is at the top here.

THE WITNESS: Thank you.

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MR. DISHER: UCF pagination.

MS. CORBELLO: Yeah. Sorry. I was trying to be helpful, but --

BY MS. CORBELLO:

Q Still on paragraph 5, subsection i where you mention NetChoice members “are open to the public, subject to their representative terms and conditions and community guidelines.”

Do you see that?

A Yes, I see that.

Q When you say they “are open to the public,” what did you mean by that?

A It means that they are accessible on [75]websites and other devices and that some people may be able to sign up for their services subject to agreeing to the community guidelines which are the viewpoints and editorial discretion of those sites and services.

Q Do you have personal knowledge of how each one of NetChoice’s members permit the public to become users on their platforms?

MR. DISHER: Objection. Form.

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THE WITNESS: I am -- I have personal knowledge of several NetChoice members on how they allow users to access their platforms.

BY MS. CORBELLO:

Q I really don't want to ask you about all if you don't have the knowledge.

Are there any members that you do not know how members of the public are able to access your members' platforms?

A Virtually every single NetChoice member has a terms of service to which all users agree when they access the platform.

Q I understand. My question's a little [76]different. Are you personally aware of each member's process for allowing a member of the public to become a user on its platform, or are there any members in that list that, sitting here today, you don't have knowledge of how that works?

A I have knowledge for all NetChoice members of how members of the public can gain access to the underlying service.

Q So let's use Facebook as an example. How does one become a user on Facebook?

A Facebook users or potential Facebook users can visit Facebook through a myriad of sources whether

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through an application, visiting the website. On both they are presented with a terms of service or terms of use and a privacy policy. In order to access certain parts of that site and service, they must also expressly agree -- sorry. Let me rephrase that.

By visiting that site, they agree to the terms of service which also include agreement to the community guidelines. These terms of service and [77]its subsidiary, the community guidelines, allow these platforms to engage in editorial discretion, in the case of Facebook, as well as promoting the viewpoints that are best for its users and its advertisers. This is a contract that users enter into with Facebook when they visit the website.

Q What personal information does a member of the public have to provide Facebook when signing up for an account with Facebook?

A Can you give me a definition of “personal information”?

Q Well, we can go one by one.

Does a member of the public have to provide their first and last name to Facebook as part of the process to sign up as a user?

A Members of the public are required to provide their real name as part of the terms of service. Failure to do so is a violation of the contract with Facebook.

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Q Are users required to provide their birthdate as part of the process in signing up to be a user on Facebook?

[114]to?

A NetChoice.

Q And did you personally review each one of the documents that have been produced?

A I reviewed the documents that were reviewed -- or -- sorry. I reviewed the documents that NetChoice produced in response to the ones used in the creation of this declaration.

Q You reviewed every single one of the documents?

A I reviewed the documents that were used and submitted in the creation of this declaration.

Q Are there any documents that were produced that you did not personally review?

A Not to my knowledge.

Q Are there any documents outside of those that were already produced that you relied on when drafting this declaration?

A Not to my knowledge.

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Q Your declaration discusses the various burdens that will -- that your members will suffer should HB20 go into effect. Is that fair?

[115]A Our declaration discusses the irreparable harms that our members will suffer if HB20 goes into effect as part of the overall statements in the declaration.

Q Does your declaration provide all of the irreparable harms that NetChoice contends will befall its members if HB20 goes into effect?

A Given that that will require me to make speculations about all possible things, that was not necessarily included in our declaration.

However, we did include in our declaration clear irreparable harms that our members will face if HB20 goes into effect.

Q As you sit here today, are there any specific irreparable harms that you know of that are not included somewhere in this declaration?

MR. DISHER: Objection. Form.

THE WITNESS: So one irreparable harm, as an example, that would be incurred would be a loss of inability to stop bad actors from posting content on member services due to the mandated disclosure of proprietary ways that NetChoice members engage in [116]content moderation.

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BY MS. CORBELLO:

Q Just to clarify, this loss of inability to stop bad actors, is this not contained in your declaration currently? Is this an example you're giving me of irreparable harm that you did not provide within the declaration?

A This is an example of an irreparable harm that is not explicitly stated in the declaration but is part of the greater irreparable harm that will be faced by NetChoice members.

Q Okay. So other than this loss of inability to stop bad actors, what are all of the other specific irreparable harms that have not already been identified in the declaration that NetChoice's members will suffer if HB20 goes into effect?

A One of the irreparable harms that is alluded to but not specifically called out in the declaration is enabling bad actors such as spammers, hate-speech mongers, Neo-Nazis, Holocaust deniers to [117]know ways to circumvent the values and content moderation standards and editorial discretion of NetChoice members.

Q What other specific irreparable harms did you not discuss in your declaration?

A That is all that I can think of right now.

Q Is there a reason that you did not specify these two irreparable harms we just talked about within your declaration?

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MR. DISHER: I'll instruct the witness not to answer to the extent it discloses any communications you've had with counsel.

Other than that, please go ahead and answer.

THE WITNESS: On advice of my counsel, I will not answer.

BY MS. CORBELLO:

Q Your declaration discusses broadly your members' content moderation practices and how those may be affected by HB20; is that correct?

A That is correct, in broad descriptions of

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**APPENDIX M — Excerpts of Deposition of
Matthew Schruers, Filed November 22, 2021**

[1]IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

1:21-cv-00840-RP

NETCHOICE, LLC D/B/A NETCHOICE, A 501(C)
(6) DISTRICT OF COLUMBIA ORGANIZATION,
COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6) NON-
STOCK VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

Tuesday, November 16, 2021
Washington, D.C.

[38]declaration is clear that at least some CCIA
members would fall within the definition.

BY MR. LYLE:

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Q. Can we turn to page -- paragraph 5 of your declaration, please.

A. (Witness complies with request.) Page 5 or paragraph 5?

Q. Paragraph 5.

So you list there some of them. You list what CCIA's membership includes?

A. That's correct.

Q. Is that an exhaustive list?

A. It was at the time this was drafted.

Q. Who has been added since then?

A. I don't believe there are any companies that have been added since this list was drafted.

Q. And which -- which of the -- which of the entities in paragraph 5 do you contend are covered by HB20?

MR. DISHER: Objection. Form.

[39]THE WITNESS: At least -- well, let me take a step back. The definition in HB20 contemplates monthly active users, which we don't know until the end of the month. So in any given month, any of these companies may arise to a user base that could trigger this statute, but we won't know until that data has been collected.

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But I believe my declaration is clear that at least some of these companies' products are covered, including, for example, Facebook and Google.

BY MR. LYLE:

Q. When you -- the month before you filed the lawsuit, which of these members do you contend were covered by HB20?

MR. DISHER: Objection. Form.

THE WITNESS: I don't have that information before me, but at least some of them met the statutory definition.

[40]BY MR. LYLE:

Q. Okay. So are you -- are you unable to give us the precise selection of the companies in Paragraph 5 that you contend are covered by HB20?

MR. DISHER: Objection. Form.

THE WITNESS: Sitting here today, I cannot tell you what the monthly active users were of all 29 companies the month that we filed the Complaint.

BY MR. LYLE:

Q. So is HB20 based solely on the number of users?

A. No.

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MR. DISHER: Objection. Form. Go ahead.

THE WITNESS: No, but it is one of the elements in the definition.

BY MR. LYLE:

Q. So I just want to be clear. Are you refusing to answer the question as to which of the entities listed in Paragraph 5 are covered in your [41]contention by HB20?

MR. DISHER: Hold on. He did not refuse to answer the question. He did answer the question, so I will object to form. And I will also object to your mischaracterization of his answer.

Go ahead and answer, if you can.

THE WITNESS: I have already answered this question to say that at least Facebook and Google are covered by this statute, and other companies may have met and may continue to meet the definitions of the statute.

BY MR. LYLE:

Q. So you're saying that all members could potentially be covered by HB20?

A. If they meet the definition in Section 120.

Q. When was the last time you had knowledge of the monthly usership sufficient for you to know who fell under

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HB20 and who didn't?

MR. DISHER: Objection. Form.

[50]parties involved in the litigation, including member.

Q. Which member?

MR. DISHER: You can answer which members.

THE WITNESS: We have common interest agreements with Google, Facebook, Amazon, Pinterest. NetChoice, who is not a member. And possibly some others. I'd have to check.

BY MR. LYLE:

Q. What about Twitter?

A. Off the top of my head, I'm not certain whether such an agreement exists.

Q. How does one create a user profile on Facebook?

A. Which product?

Q. I think you were referring to it as the blue site earlier. The one that one thinks of when one's making a Facebook profile.

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A. Facebook.com. I have not done this in many years, and so the process may have changed, [51]but, generally speaking, one navigates to the website or through the mobile app, creates an account, reviews the relevant policies and practices that you are required to review prior to creating the account.

You check that you have reviewed and agree with those practices. Hit “I accept,” provide whatever information they may ask, such as a mobile number, if you’re using it. And proceed with what they’re asking for.

Now, as I said, it’s been many years since I’ve done this, so I’m not steeped in the internal workflow.

Q. And in your understanding, can anybody do that?

MR. DISHER: Objection. Form.

THE WITNESS: No.

BY MR. LYLE:

Q. Who can’t?

MR. DISHER: Same objection.

THE WITNESS: There are many groups of people who are not eligible for [52]Facebook accounts, Facebook.com accounts.

BY MR. LYLE:

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Q. Who are those?

A. I believe that includes children, by which I mean those under the age of 13.

I believe that includes convicted sex offenders. It may include people in jurisdictions where the product is not offered, as well as other categories that I'm not privy to off the top of my head.

Q. So how does -- how does Facebook keep children from opening accounts?

MR. DISHER: Objection. Form.

THE WITNESS: I am not a member of the Facebook trust and safety team. And so my knowledge on this is generally limited to industry practice. But there are a variety of software-driven and human-driven tools that are used to identify accounts that may violate the Terms of Service.

[53]BY MR. LYLE:

Q. And, in general, from the industry practice standpoint you spoke of, are these tools implemented on the front end, like an account creation, or do they come after the creation of the account?

A. At creation, most require individuals to certify that they are of age, if the age-gating is occurring. Some services also utilize age verification technology. I could not

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tell you whether Facebook uses age verification technology in any of its products in any of the jurisdictions where it operates.

Q. As opposed to self-certification?

A. For the -- well, wait a minute. Those -- those aren't exclusive. One could do both. But -- have I answered your question?

Q. Let me rephrase it. To your -- which of your members use exclusively self-certification for creating accounts?

A. I am not steeped in the individual workflows of our company's trust and safety [54]practices. So I cannot tell you off the top of my head.

Q. Do you know which of your members use a certification that is independent of self-certification at the creation of accounts?

A. Like an age verification technology?

Q. Yes.

A. I could not point you to a particular company presently using age verification technology.

Q. What about the technologies to prevent sex offenders from creating accounts, which of your members are using verification technologies beyond self-certification for that?

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MR. DISHER: Objection. Form.

THE WITNESS: I have to give you the same answer that I did with respect to child protection, which is I'm not privy to the specific internal practices of all the companies' trust and safety operations.

[55]BY MR. LYLE:

Q. Are you aware that some use something other than self-certification?

A. It is my understanding that companies -- many companies' trust and safety practices involve screening users for that group and terminating accounts accordingly.

Q. And are you aware of ones that do that at the moment of account creation?

A. I could not point you to a specific company that does -- that I know to do that at account creation.

Q. Let's turn to paragraph 9 of your declaration, please.

A. (Witness complies with request.)

Q. How many users do -- does Facebook have?

MR. DISHER: Objection. Form.

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THE WITNESS: I mean, even if that question were specific as to a product --

BY MR. LYLE:

Q. The blue site.

[56]A. Yes. I have no idea.

