Appendix 1

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) NON-STOCK 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.

Appendix 2

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) non-stock 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 SMITH, HIGGINSON, and WILLETT, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that Appellant's opposed motion to stay the preliminary injunction pending appeal is CARRIED WITH THE CASE. This matter is expedited to the next available randomly designated regular oral argument panel. No extensions to the current merits-briefing schedule should be granted. The merits panel, once identified, will be free, in its discretion, to rule immediately on the motion to stay or await oral argument.

Appendix 3

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.

1:21-CV-840-RP

ORDER

Before the Court is Plaintiffs NetChoice, LLC d/b/a NetChoice ("NetChoice"), a 501(c)(6) District of Columbia organization, and Computer & Communications Industry Association d/b/a CCIA ("CCIA"), a 501(c)(6) non-stock Virginia corporation's ("Plaintiffs") Motion for Preliminary Injunction, (Dkt. 12), Defendant Texas Attorney General Ken Paxton's (the "State") response in opposition, (Dkt. 39), and Plaintiffs' reply, (Dkt. 48). The Court held the preliminary injunction hearing on November 29, 2021. (Dkt. 47). After considering the parties' briefs and arguments, the record, and the relevant law, the Court denies the motion to dismiss and grants the preliminary injunction.

I. BACKGROUND

A. The Challenged Legislation: HB 20

In the most recent legislative session, the State sought to pass a bill that would "allow Texans to participate on the virtual public square free from Silicon Valley censorship." Senator Bryan Hughes (@SenBryanHughes), TWITTER (Mar. 5, 2021, 10:48 PM), https://twitter.com/

SenBryanHughes/status/1368061021609463812. Governor Greg Abbott voiced his support, tweeting "[s]ilencing conservative views is un-American, it's un-Texan[,] and it's about to be illegal in Texas." Greg Abbott (@GregAbbott_TX), TWITTER (Mar. 5, 2021, 8:35 PM), https://t.co/JsPam2XyqD. After a bill failed to pass during the regular session or the first special session, Governor Abbott called a special second legislative session directing the Legislature to consider and act on legislation "protecting social-media and email users from being censored." (Proclamation by the Governor of the State of Texas (Aug. 5, 2021), https://gov.texas.gov/uploads/files/press/PROC_second_called_session_87th_legislature_IMAGE_08-05-21.pdf. The Legislature passed House Bill 20 ("HB 20"), and Governor Abbott signed it into law on September 9, 2021. (Prelim. Inj. Mot., Dkt. 12, at 16).

HB 20 prohibits large social media platforms from "censor[ing]" a user based on the user's "viewpoint." Tex. Civ. Prac. & Rem. Code § 143A.002 ("Section 7"). Specifically, Section 7 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." *Id.* § 143A.002(a)(1)-(3). The State defines social media platforms as any website or app (1) with more than 50 million active users in the United States in a calendar month, (2) that is open to the public, (3) allows users to create an account, and (4) enables users to communicate with each other "for the primary purpose of posting information, comments, messages, or images." Tex. Bus. & Com. Code §§ 120.001(1), 120.002(b); Tex. Civ. Prac. & Rem. Code § 143A.003(c). HB 20 applies to sites and apps like Facebook, Instagram, Pinterest, TikTok, Twitter, Vimeo, WhatsApp, and YouTube. (Prelim. Inj. Mot., Dkt. 12, at 11); (*see* CCIA Decl., Dkt. 12-1, at 3–4; NetChoice Decl., Dkt. 12-2, at 3–4). HB 20 excludes certain companies like Internet service providers, email providers, and sites and apps that "consist[] primarily of news, sports,

entertainment, or other information or content that is not user generated but is preselected by the provider" and user comments are "incidental to" the content. Tex. Bus. & Com. Code § 120.001(1)(A)–(C). HB 20 carves out two content-based exceptions to Section 7's broad prohibition: (1) platforms may moderate 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," and (2) platforms may moderate content that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge." Tex. Civ. Prac. & Rem. Code § 143A.006(a)(2)–(3).

HB 20 also requires social media platforms to meet disclosure and operational requirements. Tex. Bus. & Com. Code § 120.051, 120.101–.104 ("Section 2"). Section 2 requires platforms to publish "acceptable use policies," set up an "easily accessible" complaint system, produce a "biannual transparency report," and "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 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." *Id.* § 120.051(a).

If a user believes a platform has improperly "censored" their viewpoint under Section 7, the user can sue the platform, which may be enjoined, and obtain attorney's fees. Tex. Civ. Prac. & Rem. Code § 143A.007(a), (b). Lawsuits can be brought by any Texan and anyone doing business in the state or who "shares or receives expression in this state." *Id.* §§ 143A.002(a), 143A.004(a), 143A.007. In addition, the Attorney General of Texas may "bring an action to enjoin a violation or a potential

violation" of HB 20 and recover their attorney's fees. *Id.* § 143A.008. Failure to comply with Section 2's requirement also subjects social media platforms to suit. The Texas Attorney General may seek injunctive relief and collect attorney's fees and "reasonable investigative costs" if successful in obtaining injunctive relief. Tex. Bus. & Com. Code § 120.151.

Finally, HB 20 contains a severability clause. Tex. Civ. Prac. & Rem. Code § 143A.008(a). "If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected." *Id.* § 143A.008(b).

HB 20 goes into effect on December 2, 2021. *Id.* § 143A.003–143A.008 (noting that the effective date is December 2, 2021).

Plaintiffs recently challenged a similar Florida law in the Northern District of Florida in *NetChoice v. Moody*, successfully obtaining a preliminary injunction to halt the enforcement of that law. The district court in that case described the Florida legislation as "an effort to rein in social-media providers deemed too large and too liberal." No. 4:21CV220-RH-MAF, 2021 WL 2690876, at *12 (N.D. Fla. June 30, 2021). The Florida court concluded that

> Balancing the exchange of ideas among private speakers is not a legitimate governmental interest. And even aside from the actual motivation for this legislation, it is plainly content-based and subject to strict scrutiny. It is also subject to strict scrutiny because it discriminates on its face among otherwise-identical speakers: between social-media providers that do or do not meet the legislation's size requirements and are or are not under common ownership with a theme park. The legislation does not survive strict scrutiny. Parts also are expressly preempted by federal law.

Id. The court's preliminary injunction has been appealed to the Eleventh Circuit.

B. Procedural Background

Plaintiffs are two trade associations with members that operate social media platforms that would be affected by HB 20. (Compl., Dkt. 1, at 1–2); (Prelim. Inj. Mot., Dkt. 12, at 11). Plaintiffs filed their lawsuit on September 22, 2021, challenging HB 20 because it violates the First

Amendment; is void for vagueness; violates the commerce clause, full faith and credit clause, and the Fourteenth Amendment's due process clause; is preempted under the supremacy clause by the Communications Decency Act, 47 U.S.C. § 230; and violates the equal protection clause of the Fourteenth Amendment. (Compl., Dkt. 1, at 31, 35, 38, 41, 44). In their motion for preliminary injunction, Plaintiffs request that this Court preliminarily enjoin the Texas Attorney General from enforcing Sections 2 and 7 of HB 20 against Plaintiffs and their members. (Dkt. 12, at 54).

In response to the motion for preliminary injunction, the State requested expedited discovery, (Mot. Discovery, Dkt. 20), which Plaintiffs opposed, (Dkt. 22). The Court granted the State's request, in part, permitting "narrowly-tailored, expedited discovery" before the State would be required to respond to the preliminary injunction motion. (Order, Dkt. 25, at 3). The Court expressed its confidence in the State to "significantly tailor its discovery requests . . . to obtain precise information without burdening Plaintiffs' members." (*Id.* at 4). Several days later, Plaintiffs filed a motion for protective order, (Dkt. 29), which the Court granted, (Order, Dkt. 36). In that Order, the Court allowed the State to depose Plaintiffs' declarants, request documents relied on by those declarants, and serve interrogatories directed to Plaintiffs. (*Id.* at 2).

Additionally, the State filed a motion to dismiss about to two weeks after Plaintiffs filed their motion for preliminary injunction. (Mot. Dismiss, Dkt. 23). The State argues that Plaintiffs lack associational or organizational standing. (*Id.*). Plaintiffs respond that they have associational standing to represent their members covered by HB 20 and also have organizational standing. (Resp. Mot. Dismiss, Dkt. 28).

Finally, Plaintiffs filed a motion to strike the expert report of Adam Candeub, which was attached to the State's opposition to the preliminary injunction motion. (Mot. Strike, Dkt. 43). Plaintiffs challenge the report by Candeub, who is a law professor at Michigan State University, for being a "second legal brief" that offers "nothing more than (incorrect) legal conclusions." (*Id.* at 2).

Plaintiffs argue that it is well-established that an expert may not render conclusions of law. (*Id.*). They also argue that his "methodology" is unreliable because his tests are simply legal standards. (*Id.* at 4–5). Immediately before this Court issued this opinion, the State filed an opposition brief. (Dkt. 50). Because the Court does not rely on Candeub's report, the Court will dismiss Plaintiffs' motion to strike without prejudice as moot.

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 12(b)(1) allows a party to assert lack of subject-matter jurisdiction as a defense to suit. Fed. R. Civ. P. 12(b)(1). Federal district courts are courts of limited subject matter jurisdiction and may only exercise such jurisdiction as is expressly conferred by the Constitution and federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court properly dismisses a case for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied*, 536 U.S. 960 (2002). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* In ruling on a Rule 12(b)(1) motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

A preliminary injunction is an extraordinary remedy, and the decision to grant such relief is to be treated as the exception rather than the rule. *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v.*

Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). The party seeking injunctive relief carries the burden of persuasion on all four requirements. *PCI Transp. Inc. v. W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005).

III. DISCUSSION

A. Plaintiffs Have Standing To Bring This Suit

In its motion to dismiss, the State asserts that Plaintiffs lack associational and organizational standing and their complaint should be dismissed. (Dkt. 23). Under Article III of the Constitution, federal court jurisdiction is limited to cases and controversies. U.S. Const. art. III, 2, cl. 1; *Raines v. Byrd*, 521 U.S. 811, 818 (1997). A key element of the case-or-controversy requirement is that a plaintiff must establish standing to sue. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To establish Article III standing, a plaintiff must demonstrate that she has "(1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 560–61. "[W]hen standing is challenged on the basis of the pleadings, we 'accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party.'" *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

1. Plaintiffs Have Associational Standing

"Associations may assert the standing of their own members." *Texas Ass'n of Manufacturers v. United States Consumer Prod. Safety Comm'n*, 989 F.3d 368, 377 (5th Cir. 2021). An association must meet three elements to establish associational standing: (1) "its members would otherwise have standing to sue in their own right," (2) "the interests at stake are germane to the organization's purpose," and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* Plaintiffs easily meet these requirements for associational standing. The Court steps through each of the three requirements below.

a. Plaintiffs' Members Have Standing to Sue in Their Own Right

Plaintiffs' members include social media platforms like "Facebook, Google, YouTube, [and] Twitter," as recognized by the State, (Mot. Dismiss, Dkt. 23, at 3), that would be subject to regulation by the State through HB 20. Despite the State's contention otherwise, (Mot. Dismiss, Dkt. 23, at 3–4), Plaintiffs show that their members would suffer an injury-in-fact if HB 20 goes into effect. "[A] plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). In their complaint, Plaintiffs allege that their members 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," "exercise editorial judgments that are prohibited by H.B. 20," and will "face serious legal consequences for failing to comply with" HB 20. (Compl, Dkt. 1, at 5–6). Plaintiffs state that some of its members, like Facebook and YouTube, would be compelled to publish content that violates their policies and otherwise would be removed through their exercise of editorial judgment. (Compl., Dkt. 1, at 6). Plaintiffs' members do not resemble "'passive receptacle[s]' where users are free to share their speech without review or rebuke unless unlawful," as the State claims. (Mot. Dismiss, Dkt. 23, at 5). Plaintiffs also allege that "Paxton has given every indication that he intends to use all legally available enforcement tools against Plaintiffs' members" and support that allegation with Paxton's press releases and posts. (*Id.* at 10) ("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.'").