Q. What about YouTube?

A. I do not know the current users.

Q. What about Twitter?

A. I do not know.

Q. Do you know anything about the demographics of the users of those companies?

MR. DISHER: Objection. Form.

THE WITNESS: I have general knowledge about the demographics of all of the companies' user base, yes.

BY MR. LYLE:

Q. Do they include children?

MR. DISHER: Objection. Form.

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THE WITNESS: Some products are available to children, yes.

BY MR. LYLE:

Q. Which ones?

A. YouTube has a kids-focused product.

Q. Now, are the YouTube products that are not explicitly kid-focused, are those accessible to children?

[57]MR. DISHER: Objection. Form.

THE WITNESS: Define "accessible."

BY MR. LYLE:

Q. Could a child create an account online?

MR. DISHER: Objection. Form.

THE WITNESS: Could a child create an account on YouTube?

BY MR. LYLE:

Q. Yeah, the nonkids' site.

A. Are they capable of creating the account or is -- do the Terms of Service permit the account?

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Q. Capable.

MR. DISHER: Objection. Form.

THE WITNESS: Certainly anybody, even someone who -- to who -- to whom the rules prohibit access is capable of filling out the form. Now, is the account terminated after -- you know, immediately after creation or soon thereafter? You know, perhaps so.

[70]there. Did you search for these articles yourself?

A. Yes.

Q. And does your knowledge expressed in your declaration primarily come from those searches and reading the articles or from conversations with your members?

MR. DISHER: Objection. Form.

THE WITNESS: Neither. Well, speaking broadly, neither. In many cases, it arises from my general knowledge, being in this industry and communicating with these companies over the past 15 years, since this is my area of expertise.

These articles substantiate and are consistent with my understanding, provide additional information to contextualize the claims that I am putting down here

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that embody my general knowledge of trust and safety operations in the industry.

[71]BY MR. LYLE:

Q. Now, a lot of these observations refer to things that happened in the past year or two, not the last 15 years. Do you agree with that?

MR. DISHER: Objection. Form.

THE WITNESS: No. I mean, there are some instances here that have occurred recently. There are also phenomena that are described which occur persistently.

BY MR. LYLE:

Q. Did anyone help you search for these articles?

A. This was drafted with assistance by in-house counsel.

MR. DISHER: I'll instruct the witness not to answer to the extent it implicates any assistance you got from in-house counsel. But subject to that instruction, go ahead and answer if you can.

[72]THE WITNESS: And so outside of my conversations with counsel, the answer is no.

BY MR. LYLE:

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Q. No one helped you search for the articles?

A. Outside of my conversations with counsel.

Q. Let's go to paragraph 14, please. You talk about human review and the use of digital tools that rely in part on algorithms.

A. Uh-huh.

Q. Could you explain that process, please.

A. I can explain the process generally as it's implemented across industry. Necessarily, no one description is going to characterize a firm exactly, and not all firms will align with this. But as a general proposition, companies account for the risks that we were discussing earlier at the product design stage. They then develop governance that reflects those risks. And they, based on that [73]governance, develop a trust and safety program which, from the user perspective, involves enforcement of the product governance, which may be called Terms of Service or the end user licensing agreement or the community guidelines or any other number of names.

And those policies and practices and guidelines and Terms of Service are enforced through a combination of computer-aided and human-driven decisions. Computer-aided, of course, was itself developed by people.

There is then a refinement or internal evaluation mechanism that updates the three previous stages that I

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was describing. And then some -- many companies then report out to the public based on that. This is a constantly iterative process.

Q. So perhaps an example would be -- would be -- would clarify this. So you write in Paragraph 14 that Instagram has made it harder to search for graphic images involving suicide attempts and self-harm.

[74]How, as a practical matter, have they done that or would they do that?

A. So that may involve downranking or deprioritizing; for example, Tide POD challenge, when Internet trolls encouraged children to eat detergent pods. I should say young people, because not all who did this were necessarily children. And the results that may be displayed to users will reflect both software-based deprioritization of potentially dangerous results, and some of that content may be moderated by humans, which is to say that it's tagged or downranked or otherwise classified so as not to be visible.

Some services, including potentially Instagram, although I can't specifically recall, may go so far as to update their Terms of Service to say you cannot use our service to encourage others to do dangerous things, including eat detergent pods.

Q. And so from the standpoint of this both human review and use of digital tools that you referred to in Paragraph 14, how is the dangerous [75]thing, you know,

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perceived by the platform and then deranked? As a practical matter, how does that work?

MR. DISHER: Objection. Form.

THE WITNESS: That sounds like the question I just answered.

BY MR. LYLE:

Q. How do algorithms play into that?

MR. DISHER: Objection. Form.

THE WITNESS: Can we establish a working definition of algorithms before I proceed? Can we just say software code?

BY MR. LYLE:

Q. Sure.

A. Okay. There will be programming in the service's back end that may have various labels or tags assigned to it which results in what people generally refer to as deprioritization, which is to say that content with those tags is less likely to be surfaced, maybe only to a particular class of users.

But those tags and that -- those [76]adjustments to the programming will be done by members of the trust and safety team or content moderators, depending on the service, to -- to -- to effectuate that outcome.

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Q. Also in paragraph 14, you talk about how it -- more frequently, content moderation involves context-specific decisions about how to arrange and display content, how best to recommend content to users based on their interests, and how easy it should be to access certain kinds of content.

Where in HB20 is that practice required to change?

MR. DISHER: Objection. Form.

THE WITNESS: I believe you're asking me for a legal interpretation. But insofar as "detergent pods taste great" is a viewpoint, and HB20 prohibits companies from discriminating on the basis of a viewpoint, that is one aspect of the bill.

What's more, the bill has [77]extensive penalties, and the risk of running afoul of those penalties due to the vague language in the statute may deter activity that might, under an interpretation, be permitted because the risk is too great.

And as this paragraph points out, content -- the propriety of the content can be highly context-dependent.

BY MR. LYLE:

Q. In paragraph 15, you talk about age-gating. How would HB20 prohibit age-gating?

MR. DISHER: Objection. Form.

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THE WITNESS: The statute generates risks for companies implementing their content moderation practices. And what a company regards as inappropriate for young people and is, therefore, gated away from them may well be considered a viewpoint.

And saying this viewpoint is inappropriate for young people, whether

[118]endeavor.

Q. Is it more challenging for small companies or for larger companies?

MR. DISHER: Objection. Form.

THE WITNESS: That's difficult to answer. It will be a function of the size of the content on the service, the nature of the product, the number of the user base and the resources that the company has.

In a situation where you have a service which has grown at a rate faster than its infrastructure anticipated, the burden can be extraordinary.

BY MR. LYLE:

Q. Some of the citations you have for these numbers in paragraphs 24A to 24E involve transparency reports issued by these companies.

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A. Uh-huh.

Q. Sorry? Is that a “yes”?

A. Yes, I hear you and I agree, they do.

[119]Q. Why -- why do these companies issue transparency reports?

MR. DISHER: Objection. Form.

THE WITNESS: Why? Well, I can't speak to the specific motives of any individual company. I believe it is generally viewed across industry that as best resources permit, being transparent about how trust and safety operations are implemented fosters trust and confidence in users and advertisers and is subjectively desirable.

BY MR. LYLE:

Q. Have any of these companies that issued these reports, have they told you that issuing those reports was burdensome on them?

A. Yes.

Q. Which ones?

A. Sitting here today, I cannot specifically recall conversations, but I would say that in the context of my conversations with CCIA and DTSP member companies, the majority of [120]companies who offer user-facing

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services have commented on the burden and cost associated with this.

Q. Can you think of any names of companies that have commented on it?

A. I believe I have had conversations about products offered by YouTube, Twitter, Meta, at least, and there are likely other conversations that I'm not precisely recalling now regarding the burden. And, actually, Pinterest. There may be others that I just don't recall.

Q. How are HB20's disclosure requirements different from the transparency reports you've cited?

MR. DISHER: Objection. Form.

THE WITNESS: That's difficult to answer that question with any precision because companies' transparency reports vary. If it's useful, you can talk about where industry practice generally differs from the transparency requirements.

Sorry. I don't know where the [121]transparency provisions are.

Okay. Yes, this is now coming back to me. So as a general matter, reporting every 12 months is a challenge even for large companies. Reporting with respect to a six-month period would be doubly so. The statute requires tracking particular instances of things which some companies may simply not track, and the burden of rebuilding their trust and safety operations to catalog

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removal, demonetization, deprioritization are vastly burdensome, to say the least and, in some cases, not potentially operationalizable [sic]. By which I mean to the extent that some events of moderation may occur in an automatic fashion or when a service -- when a user queries the service, does that count; and, if so, how do you track that?

Generally speaking, the granularity of this, of the statute, is [122]far greater than the transparency reporting that even the most sophisticated companies do right now. To say that it's burdensome is a gross understatement.

BY MR. LYLE:

Q. Would it be possible for the members to comply with HB20?

MR. DISHER: Objection. Form.

THE WITNESS: Possible relative to what?

BY MR. LYLE:

Q. How about economically feasible. Would they go out of business?

MR. DISHER: Objection. Form.

THE WITNESS: Certainly, some of them would be faced with the option of operating in the market of -- of

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exiting the marketplace rather than attempting to comply with the statute.

BY MR. LYLE:

Q. Which -- which members would that [123]be?

MR. DISHER: Objection. Form.

THE WITNESS: That would require me to speculate.

BY MR. LYLE:

Q. Can you?

A. No.

MR. DISHER: Objection. Form.

BY MR. LYLE:

Q. You're refusing to speculate on which members would have to exit the market rather than comply with HB20?

A. Yes.

MR. DISHER: Objection. Form.

THE WITNESS: Yes, I am.

BY MR. LYLE:

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Q. What about members that would not have to exit the market?

MR. DISHER: Objection to form.

THE WITNESS: Again, this is not something that is easy to predict. The means by which companies comply with [124]burdensome regulation can vary considerably, including limiting the nature of a product, restricting the features of a product, among other practices. And it's hard to say with any degree of reliability what -- what I can confidently tell you would happen in the future for a company trying to comply other than that it is extremely burdensome.

BY MR. LYLE:

Q. Which companies do you believe would be able to stay in the market by making alterations to their business model?

MR. DISHER: Objection. Form.

THE WITNESS: I don't know that I believe any company would -- could cost-effectively stay in the Texas market and comply with the statute.

BY MR. LYLE:

Q. What specific disclosure requirements in HB20 go beyond transparency [125]reporting?

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MR. DISHER: Objection. Form.

THE WITNESS: To my knowledge, very few services report granularly about demonetization, deprioritization, contextualization, which is how I interpret the addition of an assessment to content or any other action, whatever that means.

BY MR. LYLE:

Q. Why -- why don't they report on that?

MR. DISHER: Objection. Form.

THE WITNESS: Because it's extraordinarily burdensome.

BY MR. LYLE:

Q. But surely they -- they keep records of that sort of thing?

MR. DISHER: Objection. Form.

THE WITNESS: Do they?

BY MR. LYLE:

Q. I mean, isn't that part of their

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**APPENDIX N — Excerpts of Deposition of
Stacie D . Rumenap, Filed November 22, 2021**

IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF TEXAS AUSTIN DIVISION

CIVIL ACTION
NO. 1:21-cv-00840-RP

NETCHOICE, LLC D/B/A NETCHOICE, A 501(C)
(6) DISTRICT OF COLUMBIA ORGANIZATION,
COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6) NON-
STOCK VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

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VIDEOTAPED ORAL DEPOSITION

OF

STACIE D. RUMENAP,

PRESIDENT AT STOP CHILD PREDATORS

Friday, November 12, 2021

(Remotely Reported)

VIDEOTAPED ORAL DEPOSITION OF STACIE D. RUMENAP, produced as a witness at the instance of the Defendant, and duly sworn, was taken in the above-styled and numbered cause on Friday, November 12, 2021, from 12:01 p.m. to 1:35 p.m., before Debbie D. Cunningham, CSR in and for the State of Texas, remotely reported via Machine Shorthand, pursuant to the Federal Rules of Civil Procedure.

[38]MR. DISHER: Objection, form.

A. I can tell you a story about 2008, 2009, when we were first launching Stop Internet Predators, which is a project to stop child predators, really was focusing our efforts around internet safety; and one of the main concerns that we had then was Google Street View. Google Street View, when it first came out, was very cool, innovative technology to allow people to really see the whole world, right, street by street, house by house.

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What it did not do is cover or blur or in any way, in the early version, any photos of children, of families, someone getting out of their car, license plate numbers. It did not -- a swing set in someone's backyard, a homeless shelter, or a rape counseling center, a child -- children's advocacy center, any of these types of places were all put out for anyone to see.

What we were very concerned about at the time is with very basic Google searches, you could look out on Google, look out on Facebook, kids are putting information out there about themselves; and someone who was savvy could take their picture, could take their address, could find things -- maybe they had posted something for sale on Craigslist; maybe they had [39]something about a vacation on Facebook, harmless information. But when all that information, all of that data is collected by the wrong person, we were very concerned that a predator could take that information and literally pinpoint where that child lived in the house, where that child went to school, at least with some very best guesses, how they got to school, the time of day, maybe, when their parents came home from work.

When you are talking about so many millions and millions of data points out for anyone to be able to see, people who are trying to harm children, these bad actors, they will stop at nothing to try and get the information and figure out a way just around detection.

Q. Yeah. So if I'm understanding you correctly, that example you described was an example of how if predators

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are able to have access to specific information, they can put the pieces of the puzzle together in order to harm people. My question was more specifically about the disclosure requirements of HB 20.

So if a social media platform were to disclose what HB 20 requires them to disclose, how would that specific technical information enable a predator to escape detection?

MR. DISHER: Objection, form.

[40]A. I think any kind of disclosure requirements that are going to make it easier for a bad actor to commit a bad act is something that we should be getting away from.

Q (BY MR. WALTON) Gotcha. Okay. So how does the information that HB 20 requires be disclosed, how does that help a bad actor?

MR. DISHER: Objection, form.

Go ahead and answer.

A. Bad actors are trying to circumvent the process and trying to circumvent detection every chance they get. Any kind of bill, whether it's HB 20 or some other bill that is going to force the hands of the platforms of the technology companies to talk publicly or disclose any kind of information about the inner workings of how they create these algorithms and what they do to try to combat this problem is giving a hand up to the predators.

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Q. (BY MR. WALTON) The -- so I -- let me back up. And there are -- let's see if we can do it this way. There are certain social media platforms that disclose, at least to their users, a certain amount of information about the way they collect and moderate their content. Would you agree with that?

MR. DISHER: Objection, form.

[41]A. I'm not sure how that fits into HB 20 or the declaration that I have drafted.

Q. (BY MR. WALTON) Sure. I'm just -- I'm trying understand -- there are -- there are some of the ways which social media platforms moderate content that they have affirmatively decided to disclose to their users. Are you familiar with that?

MR. DISHER: Objection, form.

A. What type of information are you asking about?

Q (BY MR. WALTONJ) Well, just generally, are you familiar with any social media platforms that give disclosures to their users about how they moderate and use content that their users decide to post on their platform?

A. Yes.

Q. Okay. Do you believe that there's anything in what is currently being disclosed that is too much, that helps enable predators to escape detection?

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MR. DISHER: Objection, form.

A. I don't know that I have an opinion on that.

Q (BY MR. WALTON) Okay. Paragraph 11, the first sentence there says, "Likewise, HB 20's onerous obligations for account and content removal will likely cause online platforms to moderate less aggressively." What is your basis for saying that?

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**APPENDIX O — Plaintiff CCIA’s Response to
Defendant’s First Set of Interrogatories in the
United States District Court for the Western District
of Texas, Austin Division, Filed November 24, 2021**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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

NETCHOICE, LLC D/B/A NETCHOICE, A 501(C)(6)
DISTRICT OF COLUMBIA ORGANIZATION,

and

COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6) NON-
STOCK VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

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**PLAINTIFF CCIA'S RESPONSE
TO DEFENDANT'S FIRST SET OF
INTERROGATORIES**

Pursuant to the Federal Rules of Civil Procedure, Plaintiff CCIA hereby responds to Defendant's First Set of Interrogatories and states as follows:

RESPONSES AND OBJECTIONS

INTERROGATORY NO. 1: Identify all steps in the process of each of your members' content moderation policies and practices on its platform. If content moderation occurs in differing ways based on the type of content, the purpose in displaying that content, or the viewpoint expressed in the content, describe each process therein.

Objections:

Plaintiff objects to this interrogatory on grounds that it is unduly burdensome and seeks information equally available to Defendant from a plain reading of its own statute, or that is publicly available to Defendant. Plaintiff also objects to this interrogatory to the extent it calls for legal conclusions.

Responses:

Notwithstanding these objections, CCIA answers as follows:

Policies and practices that Defendant defines as "content moderation" generally fall under an important

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business function frequently referred to as “trust & safety,” which includes both content and behavior. The identified CCIA member companies generally account for the possibility of certain illegal, dangerous, or otherwise harmful content or behavior in five stages of the product life cycle: at product design; in the development of product governance; during the enforcement of that governance; and through iteration on the outputs from previous stages, as informed by observed results. Lastly, companies document these practices for digital products and services and report out on actions taken.

More specifically, companies generally manage content- and conduct-related risks through practices including:

1. Identifying, evaluating, and adjusting for content- and conduct-related risks in product development. Specific examples of this may include adopting appropriate technical measures that help users to control their own product experience where appropriate (such as blocking or muting).

2. Adopting explainable processes for product governance, including which team is responsible for creating rules, and how rules are evolved. Specific instances of this may include facilitating self-regulation by the user or community to occur where appropriate, for example by providing forums for community-led governance or tools for community moderation, and finding opportunities to educate users on policies, for example, when they violate the rules.

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3. Conducting enforcement operations to implement product governance. This may include implementing methods by which content, conduct, or a user account can be easily reported as potentially violating policy (such as in-product reporting flow, easily findable forms, or designated email address) and ensuring relevant processes exist that enable users or others to “flag” or report content, conduct, or a user account as potentially violating policy, and enforcement options on that basis.

4. Assessing and improving processes associated with content- and conduct-related risks. Specific instances of this may include establishing appropriate remedy mechanisms for users that have been directly affected by moderation decisions such as content removal, account suspension or termination.

5. Ensuring that relevant trust & safety policies are published to the public, and reporting periodically to the public and other stakeholders regarding actions taken. Specific examples of this may include providing notice to users whose content or conduct is at issue in an enforcement action (with relevant exceptions, such as legal prohibition or prevention of further harm).

Below, CCIA points to where its members have made their policies publicly available and has provided summaries of the members’ respective policies. These summaries are not exhaustive, as the policies speak for themselves and are the best source of information responsive to this interrogatory.

*Appendix O***eBay**

eBay publishes its User Agreement at <https://ebay.to/3bQuzU7>.

Under eBay's Prohibited and Restricted Items Policy (<https://ebay.to/3CW2Z3K>), eBay identifies various kinds of products it does not allow, or otherwise restricts, on its website, which includes (but is not limited to) the following policies:

- Adult items (<https://ebay.to/3kjUaJL>)
- Animal products (<https://ebay.to/3H1oiU6>)
- Artifacts and cave formations (<https://ebay.to/3obytNi>)
- Disaster and tragedy (<https://ebay.to/3qixU75>)
- Illegal explicit content (<https://ebay.to/3mVq5Cb>)
- Offensive material (<https://ebay.to/308BAgI>)
- Prohibited adult items (<https://ebay.to/3CW42AI>)
- Protecting minors (<https://ebay.to/3orzocH>)
- Violence and violent criminals (<https://ebay.to/3wu1APK>)

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As described further therein, these practices can vary based on the context and potential risk.

Facebook

Facebook publishes its Terms and Policies under a page entitled “Everything you need to know, all in one place,” at: <https://bit.ly/3GJDZzg>.

In the Terms, Facebook explains many facets of its content moderation.

- Facebook Safeguards Against Harmful Conduct
- Facebook provides a personalized experience
- Facebook provides recommendations
- Facebook enables you to discover things
- Use of Automated systems

Facebook limits who may use Facebook, and prohibits any (1) users under 13 years old; (2) convicted sex offenders; (3) people whose account has been disabled for violations of terms and policies; and (4) anyone not allowed to use the service under law.

Facebook explains, “We want people to use Facebook to express themselves and to share content that is important to them, but not at the expense of the safety and well-being of others or the integrity of our community.”

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You therefore agree not to engage in the conduct described below (or to facilitate or support others in doing so)”:

- You may not use our Products to do or share anything:
 - That violates these Terms, our Community Standards, and other terms and policies that apply to your use of Facebook.
 - That is unlawful, misleading, discriminatory or fraudulent.
 - That infringes or violates someone else’s rights, including their intellectual property rights.
- You may not upload viruses or malicious code or do anything that could disable, overburden, or impair the proper working or appearance of our Products.
- You may not access or collect data from our Products using automated means (without our prior permission) or attempt to access data you do not have permission to access.

To effectuate its policies, Facebook further explains, “We can remove or restrict access to content that is in violation of these provisions.” And Facebook provides users some recourse for certain moderation decisions:

If we remove content that you have shared in violation of our Community Standards, we’ll let

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you know and explain any options you have to request another review, unless you seriously or repeatedly violate these Terms or if doing so may expose us or others to legal liability; harm our community of users; compromise or interfere with the integrity or operation of any of our services, systems or Products; where we are restricted due to technical limitations; or where we are prohibited from doing so for legal reasons.

Facebook also allows users to report content: “To help support our community, we encourage you to report content or conduct that you believe violates your rights (including intellectual property rights) or our terms and policies.” In addition to moderating individual user submissions, Facebook terminates and suspends accounts:

We want Facebook to be a place where people feel welcome and safe to express themselves and share their thoughts and ideas.

If we determine that you have clearly, seriously or repeatedly breached our Terms or Policies, including in particular our Community Standards, we may suspend or permanently disable access to your account. We may also suspend or disable your account if you repeatedly infringe other people’s intellectual property rights or where we are required to do so for legal reasons.

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When Facebook terminates or suspends an account, it provides notice and explains whether users may seek review: “Where we take such action we’ll let you know and explain any options you have to request a review, unless doing so may expose us or others to legal liability; harm our community of users; compromise or interfere with the integrity or operation of any of our services, systems or Products; or where we are restricted due to technical limitations; or where we are prohibited from doing so for legal reasons.”

Facebook also makes its Community Standards available at: <https://bit.ly/3mv8Vem>. As described in the Terms, “[t]hese guidelines outline our standards regarding the content you post to Facebook and your activity on Facebook and other Facebook Products.”

Generally, “[t]he goal of our Community Standards is to create a place for expression and give people a voice. The Facebook company wants people to be able to talk openly about the issues that matter to them, even if some may disagree or find them objectionable. In some cases, we allow content—which would otherwise go against our standards—if it’s newsworthy and in the public interest. We do this only after weighing the public interest value against the risk of harm, and we look to international human rights standards to make these judgments.”

Facebook moderates content by “limit[ing] expression,” when doing so is “in service of one or more of the following values”:

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- Safety
- Dignity
- Authenticity
- Privacy

Facebook applies its standards platform- and world-wide: “Our Community Standards apply to everyone, all around the world, and to all types of content.” So, Facebook identifies a series of categories of content, for which it (1) provides a “Policy Rationale”; (2) prohibits expressly defined kinds of user submissions; (3) identifies certain kinds of content for which it might require more context to make a moderation decision, or content for which it might provide other users a warning; and (4) provides examples of “user experiences” for certain kinds of moderation decisions (including reporting, post-report communication, takedowns, and warning screens).