Additionally, Plaintiffs have alleged that HB 20 threatens their members with classic economic harms. "[E]conomic injury is a quintessential injury upon which to base standing." *Tex.*

Democratic Party v. Benkiser, 459 F.3d 582, 586 (5th Cir. 2006). In their Complaint, Plaintiffs allege that their 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." (Compl., Dkt. 1, at 7). Furthermore, Plaintiffs allege their members will suffer damage to their brands and goodwill, (*id.* at 8), and their members will be forced to disclose technical information that will cost them competitive advantage and make it harder to block content, (*id.* at 7–8). Based on these detailed allegations, the complaint sufficiently alleges the injuries to Plaintiffs' members caused by HB 20.

b. The Interests at Stake Are Germane to the Members' Purpose

The State does not dispute this prong of the standing analysis. As Plaintiffs note in their opposition brief: "Defendant does not dispute Plaintiffs satisfy the second prong. Nor could he. H.B. 20's intrusion on the rights of Internet websites and applications is germane to Plaintiffs' respective interests." (Resp. Mot. Dismiss, Dkt. 28, at 11 n.3).

c. This Lawsuit Does Not Require the Participation of Plaintiffs' Members

The State argues that Plaintiffs' claims require the participation of Plaintiffs' members. (Mot. Dismiss, Dkt. 23, at 14). Plaintiffs seek to block the State's enforcement of the provisions of HB 20 that are facially unconstitutional. A facial challenge generally is not fact intensive and does not require individual members to participate. *Nat'l Press Photographers Ass'n v. McCraw*, 504 F. Supp. 3d 568, 580 (W.D. Tex. 2020) (recognizing associational standing to bring "facial" "content-based," "vagueness," "overbreadth," and "preemption" challenges). Plaintiffs assert facial challenges "based on the doctrines of compelled speech, infringing editorial discretion, a 'content-based' and speaker-based law, 'vagueness, 'overbreadth,' 'preemption,' and extraterritorial regulation." (Resp. Mot.

Dismiss, Dkt. 28, at 21). Each doctrine forms the basis for finding HB 20 facially invalid. (*See id.*) (citing *Nat'l Press*, 504 F. Supp. 3d at 580; *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (sustaining content-based facial challenge based on compelled speech); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (sustaining content-based facial challenge based on infringing editorial discretion); *Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664, 668 (4th Cir. 2018) (a "state law violates the extraterritoriality principle if it [] expressly applies to out-of-state commerce") (emphasis added); *Garza v. Wyeth LLC*, 2015 WL 364286, at *4 (S.D. Tex. Jan. 27, 2015) ("The preemption decision is not evidence-based but is rather a question of law.")). While the State argues the Court cannot determine whether Plaintiffs' members are common carriers, which the State argues is a crucial step in this Court's First Amendment analysis, without the participation of Plaintiffs' members, (Mot. Dismiss, Dkt. 23, at 15), the Court finds that it can determine, if necessary, whether Plaintiffs' members are common carriers. Likewise, the Court can rule on Plaintiffs' other facial challenges, like their commerce clause claim, and conduct the proper level of scrutiny analysis on Plaintiffs' First Amendment claim. Additionally, Plaintiffs' requested relief—enjoining Paxton from enforcing Sections 2 and 7 of HB 20 against them and their members—is a proper and tailored remedy that would not necessarily require the individual participation of their members. "Injunctive relief 'does not make the individual participation of each injured party indispensable to proper resolution[.]'" *Texas Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 505 (5th Cir. 2021) (quoting *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977)).

2. Plaintiffs Have Organizational Standing

Independent of their associational standing on behalf of their members, Plaintiffs have organizational standing to challenge HB 20. In their complaint, Plaintiffs allege the "already incurred costs and will continue to divert their finite resources—money, staff, and time and attention—away from other pressing issues facing their members to address compliance with and the implications of

H.B. 20 for Internet companies." (Compl., Dkt. 1, at 5). Plaintiffs continue that they would "no longer divert those finite resources to address H.B. 20" if it were declared unlawful and enjoined. (*Id.*). Plaintiffs' injury as an organization need not be "large" or "substantial." *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) ("[I]t need not measure more than an 'identifiable trifle.' This is because 'the injury in fact requirement under Article III is qualitative, not quantitative, in nature.'") (quoting *Ass'n of Cmty. Organizations for Reform Now v. Fowler*, 178 F.3d 350, 357 (5th Cir. 1999)). Plaintiffs sufficiently allege that they have diverted resources and incurred expenses as an organization to prepare for HB 20's effects on Plaintiffs' members. *See id.* at 611–14.

Having considered the State's arguments and having found that Plaintiffs have both associational standing to challenge HB 20 on behalf of their members and organizational standing to challenge it based on their own alleged injuries, the Court denies the State's motion to dismiss. This Court's ruling is supported by the fact that the Northern District of Florida enjoined a similar Florida law that was challenged by these same exact Plaintiffs, and there was no dispute in that case—in which the State of Texas filed an amicus brief—that Plaintiffs lacked standing to assert the rights of their members to challenge that state law.

B. Plaintiffs Have Shown Likelihood of Success on the Merits

Plaintiffs bring several claims against the State, and the Court focuses on Plaintiffs' claim that HB 20 violates the First Amendment.[1] To succeed on their motion for a preliminary injunction, then, Plaintiffs must show that HB 20 compels private social media platforms to "disseminate third-party content and interferes with their editorial discretion over their platforms."[2] (Prelim. Inj. Mot., Dkt. 12, at 23).

[1] The Court need not and does not reach the issues of whether HB 20 is void for vagueness, preempted by the Communications Decency Act, or violates the Commerce Clause.
[2] Findings and conclusions about the merits of this case should be understood only as statements about Plaintiffs' likelihood of success based on the record and law currently before this Court.

1. Social Media Platforms Exercise Editorial Discretion Protected by the First Amendment

The parties dispute whether social media platforms are more akin to newspapers that engage in substantial editorial discretion—and therefore are entitled to a higher level of protection for their speech—or a common carrier that acts as a passive conduit for content posted by users—and therefore are entitled to a lower level of protection, if any. Plaintiffs urge the Court to view social media platforms as having editorial discretion to moderate content, and the State advocates that social media platforms act as common carriers that may be compelled by the government to publish speech that is objectionable. Before the Court attempts to settle that debate, the Court evaluates whether the First Amendment guarantees social media platforms the right to exercise editorial discretion.

More than twenty years ago, the Supreme Court recognized that "content on the Internet is as diverse as human thought," allowing almost any person to "become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. Am. C.L. Union*, 521 U.S. 844, 870 (1997). The *Reno* Court concluded that its "cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.* Disseminating information is "speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.")) (cleaned up).

Social media platforms have a First Amendment right to moderate content disseminated on their platforms. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019) (recognizing that "certain private entities[] have rights to exercise editorial control over speech and speakers on their properties or platforms"). Three Supreme Court cases provide guidance. First, in *Tornillo*, the Court struck down a Florida statute that required newspapers to print a candidate's reply if a

newspaper assailed her character or official record, a "right of reply" statute. 418 U.S. at 243. In 1974, when the opinion was released, the Court noted there had been a "communications revolution" including that "[n]ewspapers have become big business . . . [with] [c]hains of newspapers, national newspapers, national wire and news services, and one-newspaper towns [being] the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events." *Id.* at 248–49. Those concerns echo today with social media platforms and "Big Tech" all the while newspapers are further consolidating and, often, dying out. Back to 1974, when newspapers were viewed with monopolistic suspicion, the Supreme Court concluded that newspapers exercised "editorial control and judgment" by selecting the "material to go into a newspaper," deciding the "limitations on the size and content of the paper," and deciding how to treat "public issues and public officials—whether fair or unfair." *Id.* at 258. "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.*

In *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, the Supreme Court held that a private parade association had the right to exclude a gay rights group from having their own float in their planned parade without being compelled by a state statute to do otherwise. 515 U.S. 557, 572–73 (1995). The Massachusetts law at issue—which prohibited discrimination in any public place of "public accommodation, resort[,] or amusement"— did not "target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals." *Id.* at 572. The Court reasoned that the state's equal-access law "alter[ed] the expressive content" of the private organization. *Id.* "[T]his use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. The Court clarified: "Indeed this general rule, that the

speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.*

Finally, the Supreme Court ruled that California could not require a private utility company to include a third party's newsletters when it sent bills to customers in *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 20–21 (1986). There, for decades, the private utility company sent a newsletter to its customers with monthly bills, and California required it to include the third-party newsletter, a newsletter the private utility company disagreed with. *Id.* at 4–5. Relying on *Tornillo*, the Court analogized that "[j]ust as the State is not free to tell a newspaper in advance what it can print and what it cannot, the State is not free either to restrict [the private utility company's] speech to certain topics or views or to force [it] to respond to views that others may hold." *Id.* at 11 (internal quotation marks and citations omitted). "[A] forced access rule that would accomplish these purposes indirectly is similarly forbidden." *Id.* The private utility company had the "right to be free from government restrictions that abridge its own rights in order to enhance the relative voice of its opponents." *Id.* at 14 (internal quotation marks omitted). That was because a corporation has the "choice of what not to say" and cannot be compelled to "propound political messages with which they disagree." *Id.* at 16.

The Supreme Court's holdings in *Tornillo*, *Hurley*, and *PG&E*, stand for the general proposition that private companies that use editorial judgment to choose whether to publish content—and, if they do publish content, use editorial judgment to choose what they want to publish—cannot be compelled by the government to publish other content. That proposition has repeatedly been recognized by courts. (*See* Prelim. Inj. Mot., Dkt. 12, at 26) (collecting cases). Satisfied that such editorial discretion is protected from government-compelled speech, the Court turns to whether social media platforms engage in protectable editorial discretion.

This Court starts from the premise that social media platforms are not common carriers.[3] "Equal access obligations . . . have long been imposed on telephone companies, railroads, and postal services, without raising any First Amendment issue." *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 740 (D.C. Cir. 2016). Little First Amendment concern exists because common carriers "merely facilitate the transmission of speech of others." *Id.* at 741. In *United States Telecom*, the Court added broadband providers to its list of common carriers. *Id.* Unlike broadband providers and telephone companies, social media platforms "are not engaged in indiscriminate, neutral transmission of any and all users' speech." *Id.* at 742. User-generated content on social media platforms is screened and sometimes moderated or curated. The State balks that the screening is done by an algorithm, not a person, but whatever the method, social media platforms are not mere conduits. According to the State, our inquiry could end here, with Plaintiffs not needing to prove more to show they engage in protected editorial discretion. During the hearing, the Court asked the State, "[T]o what extent does a finding that these entities are common carriers, to what extent is that important from your perspective in the bill's ability to survive a First Amendment challenge?" (*See* Minute Entry, Dkt. 47). Counsel for the State responded, "[T]he common carriage doctrine is essential to the First Amendment challenge. It's why it's the threshold issue that we've briefed . . . . It dictates the rest of this suit in terms of the First Amendment inquiry." (*Id.*). As appealing as the State's invitation is to stop the analysis here, the Court continues in order to make a determination about whether social media platforms exercise editorial discretion or occupy a purgatory between common carrier and editor.