These categories and sub-categories include (with links to public postings of the policies):

- **Violence and Criminal Behavior**
 - Violence and Incitement (<https://bit.ly/3pXq3vd>)
 - Dangerous Individuals and Organizations (<https://bit.ly/3nGnMBS>)

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- Coordinating Harm and Publicizing Crime (<https://bit.ly/3EylhZb>)
- Regulated Goods (<https://bit.ly/3q1Frah>)
- Fraud and Deception (<https://bit.ly/3pWaOCR>)
- **Safety**
 - Suicide and Self-Injury (<https://bit.ly/3BB1sPh>)
 - Child Sexual Exploitation, Abuse, and Nudity (<https://bit.ly/3CC7yQz>)
 - Sexual Exploitation of Adults (<https://bit.ly/3nJYQcZ>)
 - Bullying and Harassment (<https://bit.ly/3q0cefE>)
 - Human Exploitation (<https://bit.ly/2ZK3iji>)
 - Privacy Violations and Image Privacy Rights (<https://bit.ly/3pXzOcP>)
- **Objectionable Content**
 - Hate Speech (<https://bit.ly/3bsJ8Ny>)
 - Violent and Graphic Content (<https://bit.ly/3o5btQ7>)

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- Adult Nudity and Sexual Activity (<https://bit.ly/3CzPUgr>)
- Sexual Solicitation (<https://bit.ly/3CMrsIA>)
- **Integrity and Authenticity**
 - Account Integrity and Authentic Identity (<https://bit.ly/3myRmtZ>)
 - Spam (<https://bit.ly/3CE1gQo>)
 - Cybersecurity (<https://bit.ly/3mzMVyZ>)
 - Inauthentic Behavior (<https://bit.ly/3pT4ufu>)
 - False News (<https://bit.ly/3jVtzTi>)
 - Manipulated Media (<https://bit.ly/3w4DI4M>)
 - Memorialization (<https://bit.ly/2ZCDwh4>)
- **Respecting Intellectual Property**
 - Intellectual Property (<https://bit.ly/3jWEJqS>)
- **Content-Related Requests And Decisions**
 - User Requests (<https://bit.ly/3nQOvMc>)
 - Additional Protection of Minors (<https://bit.ly/3nM9hg6>)

*Appendix O***Nextdoor**

Nextdoor is not a CCIA member.

Pinterest

Pinterest makes its terms of service publicly available at: <https://bit.ly/3w3SpVO>.

By using Pinterest, users agree to comply with Pinterest’s Community Guidelines, which are made publicly available at: <https://bit.ly/3CANpKQ>. As Pinterest explains in the Community Guidelines, “Pinterest’s mission is to bring everyone the inspiration to create a life they love. That being said, not all content is inspiring - so we have community guidelines to outline what we do and don’t allow on Pinterest.” Furthermore, “Pinterest isn’t a place for antagonistic, explicit, false or misleading, harmful, hateful, or violent content or behavior. We may remove, limit, or block the distribution of such content and the accounts, individuals, groups and domains that create or spread it based on how much harm it poses.”

As Pinterest explains, Pinterest allows people to report content—“pins,” comments, messages, “someone’s photo on a pin”—that violates Pinterest’s Acceptable Use Policy. *See* Pinterest, Report something on Pinterest, <https://bit.ly/3jQGzeI>. Users may report content anonymously, and then Pinterest will “view [the] report and take action if [Pinterest] find[s] something unacceptable.” Pinterest uses those reports “to learn and evolve [Pinterest’s] standards, and work with subject matter experts to

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inform and update [Pinterest's] guidelines." Pinterest, Community Guidelines, <https://bit.ly/3CANpKQ>.

Pinterest specifically identifies the kinds of content it "may remove, limit, or block the distribution of":

- **Adult Content** – This includes:
 - Fetish imagery
 - Vivid sexual descriptions
 - Graphic depictions of sexual activity
 - Images of nudity where the poses, camera angles, or props suggest pornographic intent
- **Exploitation** – "Pinterest isn't a place for exploitation of people or animals. [Pinterest will] remove or limit the distribution of content and accounts involved in practices that risk harm to people or animals, including sexual, physical, or financial exploitation." Pinterest includes many examples in its policy.
- **Hateful Activities** – "Pinterest isn't a place for hateful content or the people and groups that promote hateful activities. [Pinterest] limit[s] the distribution of or remove such content and accounts[.]" Pinterest includes many examples in its policy.

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- **Misinformation** – “Pinterest isn’t a place for misinformation, disinformation, mal-information or the individuals or groups spreading or creating it. [Pinterest] remove[s] or limit[s] distribution of false or misleading content that may harm Pinners’ or the public’s well-being, safety or trust[.]” Pinterest includes many examples in its policy.
- **Harassment and Criticism** – “Pinterest isn’t a place to insult, hurt or antagonize individuals or groups of people. There are good reasons to express criticism, but [Pinterest] may limit the distribution of or remove insulting content to keep Pinterest a positive, inspiring place[.]” Pinterest includes many examples in its policy.
- **Private Information** – Pinterest does not “allow content that reveals personal or sensitive information[.]” Pinterest includes many examples in its policy.
- **Self-Injury and Harmful Behavior** – “Pinterest isn’t a place for content that displays, rationalizes or encourages suicide, self-injury, eating disorders or substance abuse. [Pinterest will] limit the distribution of or remove such content[.]” Pinterest includes many examples in its policy.
- **Graphic Threats and Violence** – “Pinterest isn’t a place for graphic violence or threatening language. [Pinterest] limit[s] the distribution of or remove such content[.]” Pinterest includes many examples in its policy.

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- **Violent Actors** – “Pinterest isn’t a place for violent content, groups or individuals. [Pinterest] limit[s] the distribution of or remove[s] content and accounts that encourage, praise, promote, or provide aid to dangerous actors or groups and their activities. . . . [Pinterest] work[s] with industry, government and security experts to help us identify these groups.” Pinterest includes examples in its policy.
- **Dangerous Goods and Activities** – “Pinterest isn’t a place for trading or selling of certain regulated goods—products or substances that can cause harm when used, altered or manufactured irresponsibly— or for the display or encouragement of dangerous activities. [Pinterest] limit[s] the distribution of or remove such content and accounts[.]” Pinterest includes many examples in its policy.
- **Harmful or Deceptive Products and Practices** – “Pinterest isn’t a place for practices and products that may be harmful or deceptive. [Pinterest] limit[s] the distribution of or remove[s] such content and accounts[.]” Pinterest includes many examples in its policy.
- **Impersonation** – Pinterest does not “allow accounts that impersonate or misrepresent their affiliation with any person or organization. If you [a user] have a fan or commentary account for a public figure or brand, make it clear through your username or Pinterest profile that you aren’t officially affiliated with them.”

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- **Comments** – “All of [Pinterest’s] Community Guidelines apply in comments posted on Pins. In addition, comments should be relevant. [Pinterest] may remove comments that violate our guidelines[.]” Pinterest includes many examples in its policy.

As described further therein, these practices can vary based on the context and potential risk.

Twitter

Twitter publishes its Terms of Service at: <https://bit.ly/3C77iIx>. Twitter incorporates its Twitter Rules and Policies into the Terms of Service, and requires compliance with those Rules and Policies.

Twitter publishes its Rules and Policies at: <https://bit.ly/3CY0RbF>. Twitter further explains, in separate pages for each, its policies in various areas:

- General
 - The Twitter Rules (<https://bit.ly/3BYhKBI>)
 - Deceased individuals (<https://bit.ly/31w1fjR>)
 - Username squatting policy (<https://bit.ly/3ki5oyv>)

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- Platform Integrity and Authenticity
 - Platform manipulation and spam policy (<https://bit.ly/3022bfl>)
 - Synthetic and manipulated media policy (<https://bit.ly/3qjL1F4>)
 - Civic integrity policy (<https://bit.ly/2YsoDxz>)
 - Parody, newsfeed, commentary, and fan account policy (<https://bit.ly/3qiiIqh>)
 - Coordinated harmful activity (<https://bit.ly/31BkmJj>)
 - Financial scam policy (<https://bit.ly/3o9cLcF>)
 - Distribution of hacked materials policy (<https://bit.ly/3qr1abw>)
 - Impersonation policy (<https://bit.ly/3mXvhVS>)
 - Ban evasion policy (<https://bit.ly/3ocg7vs>)
- Safety and Cybercrime
 - Abusive behavior (<https://bit.ly/3bQTsyW>)
 - Hateful conduct policy (<https://bit.ly/3CWlG7x>)
 - Violent organizations policy (<https://bit.ly/3wplQBQ>)

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- Violent threats policy (<https://bit.ly/3bRyJer>)
- Suicide and Self-harm Policy (<https://bit.ly/3bPQR8r>)
- Glorification of violence policy (<https://bit.ly/3GYOiQ5>)
- Abusive profile information (<https://bit.ly/3kgyRsy>)
- Illegal or certain regulated goods or services (<https://bit.ly/3qjcEOk>)
- Non-consensual nudity policy (<https://bit.ly/3o6hZpH>)
- Child sexual exploitation policy (<https://bit.ly/3GWoyUp>)
- Sensitive media policy (<https://bit.ly/3BW0SM6>)
- Intellectual Property
 - Automated copyright claims for live video (<https://bit.ly/3EVz10n>)
 - Counterfeit policy (<https://bit.ly/3GZXrHX>)
 - Trademark policy (<https://bit.ly/3qeReC5>)
 - Copyright policy (<https://bit.ly/3qfc2cJ>)

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- Platform Use Guidelines
 - Our range of enforcement options (<https://bit.ly/3o9dGK9>)
 - Content Monetization Standards (<https://bit.ly/3EUg0vl>)
 - Our use of cookies and similar technologies (<https://bit.ly/3CWCgUV>)
 - Notices on Twitter and what they mean (<https://bit.ly/3EZVaLg>)
 - Guidelines for Promotions on Twitter (<https://bit.ly/3ENaUpA>)
 - About search rules and restrictions (<https://bit.ly/3HcP8sy>)
 - Twitter, our services, and corporate affiliates (<https://bit.ly/3bS0aoI>)
 - How to report security vulnerabilities (<https://bit.ly/3H4kD84>)
 - About Twitter limits (<https://bit.ly/3CVP3Ha>)
 - Defending and respecting the rights of people using our service (<https://bit.ly/3kgA8Qm>)

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- About rules and best practices with account behaviors (<https://bit.ly/3bQUJWK>)
- Fair use policy (<https://bit.ly/3khrIbC>)
- About Twitter's APIs (<https://bit.ly/3o6iYGp>)
- Vine Camera Terms of Service and privacy policy (<https://bit.ly/3kjRJH7>)
- About government and state-affiliated media account labels on Twitter (<https://bit.ly/3CWD0tb>)
- Twitter Moments guidelines and principles (<https://bit.ly/3GYPy5L>)
- Automation rules (<https://bit.ly/3CYXUrp>)
- Report violations (<https://bit.ly/3mUU0KD>)
- Inactive account policy (<https://bit.ly/3o3MCvQ>)
- About country withheld content (<https://bit.ly/3CSIuF8>)
- Curation style guide (<https://bit.ly/3wpgfLK>)
- Super Follows policy (<https://bit.ly/3ock3fB>)
- Ticketed Spaces policy (<https://bit.ly/3H599Rs>)

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- Updates to our Terms of Service and Privacy Policy (<https://bit.ly/3obne7j>)
- About public-interest exceptions on Twitter (<https://bit.ly/3qkUiwu>)
- Additional information about data processing (<https://bit.ly/3CZ74nJ>)
- Our approach to policy development and enforcement philosophy (<https://bit.ly/30b2K6H>)
- About specific instances when a Tweet’s reach may be limited (<https://bit.ly/3wtYETe>)

Vimeo

Vimeo publishes its Acceptable Use Policy as part of its Terms of Service, available at: <https://bit.ly/3q0HgnF>.