Social media platforms "routinely manage . . . content, allowing most, banning some, arranging content in ways intended to make it more useful or desirable for users, sometimes adding

[3] HB 20's pronouncement that social media platforms are common carriers, Tex. H.B. No. 20, 87th Leg., 2nd Sess. § 1(4) (2021), does not impact this Court's legal analysis.

their own content." *NetChoice*, 2021 WL 2690876, at *7. Making those decisions entails some level of editorial discretion, *id.*, even if portions of those tasks are carried out by software code. While this Court acknowledges that a social media platform's editorial discretion does not fit neatly with our 20th Century vision of a newspaper editor hand-selecting an article to publish, focusing on whether a human or AI makes those decisions is a distraction. It is indeed new and exciting—or frightening, depending on who you ask—that algorithms do some of the work that a newspaper publisher previously did, but the core question is still whether a private company exercises editorial discretion over the dissemination of content, not the exact process used. Plaintiffs' members also push back on the idea that content moderation does not involve judgment. For example, Facebook states that it makes decisions about "billions of pieces of content" and "[a]ll such decisions are unique and context-specific[] and involve some measure of judgment." (Facebook Decl., Dkt. 12-4, at 9).

This Court is convinced that social media platforms, or at least those covered by HB 20, curate both users and content to convey a message about the type of community the platform seeks to foster and, as such, exercise editorial discretion over their platform's content. Indeed, the text of HB 20 itself points to social media platforms doing more than transmitting communication. In Section 2, HB 20 recognizes that social media platforms "(1) curate[] and target[] content to users, (2) place[] and promote[] content, services, and products, including its own content, services, and products, (3) moderate[] content, and (4) use[] search, ranking, or other algorithms or procedures that determine results on the platform." Tex. Bus. & Com. Code § 120.051(a)(1)–(4). Finally, the State's own basis for enacting HB 20 acknowledges that social media platforms exercise editorial discretion. "[T]here is a dangerous movement by social media companies to silence conservative viewpoints and ideas." *Governor Abbott Signs Law Protecting Texans from Wrongful Social Media Censorship*, OFFICE OF THE TEX. GOVERNOR (Sept. 9, 2021), https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship. "Texans must be able to

speak without being censored by West Coast oligarchs." Bryan Hughes (@SenBryanHughes), TWITTER (Aug. 9, 2021, 4:34 PM), https://twitter.com/SenBryanHughes/status/1424846466183487492 Just like the Florida law, a "constant theme of [Texas] legislators, as well as the Governor . . . , was that the [platforms'] decisions on what to leave in or take out and how to present the surviving material are ideologically biased and need to be reined in." *NetChoice*, 2021 WL 2690876, at *7. Without editorial discretion, social media platforms could not skew their platforms ideologically, as the State accuses of them of doing. Taking it all together, case law, HB 20's text, and the Governor and state legislators' own statements all acknowledge that social media platforms exercise some form of editorial discretion, whether or not the State agrees with how that discretion is exercised.

2. HB 20 Violates Plaintiffs' Members' First Amendment Rights

a. HB 20 Compels Social Media Platforms to Disseminate Objectionable Content and Impermissibly Restricts Their Editorial Discretion

HB 20 prohibits social media platforms from moderating content based on "viewpoint." Tex. Civ. Prac. & Rem. Code §§ 143A.001(1), 143A.002. The State emphasizes that HB 20 "does not prohibit content moderation. That is clear from the fact that [HB 20] has an entire provision dictating that the companies should create acceptable use policies . . . [a]nd then moderate their content accordingly." (*See* Minute Entry, Dkt. 47). The State claims that social media platforms could prohibit content categories "such as 'terrorist speech,' 'pornography,' 'spam,' or 'racism'" to prevent those content categories from flooding their platforms. (Resp. Prelim. Inj. Mot., Dkt. 39, at 21). During the hearing, the State explained that a social media platform "can't discriminate against users who post Nazi speech . . . and [not] discriminate against users who post speech about the anti-white or something like that." (*See* Minute Entry, Dkt. 47). Plaintiffs point out the fallacy in the State's assertion with an example: a video of Adolf Hitler making a speech, in one context the viewpoint is promoting Nazism, and a platform should be able to moderate that content, and in

another context the viewpoint is pointing out the atrocities of the Holocaust, and a platform should be able to disseminate that content. (*See id.*). HB 20 seems to place social media platforms in the untenable position of choosing, for example, to promote Nazism against its wishes or ban Nazism as a content category. (Prelim. Inj. Mot., Dkt. 12, at 29). As YouTube put it, "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." (YouTube Decl., Dkt. 12-3, at 22).

HB 20's prohibitions on "censorship" and constraints on how social media platforms disseminate content violate the First Amendment. The platforms have policies against content that express a viewpoint and disallowing them from applying their policies requires platforms to "alter the expressive content of their [message]." *Hurley*, 515 U.S. at 572–73. HB 20's restrictions on actions that "de-boost" and "deny equal access or visibility to or otherwise discriminate against expression" impede platforms' ability to place "post[s] in the proper feeds." Tex. Civ. Prac. & Rem. Code § 143A.001(1); *NetChoice*, 2021 WL 2690876, at *3. Social media platforms "must determine how and where users see those different viewpoints, and some posts will necessarily have places of prominence. *See NetChoice*, 2021 WL 2690876, at *3. HB 20 compels social media platforms to significantly alter and distort their products. Moreover, "the targets of the statutes at issue are the editorial judgments themselves" and the "announced purpose of balancing the discussion—reining in the ideology of the large social-media providers—is precisely the kind of state action held unconstitutional in *Tornillo*, *Hurley*, and *PG&E*." *Id.* HB 20 also impermissibly burdens social media platforms' own speech. *Id.* at *9 ("[T]he statutes compel the platforms to change their own speech in other respects, including, for example, by dictating how the platforms may arrange speech on their sites."). For example, if a platform appends its own speech to label a post as misinformation, the platform may be discriminating against that user's viewpoint by adding its own disclaimer. HB 20

restricts social media platforms' First Amendment right to engage in expression when they disagree with or object to content.[4]

Furthermore, the threat of lawsuits for violating Section 7 of HB 20 chills the social media platforms' speech rights. HB 20 broadly prohibits content moderation based on "viewpoint," authorizing the Texas Attorney General to sue for violations—and even "potential" violations—of Section 7's "censorship" restrictions. Tex. Civ. Prac. & Rem Code §§ 143A.002; 143A.008. In response to the State's interrogatories, NetChoice explained that the "threat of myriad lawsuits based on individual examples of content moderation threaten and chill the broad application of those [content moderation] policies, and thus H.B. 20's anti-moderation provisions interfere with Plaintiff's members' policies and practices. . . . Using YouTube as an example, hate speech is necessarily 'viewpoint'-based, as abhorrent as those viewpoints may be. And removing such hate speech and assessing penalties against users for submitting that content is 'censor[ship]' as defined by H.B. 20." (NetChoice Interrogatory Responses, Dkt. 44-3, at 25).

b. HB 20's Disclosure and Operational Requirements Burden Social Media Platforms' Editorial Discretion

HB 20 additionally violates Plaintiffs' members' First Amendment rights with its Section 2 requirements. First, under Section 2, a social media platform must provide "public disclosures" about how the platform operates in a manner "sufficient to enable users to make an informed

[4] The Court notes that two other Supreme Court cases address this topic, but neither applies here. *PruneYard Shopping Center v. Robins* is distinguishable from the facts of this case. 447 U.S. 74 (1980). In *PruneYard*, the Supreme Court upheld a California law that required a shopping mall to host people collecting petition signatures, concluding there was no "intrusion into the function of editors" since the shopping mall's operation of its business lacked an editorial function. *Id.* at 88. Critically, the shopping mall did not engage in expression and "the [mall] owner did not even allege that he objected to the content of the [speech]; nor was the access right content based." *PG&E*, 475 U.S. at 12. Similarly, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* has no bearing on this Court's holding because it did not involve government restrictions on editorial functions. 547 U.S. 47 (2006). The challenged law required schools that allowed employment recruiters on campus to also allow military employment recruiters on campus—a restriction on "conduct, not speech." *Id.* at 62, 65. As the Supreme Court explained, "accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when the host interviews and recruiting receptions." *Id.* at 64.

choice regarding the purchase of or use of access to or services from the platform." Tex. Bus. & Com. Code § 120.051(b). HB 20 states that each platform must disclose how it "(1) curates and targets content to users; (2) places and promotes content, services, and products, including its own content, services, and products; (3) moderates content; [and] (4) uses search, ranking, or other algorithms or procedures that determine results on the platform[.]" *Id.* § 120.051(a)(1)–(4). Second, a social media platform must "publish an acceptable use policy" that explains what content the platform will allow, how the platform will ensure compliance with the policy, and how users can inform the platform about noncompliant content. *Id.* § 120.052. Third, a social media platform must publish a "biannual transparency report" that requires information about the platform's enforcement of their policies. *Id.* § 120.053(a).

Specifically, social media platforms must provide:

- "the total number of instances in which the social media platform was alerted to illegal content, illegal activity, or potentially policy-violating content" and by what means (i.e., by users, employees, or automated processes);
- how often the platform "took action" with regard to such content including "content removal," "content demonetization," "content deprioritization," "the addition of an assessment to content," "account suspension," "account removal," and "any other action" that accords with the acceptable use policy, "categorized by" "the rule violated" and "the source for the alert";
- "the country of the user who provided the content for each instance described" above;
- "the number of coordinated campaigns;"
- "the number of instances in which a user appealed the decision to remove the user's potentially policy-violating content;"
- "the percentage of appeals . . . that resulted in the restoration of content;" and
- "a description of each tool, practice, action, or technique used in enforcing the acceptable use policy."

Id. § 120.053(a)(1)–(7), (b).

Fourth, a social media platform must provide a "complaint system to enable a user to submit a complaint in good faith and track the status of the complaint" regarding either a report of violative content or "a decision made by the social media platform to remove content posted by the user." *Id.* § 120.101. For reports of illegal content, the covered platform must "make a good faith effort to evaluate the legality of the content or activity within 48 hours of receiving the notice," excluding weekends. *Id.* § 120.102.

Fifth, a social media platform must offer a notice and appeal system for any content that it decides to remove. Subject to limited exceptions, every time a covered platform "removes" content, it must give the user (1) a notice of the removal; (2) an opportunity to appeal; and (3) a written explanation of the decision on appeal, including an explanation for any reversal. *Id.* § 120.103. During the appeal process, a social media platform must "review the [removed] content," "determine whether the content adheres to the platform's acceptable use policy," and "take appropriate steps" within 14 days (excluding weekends). *Id.* § 120.104.

To pass constitutional muster, disclosure requirements like these must require only "factual and noncontroversial information" and cannot be "unjustified or unduly burdensome." *NIFLA*, 138 S. Ct. at 2372. Section 2's disclosure and operational provisions are inordinately burdensome given the unfathomably large numbers of posts on these sites and apps. For example, in three months in 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." (CCIA Decl., Dkt. 12-1, at 15). During the last three months of 2020, YouTube removed just over 2 million channels and over 9 million videos because they violated its policies. (*Id.* at 16). While some of those removals are subject to an existing appeals process, many removals are not. For example, in a three-month-period in 2021, YouTube removed 1.16 billion comments. (YouTube Decl., Dkt. 12-3, at 23–24). Those 1.16 billion removals were not appealable, but, under HB 20, they would have to be. (*Id.*).

Over the span of six months in 2018, Facebook, Google, and Twitter took 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. (NetChoice Decl., Dkt. 12-2, at 8). During the State's deposition of Neil Christopher Potts ("Potts"), who is Facebook's Vice President of Trust and Safety Policy, Potts stated that it would be "impossible" for Facebook "to comply with anything by December 1, [2021]. . . [W]e would not be able to change systems in that nature. . . . I don't see a way that we would actually be able to go forward with compliance in a meaningful way." (Potts Depo., Dkt. 39-2, at 2, 46). Plaintiffs also express a concern that revealing "algorithms or procedures that determine results on the platform" may reveal trade secrets or confidential and competitively-sensitive information. (*Id.* at 34) (quoting Tex. Bus. & Com. Code § 120.051(a)(4)).

The Section 2 requirements burden First Amendment expression by "forc[ing] elements of civil society to speak when they otherwise would have refrained." *Washington Post v. McManus*, 944 F.3d 506, 514 (4th Cir. 2019). "It is the presence of compulsion from the state itself that compromises the First Amendment." *Id.* at 515. The provisions also impose unduly burdensome disclosure requirements on social media platforms "that will chill their protected speech." *NIFLA*, 138 S. Ct. at 2378. The consequences of noncompliance also chill the social media platforms' speech and application of their content moderation policies and user agreements. Noncompliance can subject social media platforms to serious consequences. The Texas Attorney General may seek injunctive relief and collect attorney's fees and "reasonable investigative costs" if successful in obtaining injunctive relief. *Id.* § 120.151.

3. HB 20 Discriminates Based on Content and Speaker

HB 20 additionally suffers from constitutional defects because it discriminates based on content and speaker. First, HB 20 excludes two types of content from its prohibition on content

moderation and permits social media platforms to moderate content: (1) 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," and (2) that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge." Tex. Civ. Prac. & Rem. Code § 143A.006(a)(2)–(3). When considering a city ordinance that applied to "'fighting words' that . . . provoke violence[] 'on the basis of race, color, creed, religion[,] or gender,'" the Supreme Court noted that those "who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or []sexuality—are not covered." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992). As Plaintiffs argue, the State has "no legitimate reason to allow the platforms to enforce their policies over threats based only on . . . favored criteria but not" other criteria like sexual orientation, military service, or union membership. (Prelim. Inj. Mot., Dkt. 12, at 35–36); *see id.*

HB 20 applies only to social media platforms of a certain size: platforms with 50 million monthly active users in the United States. Tex. Bus. & Com. Code § 120.002(b). HB 20 excludes social media platforms such as Parler and sports and news websites. (*See* Prelim. Inj. Mot., Dkt. 12, at 17). During the regular legislative session, a state senator unsuccessfully proposed lowering the threshold to 25 million monthly users in an effort to include sites like "Parler and Gab, which are popular among conservatives." Shawn Mulcahy, *Texas Senate approves bill to stop social media companies from banning Texans for political views*, TEX. TRIBUNE (Mar. 30, 2021), https://www.texastribune.org/2021/03/30/texas-social-media-censorship/. "[D]iscrimination between speakers is often a tell for content discrimination." *NetChoice*, 2021 WL 2690876, at *10. The discrimination between speakers has special significance in the context of media because "[r]egulations that discriminate among media, or among different speakers within a single medium, often present

serious First Amendment concerns." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 659 (1994). The record in this case confirms that the Legislature intended to target large social media platforms perceived as being biased against conservative views and the State's disagreement with the social media platforms' editorial discretion over their platforms. The evidence thus suggests that the State discriminated between social media platforms (or speakers) for reasons that do not stand up to scrutiny.

4. HB 20 Is Unconstitutionally Vague

Plaintiffs argue that HB 20 contains many vague terms, some of which the Court agrees are prohibitively vague. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012). "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* at 253–54 (internal citation omitted).

First, Plaintiffs take issue with HB 20's definition for "censor:" "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). Plaintiffs argue that requiring social media platforms to require "equal access or visibility to" content is "hopelessly indeterminate." (Prelim. Inj. Mot., Dkt. 12, at 37) (quoting *id.*). The Court agrees. A social media platform is not static snapshot in time like a hard copy newspaper. It strikes the Court as nearly impossible for a social media platform—that has at least 50 million users—to determine whether any single piece of content has "equal access or visibility" versus another piece of content given the

huge numbers of users and content. Moreover, this requirement could "prohibit[] a social media platform from" displaying content "in the proper feeds" *NetChoice*, 2021 WL 2690876, at *3.

Second, Plaintiffs argue that the definition of "social media platform" is unclear. Under HB 20, social media platform means an "Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images." Tex. Bus. & Com. Code § 120.001(1). Plaintiffs argue that it is unclear which websites and applications "enable[] users to communicate with other users for the primary purpose of posting information, comments, messages, or images." *Id.* Without more, the Court is not persuaded that that phrase is impermissibly vague.

The definition for "social media platform" excludes "an online service, application, or website: (i) that consists primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider; and (ii) for which any chat, comments, or interactive functionality is incidental to, directly related to, or dependent on the provision of the content described by Subparagraph (i)." *Id.* § 120.001(1)(C)(i), (ii). Plaintiffs object to the word "primarily" used to define excluded companies whose sites "primarily" consist of "news, sports, entertainment . . . ." § 120.001(1)(C)(i). "Even if 'primarily' means 'greater than 50%,' a person of ordinary intelligence would have no idea what 'primarily' refers to as the relevant denominator." (Prelim. Inj. Mot., Dkt. 12, at 38). In this context, "primarily" is too indeterminate to enable companies with a website, application, or online service to determine whether they are subject to HB 20's prohibitions and requirements. Plaintiffs also contend that "[o]rdinary people would further have no idea what makes a chat or comment section 'incidental to, directly related to, or dependent on' a platform's preselected content." (Prelim. Inj. Mot., Dkt. 12, at 38) (quoting Tex. Bus. & Com.

Code § 120.001(1)(C)(ii)). Plaintiffs have not established that that terminology is impermissibly vague.

Third, HB 20 empowers the Texas Attorney General to seek an injunction not just against violations of the statute but also "potential violations." Tex. Civ. Prac. & Rem. Code § 143A.008. Unlike other statutes that specify that the potential violation must be imminent, HB 20 includes no such qualification. *See, e.g.*, Tex. Occ. Code § 1101.752(a) (authorizing the attorney general to seek injunctive relief to abate a potential violation "if the commission determines that a person has violated or is about to violate this chapter"). Subjecting social media platforms to suit for potential violations, without a qualification, reaches almost all content moderation decisions platforms might make, further chilling their First Amendment rights. (Prelim. Inj. Mot., Dkt. 12, at 39).

Fourth, Plaintiffs contend that Section 2's disclosure and operational requirements are overbroad and vague. "For instance, H.B. 20's non-exhaustive list of disclosure requirements grants the Attorney General substantial discretion to sue based on a covered platform's failure to include unenumerated information." (*Id.*). While the Court agrees that these provisions may suffer from infirmities, the Court cannot at this time find them unconstitutionally vague on their face.

5. HB 20 Fails Strict Scrutiny and Intermediate Scrutiny

HB 20 imposes content-based, viewpoint-based, and speaker-based restrictions that trigger strict scrutiny. Strict scrutiny is satisfied only if a state has adopted "'the least restrictive means of achieving a compelling state interest.'" *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383, 210 L. Ed. 2d 716 (2021) (quoting *McCullen v. Coakley*, 573 U.S. 464, 478 (2014)). Even under the less rigorous intermediate scrutiny, the State must prove that HB 20 is "'narrowly tailed to serve a significant government interest.'" *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (quoting *McCullen*, 573 U.S. at 477). The proclaimed government interests here fall short under both standards.

The State offers two interests served by HB 20: (1) the "free and unobstructed use of public forums and of the information conduits provided by common carriers" and (2) "providing individual citizens effective protection against discriminatory practices, including discriminatory practices by common carriers." (Resp. Prelim. Inj. Mot., Dkt. 39, at 33–34) (internal quotation marks and brackets omitted). The State's first interest fails on several accounts. First, social media platforms are privately owned platforms, not public forums. Second, this Court has found that the covered social media platforms are not common carriers. Even if they were, the State provides no convincing support for recognizing a governmental interest in the free and unobstructed use of common carriers' information conduits.[5] Third, the Supreme Court rejected an identical government interest in *Tornillo*. In *Tornillo*, Florida argued that "government has an obligation to ensure that a wide variety of views reach the public." *Tornillo*, 418 U.S. at 247–48. After detailing the "problems related to government-enforced access," the Court held that the state could not commandeer private companies to facilitate that access, even in the name of reducing the "abuses of bias and manipulative reportage [that] are . . . said to be the result of the vast accumulations of unreviewable power in the modern media empires." *Id.* at 250, 254. The State's second interest—preventing "discrimination" by social media platforms—has been rejected by the Supreme Court. Even given a state's general interest in anti-discrimination laws, "forbidding acts of discrimination" is "a decidedly fatal objective" for the First Amendment's "free speech commands." *Hurley*, 515 U.S. at 578–79.

[5] In *PG&E*, the Supreme Court did not recognize such a governmental interest; rather, it held that a private utility company retained editorial discretion and could not be compelled to disseminate a third-party's speech. 475 U.S. at 16–18. The Supreme Court's narrow reasoning in *Turner* does not alter this Court's analysis. There, the Court applied "heightened First Amendment scrutiny" because the law at issue "impose[d] special obligations upon cable operators and special burdens upon cable programmers." *Turner Broad. Sys., Inc.*, 512 U.S. at 641. The law, on its face, imposed burdens without reference to the content of speech, yet "interfere[d] with cable operators' editorial discretion" by requiring them to carry some broadcast stations. *Id.* at 643–44, 662. When it held that cable operators must abide by the law and carry some broadcast channels, the Court's rationale turned on preventing "40 percent of Americans without cable" from losing "access to free television programming." *Id.* at 646. The analysis applied to the regulation of broadcast television has no bearing on the analysis of Internet First Amendment protections. *See Reno*, 521 U.S. at 870.

Even if the State's purported interests were compelling and significant, HB 20 is not narrowly tailored. Sections 2 and 7 contain broad provisions with far-reaching, serious consequences. When reviewing the similar statute passed in Florida, the Northern District of Florida found that that statute was not narrowly tailored "like prior First Amendment restrictions." *NetChoice*, 2021 WL 2690876, at *11 (citing *Reno*, 521 U.S. at 882; *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989)). Rather, the court colorfully described it as "an instance of burning the house to roast a pig." *Id.* This Court could not do better in describing HB 20.