The policy provides that its users “may not submit any content that”:

- Infringes any third party’s copyrights or other rights (e.g., trademark, privacy rights, etc.);
- Is sexually explicit or promotes a sexual service;
- Is defamatory;
- Is harassing or abusive;

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- Contains hateful or discriminatory speech;
- Promotes or supports terror or hate groups;
- Contains instructions on how to assemble explosive/incendiary devices or homemade/improvised firearms;
- Exploits or endangers minors;
- Depicts or encourages self-harm or suicide;
- Depicts (1) unlawful real-world acts of extreme violence, (2) vivid, realistic, or particularly graphic acts of violence and brutality, (3) sexualized violence, including rape, torture, abuse, and humiliation, or (4) animal cruelty or extreme violence towards animals;
- Promotes fraudulent or dubious money-making schemes, proposes an unlawful transaction, or uses deceptive marketing practices;
- Contains false or misleading claims about (1) vaccination safety, or (2) health-related information that has a serious potential to cause public harm;
- Contains false or misleading information about voting;
- Contains conspiracy-related content where the underlying conspiracy theory makes claims that

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(1) suggest that a real-world tragedy did not occur, or (2) violate other content restrictions; or

- Violates any applicable law.

The Acceptable Use Policy directs users to the Vimeo Guidelines (available at <https://bit.ly/3pWkkpN>) “for guidance on how we [Vimeo] interpret these terms.” These Guidelines provide detailed information for each category of content identified above. And Vimeo makes clear that it will make content moderation decisions based on a holistic evaluation of context:

In making decisions, we consider the entire context of the content to determine whether there may be a valid reason for including certain types of speech, such as newsworthiness, discussion of a religious text, criticism, or dramatic or narrative purposes (for fictional works). Such purposes may not be used, however, as mere devices to justify problematic speech (i.e., Restricted Content under our Acceptable Use Policy, as detailed in Section 1.3 above). We may also consider related content (like title, description, and tags) and information outside of Vimeo, such as the user’s activities elsewhere, materials linked from Vimeo, and the intended audience.

Vimeo’s Terms of Service also regulate conduct on Vimeo’s platform, and provide that users “may not”:

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- Use an offensive screen name (e.g., explicit language) or avatar (e.g., containing nudity);
- Act in a deceptive manner or impersonate any person or organization;
- Harass or stalk any person;
- Harm or exploit minors;
- Distribute “spam” in any form or use misleading metadata;
- Collect personal information about others;
- Access another’s account without permission;
- Use or export any of our services in violation of any U.S. export control laws;
- Engage in any unlawful activity;
- Embed our video player on or provide links to sites that contain content prohibited by Section 5.2; or
- Cause or encourage others to do any of the above.

YouTube

YouTube publishes its Terms of Service at: <https://bit.ly/3wpnymN>. YouTube states that “use of the Service is subject to these terms, the YouTube Community

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Guidelines and the Policy, Safety and Copyright Policies which may be updated from time to time.”

YouTube makes clear that “YouTube is under no obligation to host or serve Content. If you see any Content you believe does not comply with this Agreement, including by violating the Community Guidelines or the law, you can report it to us.” Further, “If you choose to upload Content, you must not submit to the Service any Content that does not comply with this Agreement (including the YouTube Community Guidelines) or the law.”

YouTube explains when it may remove content and take actions against users:

- “If we reasonably believe that any Content is in breach of this Agreement or may cause harm to YouTube, our users, or third parties, we may remove or take down that Content in our discretion. We will notify you with the reason for our action unless we reasonably believe that to do so: (a) would breach the law or the direction of a legal enforcement authority or would otherwise risk legal liability for YouTube or our Affiliates; (b) would compromise an investigation or the integrity or operation of the Service; or (c) would cause harm to any user, other third party, YouTube or our Affiliates. You can learn more about reporting and enforcement, including how to appeal on the Troubleshooting page of our Help Center.”

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- “YouTube may suspend or terminate your access, your Google account, or your Google account’s access to all or part of the Service if (a) you materially or repeatedly breach this Agreement; (b) we are required to do so to comply with a legal requirement or a court order; or (c) we believe there has been conduct that creates (or could create) liability or harm to any user, other third party, YouTube or our Affiliates.”

YouTube publishes its Community Guidelines at: <https://bit.ly/3pWkcpN>. YouTube details the following categories and subcategories of expression YouTube may restrict according to its policies:

- **Spam & deceptive practices**
 - Fake engagement (<https://bit.ly/3EVGqg7>)
 - Impersonation (<https://bit.ly/31xBTSl>)
 - External links (<https://bit.ly/3mTC6I3>)
 - Spam, deceptive practices & scams (<https://bit.ly/31HqVu6>)
 - Playlists (<https://bit.ly/3o2HA2w>)
 - Additional policies (<https://bit.ly/3khR2hC>)

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● **Violent or dangerous content**

- Harassment and cyberbullying (<https://bit.ly/3kiKYW6>)
- Harmful or dangerous content (<https://bit.ly/2ZYTan8>)
- Hate speech (<https://bit.ly/3q7zN6r>)
- Violent criminal organizations (<https://bit.ly/3BWNMhx>)
- Violent or graphic content (<https://bit.ly/3wolWK4>)

● **Misinformation**

- Misinformation (<https://bit.ly/3o6K1kR>)
- Elections misinformation (<https://bit.ly/3EXqlqw>)
- COVID-19 medical misinformation (<https://bit.ly/3BXkkbo>)
- Vaccine misinformation (<https://bit.ly/3CROcal>)

● **Sensitive content**

- Child safety (<https://bit.ly/3D0pRPy>)
- Thumbnails (<https://bit.ly/2ZYTXEC>)

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- Nudity and sexual content (<https://bit.ly/3bRVnU5>)
- Suicide and self-harm (<https://bit.ly/3CWPCR5>)
- Vulgar language (<https://bit.ly/3BVVI2G>)
- **Regulated goods**
 - Firearms (<https://bit.ly/3CYRMiT>)
 - Sale of illegal or regulated goods or services (<https://bit.ly/3EQSSO8>)

**APPENDIX P — Plaintiff NetChoice’s Response
to Defendant’s First Set of Interrogatories in the
United States District Court for the Western District
of Texas, Austin Division, Filed November 24, 2021**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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

NETCHOICE, LLC D/B/A NETCHOICE, A 501(C)(6)
DISTRICT OF COLUMBIA ORGANIZATION,

and

COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION D/B/A CCIA, A 501(C)(6) NON-STOCK
VIRGINIA CORPORATION,

Plaintiffs,

v.

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

Defendant.

**PLAINTIFF NETCHOICE’S RESPONSE
TO DEFENDANT’S FIRST SET OF
INTERROGATORIES**

Pursuant to the Federal Rules of Civil Procedure,
Plaintiff NetChoice hereby responds to Defendant’s First
Set of Interrogatories and states as follows:

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RESPONSES AND OBJECTIONS

INTERROGATORY NO. 1: Identify all steps in the process of each of your members' content moderation policies and practices on its platform. If content moderation occurs in differing ways based on the type of content, the purpose in displaying that content, or the viewpoint expressed in the content, describe each process therein.

Objections:

Plaintiff objects to this interrogatory on grounds that it is unduly burdensome and seeks information equally available to Defendant from a plain reading of its own statute, or that is publicly available to Defendant. Plaintiff also objects to this interrogatory to the extent it calls for legal conclusions.

Responses:

Notwithstanding these objections, NetChoice answers as follows:

Below, NetChoice points to where its members have made their policies publicly available and has provided summaries of the members' respective policies. These summaries are not exhaustive, as the policies speak for themselves and are the best source of information responsive to this interrogatory.

*Appendix P***Etsy**

Etsy publishes its Terms of Use at: <https://etsy.me/3HeZAJR>.

The Terms require users to comply with Etsy’s Anti-Discrimination and Hate Speech Policy (<https://etsy.me/3Dc8SKx>), Etsy’s House Rules for Sellers (<https://etsy.me/30epEtX>), House Rules for Buyers (<https://etsy.me/3mSnjxs>), and House Rules for Third Parties (<https://etsy.me/3bSehKt>).

Under its Anti-Discrimination and Hate Speech Policy, Etsy “prohibits the use of [its] Services to discriminate against people based on the following personal attributes”:

- Race
- Color
- Ethnicity
- National origin
- Religion
- Gender
- Gender identity
- Sexual orientation
- Disability
- Any other characteristic protected under applicable law

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Etsy's rules apply across the website and application:

Whether you're engaging with public features on Etsy, such as listing items, using community spaces, and writing reviews, or having direct communication with other members of the Etsy community, such as via Messages, discrimination and hate speech are not allowed. As a seller on Etsy, your shop content, including shop announcements and shop policies, cannot display discriminatory behavior toward protected groups. Examples of prohibited behavior include, but are not limited to:

- Refusal of service based on membership in one or more protected group
- Expressing intolerance or a lack of respect for another member on the basis of protected group attributes
- Having a shop policy that excludes sales to members of one or more protected groups listed above
- Directly or indirectly making derogatory or demeaning remarks against protected groups listed above
- Racial slurs
- Posts that support or glorify hate groups and their members.

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Similarly, under the House Rules for Sellers' Hate Items Policy (<https://etsy.me/31BIVpv>), Etsy reiterates its Anti-Discrimination policy:

Etsy does not allow items or listings that promote, support or glorify hatred toward people or otherwise demean people based upon: race, ethnicity, national origin, religion, gender, gender identity, disability, or sexual orientation (collectively, "protected groups"). We also prohibit items or content that promote organizations or people with such views.

The following items are not allowed on Etsy:

Items that support or commemorate current or historical hate groups, including propaganda or collectibles. Examples of hate groups include Nazi or Neo-Nazi groups, Ku Klux Klan (KKK) groups, white supremacist groups, misogynist groups, or groups that advocate anti-gay, anti-immigrant, or Holocaust denial agendas.

Items that contain racial slurs or derogatory terms in reference to protected groups.

Furthermore, the policy for sellers also regulates:

- Alcohol, Tobacco, Drugs, Drug Paraphernalia, and Medical Drugs
- Animal Products and Human Remains

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- Dangerous Items: Hazardous Materials, Recalled Items, and Weapons
- Hate Items: Items that Promote, Support, or Glorify Hatred
- Illegal Items, Items Promoting Illegal Activity, and Highly Regulated Items
- Internationally Regulated Items
- Pornography and Mature Content
- Violent Items: Items that Promote, Support, or Glorify Violence

Facebook

Facebook publishes its Terms and Policies under a page entitled “Everything you need to know, all in one place,” at: <https://bit.ly/3GJDZzg>.

In the Terms, Facebook explains many facets of its content moderation.

- Facebook Safeguards Against Harmful Conduct
- Facebook provides a personalized experience
- Facebook provides recommendations
- Facebook enables you to discover things
- Use of Automated systems

Facebook limits who may use Facebook, and prohibits any (1) users under 13 years old; (2) convicted sex

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offenders; (3) people whose account has been disabled for violations of terms and policies; and (4) anyone not allowed to use the service under law.

Facebook explains, “We want people to use Facebook to express themselves and to share content that is important to them, but not at the expense of the safety and well-being of others or the integrity of our community. You therefore agree not to engage in the conduct described below (or to facilitate or support others in doing so)”:

- You may not use our Products to do or share anything:
 - That violates these Terms, our Community Standards, and other terms and policies that apply to your use of Facebook.
 - That is unlawful, misleading, discriminatory or fraudulent.
 - That infringes or violates someone else’s rights, including their intellectual property rights.
- You may not upload viruses or malicious code or do anything that could disable, overburden, or impair the proper working or appearance of our Products.
- You may not access or collect data from our Products using automated means (without our prior permission) or attempt to access data you do not have permission to access.