Plaintiffs point out that the State could have created its own unmoderated platform but likely did not because the State's true interest is divulged by statements made by legislators and Governor Abbott: the State is concerned with "West Coast oligarchs" and the "dangerous movement by social media companies to silence conservative viewpoints and ideas." Bryan Hughes (@SenBryanHughes), TWITTER (Aug. 9, 2021, 4:34 PM), https://twitter.com/SenBryanHughes/status/1424846466183487492; *Governor Abbott Signs Law Protecting Texans from Wrongful Social Media Censorship*, OFFICE OF THE TEX. GOVERNOR (Sept. 9, 2021), https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship; (*see* Reply, Dkt. 48, at 27) ("H.B. 20's true interest is in promoting conservative speech on platforms that legislators perceive as 'liberal.'"). In the State's opposition brief, the State describes the social media platforms as "skewed," saying social media platforms' "current censorship practices" lead to "a skewed exchange of ideas in the Platforms that prevents such a search for the truth." (Resp. Prelim. Inj. Mot., Dkt. 39, at 30).

6. HB 20's Severability Clause

HB 20's severability clause does not save HB 20 from facial invalidation. This Court has found Sections 2 and 7 to be unlawful. Both sections are replete with constitutional defects, including unconstitutional content- and speaker-based infringement on editorial discretion and

onerously burdensome disclosure and operational requirements. Like the Florida statute, "[t]here is nothing that could be severed and survive." *NetChoice*, 2021 WL 2690876, at *11.

C. Remaining Factors Favor a Preliminary Injunction

The remaining factors all weigh in favor of granting Plaintiffs' request for a preliminary injunction. "There can be no question that the challenged restrictions, if enforced, will cause irreparable harm. 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)). Absent an injunction, HB 20 would "radically upset how platforms work and the core value that they provide to users." (Prelim. Inj. Mot., Dkt. 12, at 52). HB 20 prohibits virtually all content moderation, the very tool that social medial platforms employ to make their platforms safe, useful, and enjoyable for users. (*See, e.g.*, CCIA Decl., Dkt. 12-1, at 9, 13) ("[M]any services would be flooded with abusive, objectionable, and in some cases unlawful material, drowning out the good content and making their services far less enjoyable, useful, and safe.") ("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. . . . Second, content moderation is often a matter of ensuring online safety. . . . Third, content moderation facilitates the organization of content, rendering an online service more useful."). In addition, social media platforms would lose users and advertisers, resulting in irreparable injury. (Prelim. Inj. Mot., Dkt. 12, at 53–54); (*see, e.g.*, NetChoice Decl., Dkt. 12-2, at 5–6 ("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.").

The irreparable harm to Plaintiffs' members outweighs any harm to the State from a preliminary injunction. *NetChoice*, 2021 WL 2690876, at *11. Since the State lacks a compelling state interest for HB 20, the State will not be harmed. *See Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013). Finally, courts have found that "'injunctions protecting First Amendment freedoms are always in the public interest.'" *Id.* at 539 (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)). In this case, content moderation and curation will benefit users and the public by reducing harmful content and providing a safe, useful service. (*See, e.g.*, CCIA Decl., Dkt. 12-1, at 9, 13). Here, an "injunction will serve, not be adverse to, the public interest." *NetChoice*, 2021 WL 2690876, at *11.

IV. CONCLUSION

For these reasons, **IT IS ORDERED** that the State' s motion to dismiss, (Dkt. 23), is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' motion for preliminary injunction, (Dkt. 12), is **GRANTED**. Until the Court enters judgment in this case, the Texas Attorney General is **ENJOINED** from enforcing Section 2 and Section 7 of HB 20 against Plaintiffs and their members. Pursuant to Federal Rule of Civil Procedure 65(c), Plaintiffs are required to post a $1,000.00 bond.

IT IS FINALLY ORDERED that Plaintiffs' motion to strike, (Dkt. 43), is **DISMISSED WITHOUT PREJUDICE AS MOOT**.

SIGNED on December 1, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Appendix 4

United States Code Annotated
Constitution of the United States
Annotated
Amendment I. Religion; Speech and the Press; Assembly; Petition

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const Amend. I--Establishment clause; Free Exercise clause>

<USCA Const Amend. I--Free Speech clause; Free Press clause>

<USCA Const Amend. I--Assembly clause; Petition clause>

U.S.C.A. Const. Amend. I, USCA CONST Amend. I
Current through P.L. 117-116. Some statute sections may be more current, see credits for details.

End of Document

Appendix 5

Chapter 3

H.B. No. 20

AN ACT

relating to censorship of or certain other interference with digital expression, including expression on social media platforms or through electronic mail messages.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. The legislature finds that:

(1) each person in this state has a fundamental interest in the free exchange of ideas and information, including the freedom of others to share and receive ideas and information;

(2) this state has a fundamental interest in protecting the free exchange of ideas and information in this state;

(3) social media platforms function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States; and

(4) social media platforms with the largest number of users are common carriers by virtue of their market dominance.

SECTION 2. Subtitle C, Title 5, Business & Commerce Code, is amended by adding Chapter 120 to read as follows:

CHAPTER 120. SOCIAL MEDIA PLATFORMS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 120.001. DEFINITIONS. In this chapter:

(1) "Social media platform" means an Internet website

or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images. The term does not include:

(A) an Internet service provider as defined by Section 324.055;

(B) electronic mail; or

(C) an online service, application, or website:

(i) that consists primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider; and

(ii) for which any chat, comments, or interactive functionality is incidental to, directly related to, or dependent on the provision of the content described by Subparagraph (i).

(2) "User" means a person who posts, uploads, transmits, shares, or otherwise publishes or receives content through a social media platform. The term includes a person who has a social media platform account that the social media platform has disabled or locked.

Sec. 120.002. APPLICABILITY OF CHAPTER. (a) This chapter applies only to a user who:

(1) resides in this state;

(2) does business in this state; or

(3) shares or receives content on a social media platform in this state.

(b) This chapter applies only to a social media platform

that functionally has more than 50 million active users in the United States in a calendar month.

Sec. 120.003. CONSTRUCTION OF CHAPTER. This chapter may not be construed to limit or expand intellectual property law.

SUBCHAPTER B. DISCLOSURE REQUIREMENTS

Sec. 120.051. PUBLIC DISCLOSURES. (a) A social media platform shall, in accordance with this subchapter, publicly disclose accurate information regarding its content management, data management, and business practices, including specific information regarding the manner in which the social media platform:

(1) curates and targets content to users;

(2) places and promotes content, services, and products, including its own content, services, and products;

(3) moderates content;

(4) uses search, ranking, or other algorithms or procedures that determine results on the platform; and

(5) provides users' performance data on the use of the platform and its products and services.

(b) 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.

(c) A social media platform shall publish the disclosure required by Subsection (a) on an Internet website that is easily accessible by the public.

Sec. 120.052. ACCEPTABLE USE POLICY. (a) A social media platform shall publish an acceptable use policy in a location that

is easily accessible to a user.

(b) A social media platform's acceptable use policy must:

(1) reasonably inform users about the types of content allowed on the social media platform;

(2) explain the steps the social media platform will take to ensure content complies with the policy;

(3) explain 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, which includes:

(A) an e-mail address or relevant complaint intake mechanism to handle user complaints; and

(B) a complaint system described by Subchapter C; and

(4) include publication of a biannual transparency report outlining actions taken to enforce the policy.

Sec. 120.053. BIANNUAL TRANSPARENCY REPORT. (a) As part of a social media platform's acceptable use policy under Section 120.052, the social media platform shall publish a biannual transparency report that includes, with respect to the preceding six-month period:

(1) the total number of instances in which the social media platform was alerted to illegal content, illegal activity, or potentially policy-violating content by:

(A) a user complaint;

(B) an employee of or person contracting with the social media platform; or

(C) an internal automated detection tool;

(2) subject to Subsection (b), the number of instances in which the social media platform took action with respect to illegal content, illegal activity, or potentially policy-violating content known to the platform due to the nature of the content as illegal content, illegal activity, or potentially policy-violating content, including:

(A) content removal;

(B) content demonetization;

(C) content deprioritization;

(D) the addition of an assessment to content;

(E) account suspension;

(F) account removal; or

(G) any other action taken in accordance with the platform's acceptable use policy;

(3) the country of the user who provided the content for each instance described by Subdivision (2);

(4) the number of coordinated campaigns, if applicable;

(5) the number of instances in which a user appealed the decision to remove the user's potentially policy-violating content;

(6) the percentage of appeals described by Subdivision (5) that resulted in the restoration of content; and

(7) a description of each tool, practice, action, or technique used in enforcing the acceptable use policy.

(b) The information described by Subsection (a)(2) must be

categorized by:

(1) the rule violated; and

(2) the source for the alert of illegal content, illegal activity, or potentially policy-violating content, including:

(A) a government;

(B) a user;

(C) an internal automated detection tool;

(D) coordination with other social media platforms; or

(E) persons employed by or contracting with the platform.

(c) A social media platform shall publish the information described by Subsection (a) with an open license, in a machine-readable and open format, and in a location that is easily accessible to users.

SUBCHAPTER C. COMPLAINT PROCEDURES

Sec. 120.101. COMPLAINT SYSTEM. A social media platform shall provide an easily accessible complaint system to enable a user to submit a complaint in good faith and track the status of the complaint, including a complaint regarding:

(1) illegal content or activity; or

(2) a decision made by the social media platform to remove content posted by the user.

Sec. 120.102. PROCESSING OF COMPLAINTS. A social media platform that receives notice of illegal content or illegal activity on the social media platform shall make a good faith effort

to evaluate the legality of the content or activity within 48 hours of receiving the notice, excluding hours during a Saturday or Sunday and subject to reasonable exceptions based on concerns about the legitimacy of the notice.

Sec. 120.103. REMOVAL OF CONTENT; EXCEPTIONS. (a) Except as provided by Subsection (b), if a social media platform removes content based on a violation of the platform's acceptable use policy under Section 120.052, the social media platform shall, concurrently with the removal:

(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:

(A) the determination regarding an appeal requested under Subdivision (2); and

(B) in the case of a reversal of the social media platform's decision to remove the content, the reason for the reversal.

(b) A social media platform is not required to provide a user with notice or an opportunity to appeal under Subsection (a) if the social media platform:

(1) is unable to contact the user after taking reasonable steps to make contact; or

(2) knows that the potentially policy-violating content relates to an ongoing law enforcement investigation.

Sec. 120.104. APPEAL PROCEDURES. If a social media platform receives a user complaint on the social media platform's removal from the platform of content provided by the user that the user believes was not potentially policy-violating content, the social media platform shall, not later than the 14th day, excluding Saturdays and Sundays, after the date the platform receives the complaint:

(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 under Subdivision (2); and

(4) notify the user regarding the determination made under Subdivision (2) and the steps taken under Subdivision (3).

SUBCHAPTER D. ENFORCEMENT

Sec. 120.151. ACTION BY ATTORNEY GENERAL. (a) The attorney general may bring an action against a social media platform to enjoin a violation of this chapter.

(b) If an injunction is granted in an action brought under Subsection (a), the attorney general may recover costs incurred in bringing the action, including reasonable attorney's fees and reasonable investigative costs.

SECTION 3. The heading to Chapter 321, Business & Commerce Code, is amended to read as follows:

CHAPTER 321. REGULATION OF [~~CERTAIN~~] ELECTRONIC MAIL

SECTION 4. Section 321.001, Business & Commerce Code, is amended by adding Subdivision (4-a) to read as follows:

(4-a) "Malicious computer code" means an unwanted computer program or other set of instructions inserted into a computer's memory, operating system, or program that:

(A) is specifically constructed with the ability to replicate itself or to affect the other programs or files in the computer by attaching a copy of the unwanted program or other set of instructions to one or more computer programs or files; or

(B) is intended to perform an unauthorized process that will adversely impact the confidentiality of information contained in or the integrity or availability of the computer's memory, operating system, or program.

SECTION 5. Subchapter B, Chapter 321, Business & Commerce Code, is amended by adding Section 321.054 to read as follows:

Sec. 321.054. IMPEDING ELECTRONIC MAIL MESSAGES PROHIBITED. An electronic mail service provider may not intentionally impede the transmission of another person's electronic mail message based on the content of the message unless:

(1) the provider is authorized to block the transmission under Section 321.114 or other applicable state or federal law; or

(2) the provider has a good faith, reasonable belief that the message contains malicious computer code, obscene material, material depicting sexual conduct, or material that violates other law.

SECTION 6. Section 321.105(a), Business & Commerce Code, is amended to read as follows:

(a) In lieu of actual damages, a person injured by a

violation of this chapter arising from the transmission of an unsolicited or commercial electronic mail message or by a violation of Section 321.054 may recover an amount equal to the lesser of:

(1) $10 for each unlawful message or each message unlawfully impeded, as applicable; or

(2) $25,000 for each day the unlawful message is received or the message is unlawfully impeded, as applicable.

SECTION 7. Title 6, Civil Practice and Remedies Code, is amended by adding Chapter 143A to read as follows:

CHAPTER 143A. DISCOURSE ON SOCIAL MEDIA PLATFORMS

Sec. 143A.001. DEFINITIONS. In this chapter:

(1) "Censor" means to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.

(2) "Expression" means any word, music, sound, still or moving image, number, or other perceivable communication.

(3) "Receive," with respect to an expression, means to read, hear, look at, access, or gain access to the expression.

(4) "Social media platform" has the meaning assigned by Section 120.001, Business & Commerce Code.

(5) "Unlawful expression" means an expression that is unlawful under the United States Constitution, federal law, the Texas Constitution, or the laws of this state, including expression that constitutes a tort under the laws of this state or the United States.

(6) "User" means a person who posts, uploads, transmits, shares, or otherwise publishes or receives expression,

through a social media platform. The term includes a person who has a social media platform account that the social media platform has disabled or locked.

Sec. 143A.002. CENSORSHIP PROHIBITED. (a) A social media platform may not 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 another person's expression; or

(3) a user's geographic location in this state or any part of this state.

(b) This section applies regardless of whether the viewpoint is expressed on a social media platform or through any other medium.

Sec. 143A.003. WAIVER PROHIBITED. (a) A waiver or purported waiver of the protections provided by this chapter is void as unlawful and against public policy, and a court or arbitrator may not enforce or give effect to the waiver, including in an action brought under Section 143A.007, notwithstanding any contract or choice-of-law provision in a contract.

(b) The waiver prohibition described by Subsection (a) is a public-policy limitation on contractual and other waivers of the highest importance and interest to this state, and this state is exercising and enforcing this limitation to the full extent permitted by the United States Constitution and Texas Constitution.

Sec. 143A.004. APPLICABILITY OF CHAPTER. (a) This chapter applies only to a user who:

(1) resides in this state;

(2) does business in this state; or

(3) shares or receives expression in this state.

(b) This chapter applies only to expression that is shared or received in this state.

(c) This chapter applies only to a social media platform that functionally has more than 50 million active users in the United States in a calendar month.

(d) This chapter applies to the maximum extent permitted by the United States Constitution and the laws of the United States but no further than the maximum extent permitted by the United States Constitution and the laws of the United States.

Sec. 143A.005. LIMITATION ON EFFECT OF CHAPTER. This chapter 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.

Sec. 143A.006. CONSTRUCTION OF CHAPTER. (a) This chapter does not prohibit a social media platform from censoring expression that:

(1) the social media platform is specifically authorized to censor by federal law;

(2) 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;

(3) directly incites criminal activity or consists of specific threats of violence targeted against a person or group

because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge; or

(4) is unlawful expression.

(b) This chapter may not be construed to prohibit or restrict a social media platform from authorizing or facilitating a user's ability to censor specific expression on the user's platform or page at the request of that user.

(c) This chapter may not be construed to limit or expand intellectual property law.

Sec. 143A.007. USER REMEDIES. (a) A user may bring an action against a social media platform that violates this chapter with respect to the user.

(b) If the user proves that the social media platform violated this chapter with respect to the user, the user is entitled to recover:

(1) declaratory relief under Chapter 37, including costs and reasonable and necessary attorney's fees under Section 37.009; and

(2) injunctive relief.

(c) If a social media platform fails to promptly comply with a court order in an action brought under this section, the court shall hold the social media platform in contempt and shall use all lawful measures to secure immediate compliance with the order, including daily penalties sufficient to secure immediate compliance.

(d) A user may bring an action under this section regardless of whether another court has enjoined the attorney general from

enforcing this chapter or declared any provision of this chapter unconstitutional unless that court decision is binding on the court in which the action is brought.

(e) Nonmutual issue preclusion and nonmutual claim preclusion are not defenses to an action brought under this section.

Sec. 143A.008. ACTION BY ATTORNEY GENERAL. (a) Any person may notify the attorney general of a violation or potential violation of this chapter by a social media platform.

(b) The attorney general may bring an action to enjoin a violation or a potential violation of this chapter. If the injunction is granted, the attorney general may recover costs and reasonable attorney's fees incurred in bringing the action and reasonable investigative costs incurred in relation to the action.

SECTION 8. (a) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other.

(b) If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications

of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone.

(c) If any court declares or finds a provision of this Act facially unconstitutional, when discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating the United States Constitution and Texas Constitution, those applications shall be severed from all remaining applications of the provision, and the provision shall be interpreted as if the legislature had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate the United States Constitution and Texas Constitution.

(d) The legislature further declares that it would have enacted this Act, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this Act, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this Act, were to be declared unconstitutional.

(e) If any provision of this Act is found by any court to be unconstitutionally vague, the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force.

(f) No court may decline to enforce the severability requirements of Subsections (a), (b), (c), (d), and (e) of this section on the ground that severance would rewrite the statute or

involve the court in legislative or lawmaking activity. A court that declines to enforce or enjoins a state official from enforcing a statutory provision does not rewrite a statute, as the statute continues to contain the same words as before the court's decision. A judicial injunction or declaration of unconstitutionality:

(1) is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the Texas Constitution or United States Constitution;

(2) is not a formal amendment of the language in a statute; and

(3) no more rewrites a statute than a decision by the executive not to enforce a duly enacted statute in a limited and defined set of circumstances.

SECTION 9. Chapter 143A, Civil Practice and Remedies Code, as added by this Act, applies only to a cause of action that accrues on or after the effective date of this Act.

SECTION 10. This Act takes effect on the 91st day after the last day of the legislative session.

H.B. No. 20

President of the Senate

Speaker of the House

I certify that H.B. No. 20 was passed by the House on August 30, 2021, by the following vote: Yeas 77, Nays 49, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 20 on September 2, 2021, by the following vote: Yeas 78, Nays 42, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 20 was passed by the Senate, with amendments, on August 31, 2021, by the following vote: Yeas 17, Nays 14.

Secretary of the Senate

APPROVED: 9-7-21

Date

Governor

FILED IN THE OFFICE OF THE SECRETARY OF STATE
7 pm O'CLOCK

Appendix 6

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 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 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

[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.

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 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]

[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.

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. 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 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 non-profit 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 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 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'

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[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!.

[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.

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 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 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 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 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

[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).

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 "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.

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[10] *Id.* at *3.

[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.

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.

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 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, 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

[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

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 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

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media page if that information is personal, sensitive, obscene, threatening, harassing, discriminatory, or would otherwise compromise public safety or incite violence or illegal activities.").

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 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 speech that it does not want to host forces the platform to

[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 internet

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.

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

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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.").

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]

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

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[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.

[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.

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. 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]

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

[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.

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.

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.

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

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 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."

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[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.

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 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

[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.

further excludes from the definition of "social media platform" all 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," 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 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

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

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 world-wide. *Id.* § 120.002(a)(3); Tex. Civ. Prac. & Rem. Code § 143A.003(a)-(b).

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]

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

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

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" 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

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

operating a 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 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 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 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 irremediable 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 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).

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 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 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 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* "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 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 *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 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.

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.

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.

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.

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 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 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 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 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 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 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(c). 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-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 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).

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 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.

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).

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 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.

/s/ Scott A. Keller

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*Motion for admission *pro hac vice* forthcoming

Appendix 7

Appendix 7.a

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-RP

Exhibit A – CCIA's Declaration

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*.	Civ. Action No. 21-cv-00840

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 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 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 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.

[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.

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 on these services is significant. Facebook[3] and YouTube[4] 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]

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,

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[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.

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 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

[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/good-company/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-commerce-rises/.

[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/.

[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-captions-are-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/.

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 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

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[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-aid-texas-storm/.

[19] Allison Slater Tate, *School supplies: Help teachers #ClearTheList with PPE, wipes*, TODAY (July 30, 2020), https://www.today.com/parents/school-supplies-help-teachers-clearthelist-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-to-help-teachers/2730463/.

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, 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]

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[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-videos-attack-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), https://www.tsf.foundation/blog/roblox-tries-to-deal-with-adult-content-on-a-platform-used-by-many-kids-2020.

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 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

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[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-down-community-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-the-game-with-new-social-media-app-called-gettr/L4N5FCAINBF6ZNMU4NBBMP37RA/.

[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/.

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 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

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[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-and-expanding-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.*

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 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 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

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[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.

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

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]

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.

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[34] *Sensitive media policy*, Twitter, https://help.twitter.com/en/rules-and-policies/media-policy.

[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-warning-labels-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.").

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

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—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 hamstrings 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.

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.

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, 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

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[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-action-against-vaccine-misinformation-superspreaders/.

[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-standards-enforcement-report-q1-2021/.

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

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]

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

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

[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.

million videos related to dangerous 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 supremacism. 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 regarding Nazism or interviews with white supremacists serve an educational function or, instead, glorify those ideologies.[49]

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[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/.

[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-new-policy-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-and-artistic-content-youtube/.

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 ever-changing circumstances presented by 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:

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

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]

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 of transgender individuals." Twitter made that change as part of a broader change to its policy on "dehumanizing language," which was expanded "to

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

[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-instagram-users-safe; *Suicide and Self-harm Policy*, Twitter, https://help.twitter.com/en/rules-and-policies/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-myanmar-tv-channels-from-platform-idUSKBN2AX0BQ.