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To effectuate its policies, Facebook further explains, “We can remove or restrict access to content that is in violation of these provisions.” And Facebook provides users some recourse for certain moderation decisions:

If we remove content that you have shared in violation of our Community Standards, we’ll let you know and explain any options you have to request another review, unless you seriously or repeatedly violate these Terms or if doing so may expose us or others to legal liability; harm our community of users; compromise or interfere with the integrity or operation of any of our services, systems or Products; where we are restricted due to technical limitations; or where we are prohibited from doing so for legal reasons.

Facebook also allows users to report content: “To help support our community, we encourage you to report content or conduct that you believe violates your rights (including intellectual property rights) or our terms and policies.” In addition to moderating individual user submissions, Facebook terminates and suspends accounts:

We want Facebook to be a place where people feel welcome and safe to express themselves and share their thoughts and ideas.

If we determine that you have clearly, seriously or repeatedly breached our Terms or Policies, including in particular our Community

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Standards, we may suspend or permanently disable access to your account. We may also suspend or disable your account if you repeatedly infringe other people’s intellectual property rights or where we are required to do so for legal reasons.

When Facebook terminates or suspends an account, it provides notice and explains whether users may seek review: “Where we take such action we’ll let you know and explain any options you have to request a review, unless doing so may expose us or others to legal liability; harm our community of users; compromise or interfere with the integrity or operation of any of our services, systems or Products; or where we are restricted due to technical limitations; or where we are prohibited from doing so for legal reasons.”

Facebook also makes its Community Standards available at: <https://bit.ly/3mv8Vem>. As described in the Terms, “[t]hese guidelines outline our standards regarding the content you post to Facebook and your activity on Facebook and other Facebook Products.”

Generally, “[t]he goal of our Community Standards is to create a place for expression and give people a voice. The Facebook company wants people to be able to talk openly about the issues that matter to them, even if some may disagree or find them objectionable. In some cases, we allow content—which would otherwise go against our standards—if it’s newsworthy and in the public interest. We do this only after weighing the public interest value

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against the risk of harm, and we look to international human rights standards to make these judgments.”

Facebook moderates content by “limit[ing] expression,” when doing so is “in service of one or more of the following values”:

- Safety
- Dignity
- Authenticity
- Privacy

Facebook applies its standards platform- and world-wide: “Our Community Standards apply to everyone, all around the world, and to all types of content.” So, Facebook identifies a series of categories of content, for which it (1) provides a “Policy Rationale”; (2) prohibits expressly defined kinds of user submissions; (3) identifies certain kinds of content for which it might require more context to make a moderation decision, or content for which it might provide other users a warning; and (4) provides examples of “user experiences” for certain kinds of moderation decisions (including reporting, post-report communication, takedowns, and warning screens).

These categories and sub-categories include (with links to public postings of the policies):

- **Violence and Criminal Behavior**
 - o Violence and Incitement (<https://bit.ly/3pXq3vd>)

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- o Dangerous Individuals and Organizations (<https://bit.ly/3nGnMBS>)
- o Coordinating Harm and Publicizing Crime (<https://bit.ly/3EylhZb>)
- o Regulated Goods (<https://bit.ly/3q1Frah>)
- o Fraud and Deception (<https://bit.ly/3pWaOCR>)
- **Safety**
 - o Suicide and Self-Injury (<https://bit.ly/3BB1sPh>)
 - o Child Sexual Exploitation, Abuse, and Nudity (<https://bit.ly/3CC7yQz>)
 - o Sexual Exploitation of Adults (<https://bit.ly/3nJYQcZ>)
 - o Bullying and Harassment (<https://bit.ly/3q0cefE>)
 - o Human Exploitation (<https://bit.ly/2ZK3iji>)
 - o Privacy Violations and Image Privacy Rights (<https://bit.ly/3pXzOcP>)
- **Objectionable Content**
 - o Hate Speech (<https://bit.ly/3bsJ8Ny>)

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- o Violent and Graphic Content (<https://bit.ly/3o5btQ7>)
- o Adult Nudity and Sexual Activity (<https://bit.ly/3CzPUgr>)
- o Sexual Solicitation (<https://bit.ly/3CMrsIA>)
- **Integrity and Authenticity**
 - o Account Integrity and Authentic Identity (<https://bit.ly/3myRmtZ>)
 - o Spam (<https://bit.ly/3CE1gQo>)
 - o Cybersecurity (<https://bit.ly/3mzMVyZ>)
 - o Inauthentic Behavior (<https://bit.ly/3pT4ufu>)
 - o False News (<https://bit.ly/3jVtzTi>)
 - o Manipulated Media (<https://bit.ly/3w4DI4M>)
 - o Memorialization (<https://bit.ly/2ZCDwh4>)
- **Respecting Intellectual Property**
 - o Intellectual Property (<https://bit.ly/3jWEJqS>)
- **Content-Related Requests And Decisions**
 - o User Requests (<https://bit.ly/3nQOvMc>)
 - o Additional Protection of Minors (<https://bit.ly/3nM9hg6>)

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misleading content that may harm Pinners' or the public's well-being, safety or trust[.]” Pinterest includes many examples in its policy.

- **Harassment and Criticism** – “Pinterest isn’t a place to insult, hurt or antagonize individuals or groups of people. There are good reasons to express criticism, but [Pinterest] may limit the distribution of or remove insulting content to keep Pinterest a positive, inspiring place[.]” Pinterest includes many examples in its policy.
- **Private Information** – Pinterest does not “allow content that reveals personal or sensitive information[.]” Pinterest includes many examples in its policy.
- **Self-Injury and Harmful Behavior** – “Pinterest isn’t a place for content that displays, rationalizes or encourages suicide, self-injury, eating disorders or substance abuse. [Pinterest will] limit the distribution of or remove such content[.]” Pinterest includes many examples in its policy.
- **Graphic Threats and Violence** – “Pinterest isn’t a place for graphic

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violence or threatening language. [Pinterest] limit[s] the distribution of or remove such content[.]” Pinterest includes many examples in its policy.

- **Violent Actors** – “Pinterest isn’t a place for violent content, groups or individuals. [Pinterest] limit[s] the distribution of or remove[s] content and accounts that encourage, praise, promote, or provide aid to dangerous actors or groups and their activities. . . . [Pinterest] work[s] with industry, government and security experts to help us identify these groups.” Pinterest includes examples in its policy.
- **Dangerous Goods and Activities** – “Pinterest isn’t a place for trading or selling of certain regulated goods—products or substances that can cause harm when used, altered or manufactured irresponsibly—or for the display or encouragement of dangerous activities. [Pinterest] limit[s] the distribution of or remove such content and accounts[.]” Pinterest includes many examples in its policy.

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- **Harmful or Deceptive Products and Practices** – “Pinterest isn’t a place for practices and products that may be harmful or deceptive. [Pinterest] limit[s] the distribution of or remove[s] such content and accounts[.]” Pinterest includes many examples in its policy.
- **Impersonation** – Pinterest does not “allow accounts that impersonate or misrepresent their affiliation with any person or organization. If you [a user] have a fan or commentary account for a public figure or brand, make it clear through your username or Pinterest profile that you aren’t officially affiliated with them.”
- **Comments** – “All of [Pinterest’s] Community Guidelines apply in comments posted on Pins. In addition, comments should be relevant. [Pinterest] may remove comments that violate our guidelines[.]” Pinterest includes many examples in its policy.

As described further therein, these practices can vary based on the context and potential risk.

*Appendix P***Nextdoor**

Nextdoor publishes its Community Guidelines (<https://bit.ly/3ETuBXV>) and Member Agreement online (<https://bit.ly/2YoS7fI>). Members of Nextdoor can report content that they believe violates Nextdoor’s rules and members of Nextdoor’s Leads and Review Team will review and vote whether to remove the content. Members of the Leads and Review Team do not have the power to limit a user’s posting ability or the power to restrict their access to the platform. Instead, only Nextdoor’s staff can take such enforcement actions.

Nextdoor encourages users to work directly with Leads and Review Team members (through private message) to resolve their concerns about reported or removed posts, or about closed discussions. Users can also appeal Leads’ decisions or report problems directly to Nextdoor Support.

Under Nextdoor’s Community Guidelines, Nextdoor identifies the “values of the community [Nextdoor] want[s] to build”:

1. Be respectful to your neighbors – You’re speaking to your real neighbors. Strong communities are built on strong relationships. (<https://bit.ly/3o94gyr>)
2. Do not discriminate – We do not tolerate racism, hateful language, or discrimination of any kind. (<https://bit.ly/3C0TP4K>)

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3. Discuss important topics in the right way – We have policies and dedicated spaces for important non-local topics, such as national politics. (<https://bit.ly/3mVhQWD>)
4. Promote local commerce the right way – We have created designated spaces for neighbors and local businesses to sell products and services. (<https://bit.ly/3mTc33Y>)
5. Use your true identity – Nextdoor is built on trust — we want everyone to know they’re communicating with their real neighbor, and therefore require you to use your true identity. (<https://bit.ly/3mUgHP2>)
6. Do not engage in harmful activity – We prohibit any activity that could hurt someone, from physical harm to scams. (<https://bit.ly/3bSO8LF>)

For instance, Nextdoor identifies the following prohibited kinds of discriminatory expression not allowed on the site:

- Discriminate against, threaten, or insult individuals or groups based on race, color, ethnicity, immigration status, national origin, religion or faith, sex or gender identity, sexual orientation, housing status, disability, or medical condition.
- Assume that someone is engaged in suspicious activity or criminal behavior

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because of their race or ethnicity. (Learn more about preventing racial profiling.)

- Use negative stereotypes, caricatures, or generalizations about a group of individuals. This includes the use of insulting imagery or memes.
- Use slurs, profanity, derogatory racial terms, or other language that reduces an individual's humanity. This includes the use of the dehumanizing terms, "illegals," "illegal aliens," or "aliens" to refer to non-citizens, the use of racial code words (e.g., "Thug" or "Oriental"), as well as the use of derogatory language to refer to people who have a criminal history (e.g., "scum" or "animals").
- Deny an individual's gender identity or sexual orientation, or promote support for conversion therapy and related programs.
- Show or elicit support for hate groups or people promoting hateful activities.
- Promote hate-based conspiracy theories and misinformation (e.g., Holocaust denial or "Antifa is invading the suburbs")
- Suggest, show, threaten, or glorify the use of violence — even jokingly — against an individual or a group of individuals. See our policy on Threats to the safety of others.
- Attempt to condone or trivialize violence against others — even inadvertently (e.g., "Yeah, but that person is a criminal").

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- Attack individuals, including public figures, based on their membership in a marginalized or protected group.
- Mock or attack the beliefs, sacred symbols, movements, or institutions of marginalized or protected groups.

Next door also has policies outlining its support for equality, including racial and LGBTQIA+ equality. And Nextdoor has its own policy regarding acceptable expression about COVID-19.

TikTok

TikTok makes its terms of service publicly available at: <https://bit.ly/3wcyYu8>. These Terms provide that “access to and use of [TikTok’s] Services is [] subject to our Privacy Policy and Community Guidelines[.]”

TikTok also publicly posts its Community Guidelines at: <https://bit.ly/3pWx8MA>. As Tik- Tok explains:

TikTok’s mission is to inspire creativity and bring joy. We are building a global community where people can create and share, discover the world around them, and connect with others across the globe. As we grow, we are committed to maintaining a supportive environment for our community. Our Community Guidelines define a set of norms and common code of conduct for TikTok; they provide guidance on what is and is not allowed to make a welcoming space for everyone.