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]

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

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[54] *Hateful conduct policy*, Twitter, https://help.twitter.com/en/rules-and-policies/hateful-conduct-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-policies-together.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/advertisers-agree-deal-with-social-media-on-steps-to-curb-harmful-content-idUSKCN26E1O1; *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-for-advertisers-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/mozilla-investigation-youtube-algorithm-recommends-videos-that-violate-the-platforms-very-own-policies/.

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.

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 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 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

[57] Heather Greenfield, *Texas Legislators Approve Bill Making It Easier To Sue Companies For Policies Protecting Users Online*, CCIA (Aug. 30, 2021), https://www.ccianet.org/2021/08/texas-legislators-approve-bill-making-it-easier-to-sue-companies-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-youtube-german-coronavirus/.

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 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 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.

Matthew Schruers

Appendix 7.b

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-RP

Exhibit B – NetChoice, LLC's Declaration

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-RP

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

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 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

[1] Home, NetChoice, https://perma.cc/3NPH-KH2T.
[2] About Us, NetChoice, https://perma.cc/4NPV-PLU7.

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 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]

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 main-

[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.

tain 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 users[6] 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 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.

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[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.

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 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,

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

[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).

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]

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 dis-

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

[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).

played alongside such content. Users and advertisers would likely abandon online businesses that are no longer permitted to moderate offensive and harmful content.

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]

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 vid-

[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/Y WO5-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.*

eos 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. 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

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[19] Olivia Solon, *Google's Bad Week: YouTube Loses Millions as Advertising Row Reaches US*, The Guardian (Mar. 25, 2017), https://perma.cc/Y W5-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.

[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.).

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 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]

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

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[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.

[25] See Removing Harassing Subreddits, Reddit (Jun. 10, 2015), https://perma.cc/65FE-TPyC.

[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/3zgWNl4.

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.

_____

Carl Szabo

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

Appendix 7.c

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-RP

Exhibit C – YouTube's Declaration

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*.	Civ. Action No. 21-cv-840

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 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 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 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-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.

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.[1] We 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 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.

[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.

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 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 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 requirements[3] 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)

[2] https://bit.ly/3fpnHzu.
[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.

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.

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.[6] In Q2 2021, 29.9% of the videos removed were due to child safety issues. 55% of removed comments were due to spam.[7] Further statistics (including others discussed in 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.

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

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[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.

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 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]

[9] https://nyti.ms/3xoq0IW.

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 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.[10] These 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

[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

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]

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

[11] *See* https://bit.ly/38noixm.

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 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 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 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.

[12] https://bit.ly/2VhM7DW

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 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.

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 policy[13] 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

[13] bit.ly/3m0tMVo.

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 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

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

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 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.

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

[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/

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 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.

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.

[16] https://bit.ly/3kNf8BF.

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.

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 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

[17] https://bit.ly/3jiTWl1.

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 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.

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 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 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 7.d

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-RP

Exhibit D – Facebook's Declaration

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

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 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 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 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).

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 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

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

[3] *Facebook Community Standards*.

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.

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

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

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.

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, 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.

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 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 context-specific, 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.
- 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 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..

DocuSigned by:
381E463703AB40C...

Neil Potts

Appendix 7.e

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-RP

Exhibit E – LGBT Technology Institute's Declaration

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.

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

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) 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 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:

- 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 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:

- 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 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

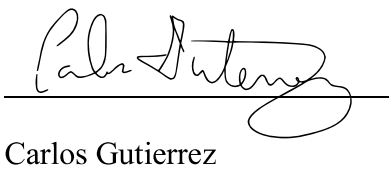
[1] See p. 9 https://www.glaad.org/sites/default/files/images/2021-05/GLAAD%20SOCIAL%20MEDIA%20SAFETY%20INDEX_0.pdf

[2] *Id.*

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 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.



Carlos Gutierrez

Appendix 7.f

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-RP

Exhibit F – Stop Child Predators' Declaration

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.

Civ. Action No. 21-cv-00840

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 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 sex-trafficking 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 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]

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[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.*

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.

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."

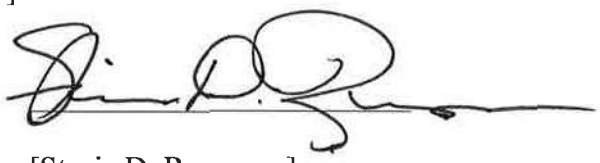
13. While this carve-out is welcome, we still have three main concerns.

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].



[Stacie D. Rumenap]

Appendix 8

Appendix 8.a

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, 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-RP

Tuesday, November 16, 2021

Washington, D.C.

MATTHEWS SCHRUERS, 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 CCIA, 25 Massachusetts Avenue, NW, 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.

APPEARANCES:

On Behalf of Plaintiff CCIA:
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On Behalf of the Defendant:
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Videographer: Gene Aronov

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WITNESSES

EXHIBITS

*****Exhibit 2 was not tendered to reporter*****

P R O C E E D I N G S

THE VIDEOGRAPHER: Good morning. This begins the video deposition of Matthew Schruers taken by defendant [sic] in the matter of NetChoice, LLC, et al., versus Computer & Communications Industry Association, et al., filed in the United States District Court for the Western District of Texas, Austin Division, Civil Action Number 1:21-cv-00840-RP.

This deposition is being held at 25 Massachusetts Avenue NW, Suite 300C, Washington, D.C. on November 16, 2021, at approximately 2:24 p.m.

My name is Gene Aronov from the firm Integrity Legal Support Solutions, and I am the legal video specialist. The court reporter is Barbara Moore from the firm Integrity Legal Support Solutions.

Will counsel please introduce themselves.

(Attorneys stated their appearances for the record.)

THE VIDEOGRAPHER: Will the court reporter please swear in the witness.

****

MATTHEW SCHRUERS,

having been called as a witness on behalf of the Defense and having been first duly sworn, was examined and testified as follows:

EXAMINATION BY

MR. LYLE:

Q. Good afternoon, Mr. Schruers. Would you please state and spell your name for the record.

A. Matthew Schruers, S-c-h-r-u-e-r-s.

Q. And have you been deposed before?

A. I have not.

Q. So a few guidelines. If you could please give a verbal answer to every question so the court reporter can get it down. Don't say "uh-huh" or nod or anything like that. And if you want to take a break, feel free to, you know, ask your counsel to ask for one, but please finish

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answering whatever question you've been asked beforehand.
What does -- what does CCIA stand for?
A. It's the Computer & Communications Industry Association.
Q. And what is your position at CCIA?
A. I'm the president.
Q. And what -- what are your job duties there?
A. I oversee the organization and manage its general affairs and direct its policy and its legal practice.
Q. And what does the organization do?
A. It is a trade association that seeks to foster its mission and the interests of its members.
Q. And what is its mission?
A. Open markets, open systems, open networks.
Q. And who -- who are some of its more prominent members?
A. The association has 20-some members.

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They include Apple, Amazon, Facebook, Google, Twitter, Pinterest, Samsung, Intel, Intuit and various others. They're all on the association's website.
Q. And how do you become a member of CCIA?
A. There's an application process.
Q. And how thoroughly are applicants vetted, or what are some of the requirements?
A. Applicants are vetted by board. They need to meet criteria that the board applies. And general criteria established on the application form includes belonging to the industry, sharing the association's mission, various other factors that are for the board's consideration.
Q. And how would you describe that industry?
A. The computer and communications industry.
Q. Okay. How does CCIA receive funding?
A. Through dues.

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Q. Through what?
A. Through contributions from members, companies.
Q. Okay. To be a member, is it a condition that you make a monetary contribution?
A. There is a dues requirement for membership, yes.
Q. And are those dues equal across the membership, or do they vary from member to member?
A. They are indexed by revenue.
Q. Indexed by revenue. What sort of percentage of each company's revenue would that index consist of?
MR. DISHER: Objection. Form.
THE WITNESS: Yeah, can you --
BY MR. LYLE:
Q. So you said the dues are indexed by revenue. Does that mean that each company pays a percentage of its revenue?
A. No.
Q. What does "indexed by revenue" mean?
A. "Indexed by revenue" means that as

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revenues increase, the dues increase.
Q. On a company-by-company basis?
A. What's on a company-by-company basis?
Q. So, for example, would a company like Google pay more in dues than a company that was, say, 1/100 of its size by revenue?
A. Yes.
Q. So it's fair to say that the greater the revenue of the company, the more dues they pay?
MR. DISHER: Objection. Form.
THE WITNESS: Is it fair?
BY MR. LYLE:
Q. Is it accurate?
A. It is -- it is accurate that higher annual revenues companies pay higher dues.
Q. Okay. Who are your three highest annual revenue companies?
A. I don't have that information at my fingertips.
Q. Would -- would Facebook be in the top five?

A. I don't have that at my fingertips.
Q. Would Google be in the top five?
A. I don't have that at my fingertips either.
Q. What about Amazon?
A. I don't have that at my fingertips.
Q. So you don't -- you don't know who your top five dues payers in revenue are?
MR. DISHER: Objection. Form.
THE WITNESS: I'd have to speculate.
BY MR. LYLE:
Q. Could you speculate, please?
MR. DISHER: Objection. Form.
MR. LYLE: Okay. So just let the record reflect that the deponent is refusing to speculate as to the top five dues payers.
BY MR. LYLE:
Q. Do you work with NetChoice in any other context besides this lawsuit?
A. Context?

Q. Yes. Apart from suing the State of Texas for NetChoice, do you work with them in any other way?
A. The association is also a co-plaintiff with NetChoice in a suit against Florida.
Q. Okay. You said -- you described your organization's mission earlier. As a practical matter, how does that play out in the organization's activities?
A. Influences the association personnel's decision-making about what issues to prioritize and how to pursue policies that are representative of the industry's interests, generally speaking.
Q. Does the organization lobby members of Congress?
A. It does.
Q. Does it lobby members of the Senate?
A. Yes.
Q. Does it make any campaign contributions?

A. No.
Q. All right. I'm going to hand you your declaration, Mr. Schruers. And I'm going to mark this as Exhibit 1.
(Exhibit 1, Declaration, was marked for identification.)
BY MR. LYLE:
Q. Are you familiar with that document, Mr. Schruers?
A. Assuming this document is a true copy of my declaration, yes.
MR. DISHER: Is that document in the exhibit binder?
MR. LYLE: Yes.
BY MR. LYLE:
Q. Who drafted that document, Mr. Schruers?
A. I did, in collaboration with the association's counsel.
Q. About how many drafts did that go through?
MR. DISHER: I'll instruct the

witness not to answer to the extent it will implicate anything you've discussed or worked on with counsel for CCIA.
BY MR. LYLE:
Q. Who edited it and revised it?
MR. DISHER: Same instruction.
BY MR. LYLE:
Q. Who saw drafts before you signed it?
MR. DISHER: Same instruction.
BY MR. LYLE:
Q. When did you start drafting it?
A. Prior to filing the Complaint.
Q. Who did you consult with while drafting it?
MR. DISHER: Again, same instruction to the extent it implicates discussions you've had with attorneys. Otherwise, you can answer.
MR. LYLE: So I wasn't asking about the content of the discussions. I'm was asking about who he consulted with, which I don't believe is

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privileged.
MR. DISHER: You can identify who you talked to. To the extent that those conversations took place with lawyers for CCIA, do not answer.
THE WITNESS: Can I identify counsel?
MR. LYLE: Yes.
THE WITNESS: I discussed the draft with one of our in-house counsel.
BY MR. LYLE:
Q. And did that in-house counsel have a role in editing and revising it?
MR. DISHER: I will instruct the witness not to answer that question based on attorney-client privilege and attorney work product privilege.
BY MR. LYLE:
Q. Did you communicate with your members as to any of the information contained in the declaration?
A. Not to my recollection.