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TikTok “prioritize[s] safety, diversity, inclusion, and authenticity. We encourage creators to celebrate what makes them unique and viewers to engage in what inspires them; and we believe that a safe environment helps everyone express themselves openly.”

TikTok makes clear that its “Community Guidelines apply to everyone and to everything on TikTok. We proactively enforce them using a mix of technology and human moderation before content gets reported to us. We also encourage our community members to use the tools we provide on TikTok to report any content they believe violates our Community Guidelines.”

Consequently, TikTok “will remove any content – including video, audio, livestream, images, comments, and text – that violates our Community Guidelines. Individuals are notified of our decisions and can appeal if they believe no violation has occurred. We will suspend or ban accounts and/or devices that are involved in severe or repeated violations; we will consider information available on other platforms and offline in these decisions. When warranted, we will report the accounts to relevant legal authorities.”

Furthermore, TikTok’s “algorithms are designed with trust and safety in mind. For some content – such as spam, videos under review, or videos that could be considered upsetting or depict things that may be shocking to a general audience – we may reduce discoverability, including by redirecting search results or limiting distribution in the For You feed.”

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But, “some content that would normally be removed per our Community Guidelines could be in the public interest. Therefore, we may allow exceptions under certain circumstances, such as educational, documentary, scientific, or artistic content, satirical content, content in fictional settings, counterspeech, and content in the public interest that is newsworthy or otherwise enables individual expression on topics of social importance.”

TikTok identifies the following kinds of content:

Violent Extremism

Threats and Incitement to Violence. TikTok Prohibits:

- Statements of intent to inflict physical injuries on an individual or a group;
- Statements or imagery that encourage others to commit or that advocate for physical violence;
- Conditional or aspirational statements that encourage other people to commit violence;
- Calls to bring weapons to a location with the intent to intimidate or threaten an individual or group with violence; and
- Instructions on how to make or use weapons with an intent to incite violence.

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Dangerous Individuals and Organizations.

TikTok prohibits:

- Content that praises, promotes, glorifies, or supports dangerous individuals and/or organizations;
- Content that encourages participation in, or intends to recruit individuals to, dangerous organizations; and
- Content with names, symbols, logos, flags, slogans, uniforms, gestures, salutes, illustrations, portraits, songs, music, lyrics, or other objects meant to represent dangerous individuals and/or organizations.

Hateful Behavior

Attacks on the Basis of Protected Attributes. TikTok “define[s] hate speech or behavior as content that attacks, threatens, incites violence against, or otherwise dehumanizes an individual or a group on the basis of the following protected attributes”: race; ethnicity; national origin; religion; caste; sexual orientation; sex; gender; gender identity; serious disease; disability; and immigration status.

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TikTok prohibits:

- Hateful content related to an individual or group, including:
 - o claiming that they are physically, mentally, or morally inferior;
 - o calling for or justifying violence against them;
 - o claiming that they are criminals;
 - o referring to them as animals, inanimate objects, or other non-human entities;
 - o promoting or justifying exclusion, segregation, or discrimination against them; and
- Content that depicts harm inflicted upon an individual or a group on the basis of a protected attribute.

Slurs. TikTok prohibits “[c]ontent that uses or includes slurs.”

Hateful Ideology. TikTok prohibits:

- Content that praises, promotes, glorifies, or supports any hateful ideology;
- Content that contains names, symbols, logos, flags, slogans, uniforms, gestures, salutes, illustrations, portraits, songs, music, lyrics, or other objects related to a hateful ideology;

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- Content that denies well-documented and violent events have taken place affecting groups with protected attributes;
- Claims of supremacy over a group of people with reference to other protected attributes; and
- Conspiracy theories used to justify hateful ideologies.

Illegal Activities and Regulated Goods

Criminal Activities. TikTok prohibits:

- Content that depicts or promotes acts of physical harm, such as assault or kidnapping;
- Content that risks the safety of others, including swatting;
- Content that depicts or promotes human exploitation, including human smuggling, bonded labor, domestic servitude, sex trafficking, or prostitution;
- Content that depicts or promotes the poaching or illegal trade of wildlife;
- Content that offers the purchase, sale, trade, or solicitation of unlawfully acquired or counterfeit goods; and
- Content that provides instructions on how to conduct criminal activities.

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Weapons. TikTok prohibits:

- Content that displays firearms, firearm accessories, ammunition, or explosive weapons; and
- Content that offers the purchase, sale, trade, or solicitation of firearms, accessories, ammunition, explosive weapons, or instructions on how to manufacture them.

Drugs, Controlled Substances, Alcohol, and Tobacco. TikTok prohibits:

- Content that depicts or promotes drugs, drug consumption, or encourages others to make, use, or trade drugs or other controlled substances;
- Content that offers the purchase, sale, trade, or solicitation of drugs or other controlled substances, alcohol or tobacco products (including vaping products);
- Content that provides information on how to buy illegal or controlled substances;
- Content that depicts or promotes the making of illicit alcohol products;
- Content that depicts or promotes the misuse of legal substances, or instruction on how to make homemade substances, in an effort to become intoxicated.

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Frauds and Scams. TikTok prohibits:

- Content that depicts or promotes phishing;
- Content that depicts or promotes Ponzi, multi-level marketing, or pyramid schemes;
- Content that depicts or promotes investment schemes with promise of high returns, fixed betting, or any other types of scams.

Gambling. TikTok prohibits “[c]ontent that promotes casinos, sports betting, poker, lotteries, gambling-related software and apps, or other gambling services.”

Privacy, Personal Data, and Personally Identifiable Information (PII). TikTok prohibits “[c]ontent that contains personal data or personally identifiable information (PII).”

Violent and Graphic Content. TikTok prohibits:

- Content of humans that depicts:
 - o violent or graphic deaths or accidents;
 - o dismembered, mutilated, charred, or burned human remains;
 - o gore in which an open wound or injury is the core focus;

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- o real-world physical violence, fighting, or torture;
- Content of animals that depicts:
 - o the slaughter or other non-natural death of animals;
 - o dismembered, mutilated, charred, or burned animal remains; or
 - o animal cruelty and gore.

Suicide, Self-Harm, and Dangerous Acts

Suicide. TikTok prohibits:

- Content that provides instructions for suicide;
- Content that depicts, promotes, normalizes, or glorifies suicide; and
- Suicide games, dares, pacts, or hoaxes.

Self-Harm and Eating Disorders. TikTok prohibits:

- Content that depicts, promotes, normalizes, or glorifies self-harm or eating disorders;
- Content that provides instructions on how to engage in self-harm or eating disorders;
- Self-harm or eating disorder games, dares, pacts, or hoaxes; and

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- Content that depicts, promotes, normalizes, or glorifies eating disorders or other dangerous weight loss behaviors associated with eating disorders.

Dangerous Acts. TikTok prohibits:

- Content that shows the potentially inappropriate use of dangerous tools, vehicles, or objects;
- Content that depicts or promotes ingesting substances that are not meant for consumption or could lead to severe harm;
- Dangerous games, dares, or stunts that might lead to injury; and
- Harassment and bullying.

Harassment and Bullying

Abusive Behavior. TikTok prohibits:

- Content that insults another individual, or disparages an individual on the basis of attributes such as intellect, appearance, personality traits, or hygiene;
- Content that encourages coordinated harassment;
- Content that disparages victims of violent tragedies;

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- Content that uses TikTok interactive features (e.g., duet) to degrade others;
- Content that depicts willful harm or intimidation, such as cyberstalking or trolling; and
- Content that wishes death, serious disease, or other serious harm on an individual or public figure.

Sexual Harassment. TikTok prohibits:

- Content that attempts to make unwanted sexual contact;
- Content that simulates sexual activity with another user, either verbally, in text (including emojis), or through the use of any in-app features;
- Content that disparages another person's sexual activity;
- Content that alters or morphs an image of another individual to portray or imply sexual suggestiveness or engagement in sexual activity;
- Content that reveals, or threatens to reveal a person's private sexual life, including threats to publicize digital content, sexual history, and names of previous sexual partners; and

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- Content that exposes, or threatens to expose, a person's sexual orientation without their consent or knowledge.

Threats of Hacking, Doxxing, and Blackmail. TikTok prohibits:

- Content that threatens to reveal personal data or personally identifiable information (PII), including residential address, private email address, private phone number, bank statement, social security number, or passport number;
- Threats of blackmail or hacking another individual's account;
- Content that incites or encourages others to hack or reveal another person's account, personal data, or personally identifiable information (PII); and
- An individual's account, personal data, or personally identifiable information for others to abuse, troll, or harass.

Adult Nudity and Sexual Activities

Sexual Exploitation. TikTok prohibits:

- Content that depicts, solicits, promotes, normalizes, or glorifies non-consensual sexual acts or non-consensual touching, including rape and sexual assault;

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- Content that depicts, solicits, promotes, normalizes, or glorifies the sharing of nonconsensual intimate imagery, including sexual images that are taken, created, or shared without consent;
- Content that depicts, promotes, normalizes, or glorifies sexual violence; and
- Content that depicts, promotes, or glorifies sexual solicitation, including offering or asking for sexual partners, sexual chats or imagery, sexual services, premium sexual content, or sexcamming.

Nudity and Sexual Activity Involving Adults.
TikTok prohibits:

- Content that explicitly or implicitly depicts sexual activities including penetrative and non-penetrative sex, oral sex, or erotic kissing;
- Content that depicts sexual arousal or sexual stimulation;
- Content that depicts a sexual fetish;
- Content that depicts exposed human genitalia, female nipples or areola, pubic regions, or buttocks; and
- Content that contains sexually explicit language for sexual gratification.

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Minor Safety

Sexual Exploitation of Minors. TikTok prohibits:

- Content that shares, reshares, offers to trade or sell, or directs users off platform to obtain or distribute CSAM;
- Content that engages with minors in a sexualized way, or otherwise sexualizes a minor (e.g., via product features like duets);
- Content that depicts, solicits, glorifies, or encourages child abuse imagery including nudity, sexualized minors, or sexual activity with minors;
- Content that depicts, promotes, normalizes, or glorifies pedophilia or the sexual assault of a minor; and
- Content that revictimizes or capitalizes on minor victims of abuse by third party reshares or reenactments of assault or confessions.

Grooming Behavior. TikTok prohibits:

- Grooming advances;
- Content that depicts, promotes, normalizes, or glorifies grooming behaviors;
- Content that solicits real-world sexual contact between a minor and an adult or

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between minors with a significant age difference;

- Content that displays or offers nudity to minors; and
- Any solicitation of nude imagery or sexual contact, through blackmail or other means of coercion.

Nudity and Sexual Activity Involving Minors.
TikTok prohibits:

- Content that depicts or implies minor sexual activities including penetrative and nonpenetrative sex, oral sex, or intimate kissing;
- Content that depicts sexual arousal or sexual stimulation involving a minor
- Content that depicts a sexual fetish involving a minor;
- Content that depicts exposed human genitalia, female nipples or areola, pubic regions, or buttocks of a minor;
- Content that contains sexually explicit language depicting or describing a minor;
- Content depicting a minor that contains sexually explicit song lyrics;
- Content with sexually explicit dancing of a minor, including twerking, breast shaking, pelvic thrusting, or fondling the groin or breasts of oneself or another;

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- Content depicting a minor undressing;
- Content depicting a minor in minimal clothing that is not situationally relevant to the location; and
- Sexualized comments, emojis, text, or other graphics used to veil or imply nudity or sexual activity of a minor.

Harmful Activity by Minors. TikTok prohibits:

- Content that suggests, depicts, imitates, or promotes the possession or consumption of alcoholic beverages, tobacco, or drugs by a minor;
- Content that offers instruction targeting minors on how to buy, sell, or trade alcohol, tobacco, or controlled substances; and
- Content that depicts or promotes activities that may jeopardize youth well-being, including physical challenges, dares, or stunts.

Physical and Psychological Harm of Minors. TikTok prohibits:

- Content that depicts or promotes physical abuse, neglect, endangerment, or psychological disparagement of minors; and
- Content that depicts or promotes survivalist techniques without a warning asserting the hazards of replication.

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Crimes Against Children. “We do not allow users who have been convicted of crimes against children to have an account on our platform. These crimes include: sexual assault, molestation, murder, physical abuse or neglect, abduction, international parental kidnapping, trafficking, exploitation of minors for prostitution, live online sexual abuse of a minor, sexual exploitation of minors in the context of travel and tourism, attempts to obtain or distribute child sexual abuse material (CSAM), and the production, possession, or distribution of child sexual abuse material (CSAM). If we discover any such users, we ban the account. Any self-disclosed user information that states the account holder is a pedophile or minor sex offender will be taken at face value and the account may be deleted.”

Integrity and Authenticity

Spam and Fake Engagement. TikTok tells its users not to:

- Share instructions on how to artificially increase views, likes, followers, shares, or comments
- Attempt to or engage in selling or buying views, likes, followers, shares, or comments
- Promote artificial traffic generation services
- Operate multiple TikTok accounts under false or fraudulent pretenses to distribute commercial spam

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Impersonation. TikTok tells its users not to “[p]ose as another person or entity by using someone else’s name, biographical details, or profile picture in a misleading manner.”

Misinformation. TikTok prohibits:

- Misinformation that incites hate or prejudice
- Misinformation related to emergencies that induces panic
- Medical misinformation that can cause harm to an individual’s physical health
- Content that misleads community members about elections or other civic processes
- Conspiratorial content that attacks a specific protected group or includes a violent call to action, or denies a violent or tragic event occurred
- Digital Forgeries (Synthetic Media or Manipulated Media) that mislead users by distorting the truth of events and cause harm to the subject of the video, other persons, or society.

TikTok further tells its users not to “[e]ngage in coordinated inauthentic behaviors (such as the creation of accounts) to exert influence and sway public opinion while misleading individuals and our community about the account’s identity, location, or purpose.”

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Intellectual Property Violations. TikTok prohibits “[c]ontent that violates or infringes someone else’s copyrights, trademarks, or other intellectual property rights”

Twitter

Twitter publishes its Terms of Service at: <https://bit.ly/3C77iIx>. Twitter incorporates its Twitter Rules and Policies into the Terms of Service, and requires compliance with those Rules and Policies.

Twitter publishes its Rules and Policies at: <https://bit.ly/3CY0RbF>. Twitter further explains, in separate pages for each, its policies in various areas:

- General
 - o The Twitter Rules (<https://bit.ly/3BYhKBI>)
 - o Deceased individuals (<https://bit.ly/31w1fjR>)
 - o Username squatting policy (<https://bit.ly/3ki5oyv>)
- Platform Integrity and Authenticity
 - o Platform manipulation and spam policy (<https://bit.ly/3022bfl>)
 - o Synthetic and manipulated media policy (<https://bit.ly/3qjL1F4>)
 - o Civic integrity policy (<https://bit.ly/2YsoDxz>)

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- o Parody, newsfeed, commentary, and fan account policy (<https://bit.ly/3qiiIqh>)
- o Coordinated harmful activity (<https://bit.ly/31BkmJj>)
- o Financial scam policy (<https://bit.ly/3o9cLcF>)
- o Distribution of hacked materials policy (<https://bit.ly/3qr1abw>)
- o Impersonation policy (<https://bit.ly/3mXvhVS>)
- o Ban evasion policy (<https://bit.ly/3ocg7vs>)
- Safety and Cybercrime
 - o Abusive behavior (<https://bit.ly/3bQTsyW>)
 - o Hateful conduct policy (<https://bit.ly/3CW1G7x>)
 - o Violent organizations policy (<https://bit.ly/3wplQBQ>)
 - o Violent threats policy (<https://bit.ly/3bRyJer>)
 - o Suicide and Self-harm Policy (<https://bit.ly/3bPQR8r>)
 - o Glorification of violence policy (<https://bit.ly/3GYOiQ5>)
 - o Abusive profile information (<https://bit.ly/3kgyRsy>)

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- o Illegal or certain regulated goods or services (<https://bit.ly/3qjcEOk>)
- o Non-consensual nudity policy (<https://bit.ly/3o6hZpH>)
- o Child sexual exploitation policy (<https://bit.ly/3GWoyUp>)
- o Sensitive media policy (<https://bit.ly/3BW0SM6>)
- Intellectual Property
 - o Automated copyright claims for live video (<https://bit.ly/3EVz10n>)
 - o Counterfeit policy (<https://bit.ly/3GZXrHX>)
 - o Trademark policy (<https://bit.ly/3qeReC5>)
 - o Copyright policy (<https://bit.ly/3qfc2cJ>)
- Platform Use Guidelines
 - o Our range of enforcement options (<https://bit.ly/3o9dGK9>)
 - o Content Monetization Standards (<https://bit.ly/3EUg0vl>)
 - o Our use of cookies and similar technologies (<https://bit.ly/3CWCgUV>)
 - o Notices on Twitter and what they mean (<https://bit.ly/3EZVaLg>)

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- o Guidelines for Promotions on Twitter (<https://bit.ly/3ENAUaA>)
- o About search rules and restrictions (<https://bit.ly/3HcP8sy>)
- o Twitter, our services, and corporate affiliates (<https://bit.ly/3bS0aoI>)
- o How to report security vulnerabilities (<https://bit.ly/3H4kD84>)
- o About Twitter limits (<https://bit.ly/3CVP3Ha>)
- o Defending and respecting the rights of people using our service (<https://bit.ly/3kgA8Qm>)
- o About rules and best practices with account behaviors (<https://bit.ly/3bQUJWK>)
- o Fair use policy (<https://bit.ly/3khrIbC>)
- o About Twitter's APIs (<https://bit.ly/3o6iYGp>)
- o Vine Camera Terms of Service and privacy policy (<https://bit.ly/3kjRJH7>)
- o About government and state-affiliated media account labels on Twitter (<https://bit.ly/3CWD0tb>)
- o Twitter Moments guidelines and principles (<https://bit.ly/3GYPy5L>)

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- o Automation rules (<https://bit.ly/3CYXUrp>)
- o Report violations (<https://bit.ly/3mUU0KD>)
- o Inactive account policy (<https://bit.ly/3o3MCvQ>)
- o About country withheld content (<https://bit.ly/3CSIuF8>)
- o Curation style guide (<https://bit.ly/3wpgfLK>)
- o Super Follows policy (<https://bit.ly/3ock3fB>)
- o Ticketed Spaces policy (<https://bit.ly/3H599Rs>)
- o Updates to our Terms of Service and Privacy Policy (<https://bit.ly/3obne7j>)
- o About public-interest exceptions on Twitter (<https://bit.ly/3qkUiwu>)
- o Additional information about data processing (<https://bit.ly/3CZ74nJ>)
- o Our approach to policy development and enforcement philosophy (<https://bit.ly/30b2K6H>)
- o About specific instances when a Tweet's reach may be limited (<https://bit.ly/3wtYETe>)

*Appendix P***YouTube**

YouTube publishes its Terms of Service at: <https://bit.ly/3wpnymN>. YouTube states that “use of the Service is subject to these terms, the YouTube Community Guidelines and the Policy, Safety and Copyright Policies which may be updated from time to time.”

YouTube makes clear that “YouTube is under no obligation to host or serve Content. If you see any Content you believe does not comply with this Agreement, including by violating the Community Guidelines or the law, you can report it to us.” Further, “If you choose to upload Content, you must not submit to the Service any Content that does not comply with this Agreement (including the YouTube Community Guidelines) or the law.”

YouTube explains when it may remove content and take actions against users:

- “If we reasonably believe that any Content is in breach of this Agreement or may cause harm to YouTube, our users, or third parties, we may remove or take down that Content in our discretion. We will notify you with the reason for our action unless we reasonably believe that to do so: (a) would breach the law or the direction of a legal enforcement authority or would otherwise risk legal liability for YouTube or our Affiliates; (b) would compromise an investigation or the integrity or operation of the Service; or (c) would cause harm to

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any user, other third party, YouTube or our Affiliates. You can learn more about reporting and enforcement, including how to appeal on the Troubleshooting page of our Help Center.”

- “YouTube may suspend or terminate your access, your Google account, or your Google account’s access to all or part of the Service if (a) you materially or repeatedly breach this Agreement; (b) we are required to do so to comply with a legal requirement or a court order; or (c) we believe there has been conduct that creates (or could create) liability or harm to any user, other third party, YouTube or our Affiliates.”

YouTube publishes its Community Guidelines at: <https://bit.ly/3pWkkpN>. YouTube details the following categories and subcategories of expression YouTube may restrict according to its policies:

- **Spam & deceptive practices**
 - o Fake engagement (<https://bit.ly/3EVGqg7>)
 - o Impersonation (<https://bit.ly/31xBTSl>)
 - o External links (<https://bit.ly/3mTC6I3>)
 - o Spam, deceptive practices & scams (<https://bit.ly/31HqVu6>)

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- o Playlists (<https://bit.ly/3o2HA2w>)
- o Additional policies (<https://bit.ly/3khR2hC>)
- **Violent or dangerous content**
 - o Harassment and cyberbullying (<https://bit.ly/3kiKYW6>)
 - o Harmful or dangerous content (<https://bit.ly/2ZYTan8>)
 - o Hate speech (<https://bit.ly/3q7zN6r>)
 - o Violent criminal organizations (<https://bit.ly/3BWNMhx>)
 - o Violent or graphic content (<https://bit.ly/3wolWK4>)
- **Misinformation**
 - o Misinformation (<https://bit.ly/3o6K1kR>)
 - o Elections misinformation (<https://bit.ly/3EXqlqw>)
 - o COVID-19 medical misinformation (<https://bit.ly/3BXkkbo>)
 - o Vaccine misinformation (<https://bit.ly/3CROcal>)
- **Sensitive content**
 - o Child safety (<https://bit.ly/3D0pRPy>)
 - o Thumbnails (<https://bit.ly/2ZYTXEC>)

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- o Nudity and sexual content (<https://bit.ly/3bRVnU5>)
- o Suicide and self-harm (<https://bit.ly/3CWPCR5>)
- o Vulgar language (<https://bit.ly/3BVVI2G>)
- **Regulated goods**
 - o Firearms (<https://bit.ly/3CYRMiT>)
 - o Sale of illegal or regulated goods or services (<https://bit.ly/3EQSSO8>)

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**APPENDIX Q — United States Court of Appeals
for the Fifth Circuit Order Staying Preliminary
Injunction, Filed May 11, 2022**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-51178

NETCHOICE, L.L.C., A 501(C)(6) DISTRICT
OF COLUMBIA ORGANIZATION DOING
BUSINESS AS NETCHOICE; COMPUTER &
COMMUNICATIONS INDUSTRY ASSOCIATION,
A 501(C) (6) NONSTOCK VIRGINIA CORPORATION
DOING BUSINESS AS CCIA,

Plaintiffs-Appellees,

versus

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

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:21-CV-840

Before JONES, SOUTHWICK, and OLDHAM, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that appellant's opposed motion to
stay preliminary injunction pending appeal is GRANTED.*

* The panel is not unanimous.

481a

**APPENDIX R — Order Staying Mandate
of the United States Court of Appeals for the
Fifth Circuit, Filed October 12, 2022**

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ORDER

The Appellees' unopposed motion to stay the mandate pending their petition for writ of certiorari is GRANTED.

/s/ Andrew S. Oldham
Andrew S. Oldham
United States Circuit Judge