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Q. So they didn't go over any drafts or anything?
A. Not to my recollection.
Q. Any phone conversations or anything with them?
A. Again, not to my recollection.
Q. When was the Digital Trust & Safety Partnership created?
A. It was incorporated in approximately the first quarter of 2020.
Q. And I see from the organization's -- or the partnership's framework that CCIA incubated it or is incubating it. Is that correct?
A. That's generally the accurate term, yes.
Q. And what -- what does that mean?
A. The association supports the efforts of the partnership in its activities.
Q. Did the association draft the framework?
A. No.
Q. Did it have input on the framework?

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A. I, in my joint capacity as one of the cofounders, provided input and contributed to the drafting of the framework.
Q. As a cofounder of the framework or a cofounder of CCIA?
A. A cofound- -- what is a --
Q. I'm sorry?
A. Can you give me a full question?
Q. You contributed to the framework as a cofounder of the digital partnership or of CCIA?
A. I contributed to the framework as a cofounder of the Digital Trust & Safety Partnership.
Q. Okay.
(Discussion held off the record.)
BY MR. LYLE:
Q. I'm handing you the first seven pages of your document production of the Digital Trust & Safety Partnership.
MR. DISHER: Is this in the binder too?

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MR. LYLE: Yes.
MR. DISHER: Do you know what tab it is?
MR. LYLE: 15.
BY MR. LYLE:
Q. Mr. Schruers, is there a significant overlap between CCIA's membership and not of the Digital Trust & Safety Partnership?
MR. DISHER: Hold on one second. Just to be clear, two -- it looks like that starts on page 1 of that document, not page 2. I just want to be --
MR. LYLE: Yeah, you're right.
(Exhibit 2, DTSP document , was marked for identification.)
MR. DISHER: Okay. So is this -- this is Exhibit 2. And Exhibit 2 is Bates No. CCIA -- it looks like the Bates got cut off here. But it's the -- it's the DTSP document --
MR. LYLE: Yes, it's 1 to 7.
MR. DISHER: -- titled

"Digital" --
MR. LYLE: "Digital Trust" --
MR. DISHER: Excuse me. "Trust and Safety Best Practices Framework."
MR. LYLE: Yes.
MR. DISHER: Okay.
BY MR. LYLE:
Q. So is there -- is there a significant overlap between the partnership's membership and that of CCIA?
A. There is overlap.
Q. Is Facebook part of the Trust & Safety Partnership?
A. Yes.
Q. What about Google?
A. Yes.
Q. What about Amazon?
A. No.
Q. What about Twitter?
A. Yes.
Q. Okay. This -- the pages I just handed you, they include guidelines for the

members; correct?
A. I wouldn't characterize it that way.
Q. What would you characterize them as?
A. I would characterize this as the practice -- framework of best practices.
Q. Is there any auditing as to members complying with these practices?
MR. DISHER: Objection. Form.
THE WITNESS: Presently?
BY MR. LYLE:
Q. Yes.
A. No.
Q. Was there?
A. No.
Q. Will there be?
MR. DISHER: Objection. Form.
THE WITNESS: The organization's road map contemplates internal assessments and ultimately third-party assessments of implementation of the best practices framework.

BY MR. LYLE:
Q. But as of now, there's no third-party auditing going on?
A. At present, there is no third-party assessment of any kind.
Q. How about any self-reporting at present?
MR. DISHER: Objection. Form.
THE WITNESS: Are you asking me are companies presently doing self-reporting?
BY MR. LYLE:
Q. To -- to the partnership.
A. That process is currently underway.
Q. Is there any -- is there anyplace one could go to look at the results of that self-reporting; the public, for example?
A. At present?
Q. Yes.
A. No.
Q. But they are reporting to the partnership?

A. No.
Q. No?
A. That process is currently underway.
Q. Okay. On page 7, you talk about content and content-related risks.
A. Sorry, who is "you"?
Q. The partnership document, the best practices.
A. Okay.
Q. And I'm seeing that to be considered a risk, it has to be prohibited by the relevant policies and Terms of Service of the organization; correct?
MR. DISHER: Objection. Form.
THE WITNESS: No, I don't agree with that interpretation.
BY MR. LYLE:
Q. So your interpretation is there's a sort of separate metric for determining if it's a risk apart from the -- or it's irrelevant whether it's consistent with the relevant policies and Terms of Service?

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MR. DISHER: Objection. Form.
THE WITNESS: No, no. You said relevant policies and Terms of Service of the organization? You didn't define "organization." I assume that --
BY MR. LYLE:
Q. The digital -- the digital partnership on page 7, page 7 of what I handed you, says "content and conduct-related risks."
A. Uh-huh.
Q. This is the Digital Trust & Safety Partnership framework?
A. That's correct.
Q. "'Content and conduct-related risks' refers to the possibility of certain illegal, dangerous, or otherwise harmful content or behavior, including risks to human rights, which are prohibited by relevant policies and Terms of Service. References to risks shall be understood to refer to content and conduct-related risks."
That is what the last -- the document says at the last paragraph; correct?

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A. The document says that, yes.
Q. So is the interpretation correct that under these -- under this best practices framework, in order to be considered a content and conduct-related risk, it must be prohibited by the relevant policies and Terms of Service of the organization in question?
MR. DISHER: Objection. Form.
THE WITNESS: Define "organization in question."
BY MR. LYLE:
Q. "Prohibited by relevant policies and Terms of Service." So, for example, if -- if Facebook did not prohibit content X in its policies and Terms of Service, that would not be considered a content or conduct-related risk under the framework; correct?
MR. DISHER: Objection. Form.
THE WITNESS: I believe -- I believe that content that does not -- that is not prohibited by relevant policies and Terms of Service would not

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meet the definition of content and conduct-related risks.
BY MR. LYLE:
Q. Okay. Which -- which kind of risk is considered most serious by the framework, the content-related or the conduct-related?
MR. DISHER: Objection. Form.
THE WITNESS: Neither.
BY MR. LYLE:
Q. Neither. So they are considered equally serious?
A. The practices are agnostic as to the nature of the content at issue.
Q. What about the conduct-related risks?
A. Similarly.
Q. They are distinct forms of risks; correct?
A. No, no. Because there can be conduct which generates content. It's best to consider the two as overlapping circles in the Venn diagram. There is some content that is strictly

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content. There is conduct that will produce content. But there is also conduct which does not necessarily have any associated content with it that can constitute a risk.
Q. And is there content that doesn't have any associated conduct with it that can constitute a risk?
A. At least in theory. If you assume away that -- the conduct of posting the content.
Q. Okay. Where they -- where these risks are distinct in the Venn diagram, is one more resource-intensive for dealing with than the other?
MR. DISHER: Objection. Form.
THE WITNESS: That's going to vary by company and by the nature of the product.
BY MR. LYLE:
Q. So Facebook, for example.
MR. DISHER: Same objection.
THE WITNESS: Facebook isn't a product. Facebook has multiple products.

BY MR. LYLE:
Q. So the -- Facebook's what we think of as a social networking site?
MR. DISHER: Same objection.
THE WITNESS: Even within Facebook's -- the blue website, I imagine that Facebook would construe different parts of the site to be separate products.
Having said that, based on my knowledge of trust and safety practices across the industry, which are not specific to any one company, I don't believe that trust and safety policies are constructed distinctly around content in one bucket and conduct in another.
BY MR. LYLE:
Q. Okay.
(Discussion held off the record.)
BY MR. LYLE:
Q. Who is Alex Feerst, F-e-e-r-s-t?

A. Alex Feerst is a lawyer with expertise in this area who consulted for the Digital Trust & Safety Partnership at and beyond its incubation.
Q. Was he consulting when you were working on the Digital Trust & Safety Partnership?
A. Yes.
Q. Did you work with him personally?
A. Yes.
Q. What did he mean -- and I'm trying to pull the exhibit for you, but I'm having difficulty because the Bates number seems to have been cut off.
When he says that the partnership was not aiming to create an industry-wide definition of hate speech or misinformation, but to define the internal processes companies should use to develop their own policies, is that a fair characterization of the partnership?
MR. DISHER: Objection to form.
THE WITNESS: I would say that's a fair characterization of what the

partnership attempts to do.
BY MR. LYLE:
Q. So why does the partnership shy away from having an industry-wide definition of hate speech or misinformation?
MR. DISHER: Objection. Form.
THE WITNESS: I don't agree with the notion that it shies away from anything. But if you're asking does it have such a definition, the answer is no.
BY MR. LYLE:
Q. Is it planning to create such a definition?
A. As a member of the board of the organization, I cannot speak for the entire entity, but it is my understanding that such a definition is not planned and would not be consistent with the mission of the organization.
Q. Would the organization want such a definition?
MR. DISHER: Objection. Form.
THE WITNESS: I'm not sure I can

speak to what the organization would want, but DTSP has been clear that its practices are content-agnostic and seek to identify practices and processes, not content-specific rules.
BY MR. LYLE:
Q. So these processes would be for individual companies to define on their own what constituted hate speech or misinformation?
A. No.
Q. Would it be consistent with the partnership in this regard that what YouTube considered hate speech or misinformation was different from what Facebook considered hate speech or misinformation?
MR. DISHER: Objection. Form.
THE WITNESS: I don't know that it would be consistent or inconsistent, but the practices admit for the -- the possibility that companies can and will adopt different rules around what content and conduct their products -- is

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permitted on their products.
BY MR. LYLE:
Q. So that the quote continues, "The goal is that there should be sufficient flexibility such that the different companies can have different substantive definitions of these things and still agree on whether you have a set of institutional practices that are addressing them."
And I'm going to hand you that marked as Exhibit 3.
(Exhibit 3, HB 20, was marked for identification.)
MR. DISHER: Do you know what -- what pages these are of tab 15?
MR. LYLE: It should be 122 to 123, if -- do you have them there at the bottom, the Bates number?
MR. DISHER: No, they're cut off. I think I found it.
Okay. I got it.
MR. LYLE: Okay.

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BY MR. LYLE:
Q. So does that -- is it an accurate characterization of that quote I just read you that individual companies that are members of the partnership can, under the guidelines, have different substantive definitions of hate speech and misinformation?
A. Consistent with the practices, companies could and do have different approaches for those types of content.
Q. Meaning misinformation and hate speech?
A. Among other types of content.
Q. And part of what the quote I just read you means that the different approaches include different substantive definitions?
MR. DISHER: Objection. Form.
THE WITNESS: The approach to the content will necessarily involve the service's definition of that content. Does that answer your question?

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BY MR. LYLE:
Q. I just want to be clear. So one company in the partnership and another company in the partnership could have different substantive definitions of hate speech and misinformation, and this would be consistent with the best practices under the partnership?
A. Yes.
Q. Okay. Do you personally believe that hate speech can be objectively defined?
MR. DISHER: Objection. Form.
THE WITNESS: I don't believe that's within the scope of my definition -- my declaration.
BY MR. LYLE:
Q. Are you refusing to answer the question?
A. I just did.
MR. DISHER: Objection. Form. And I'll instruct the witness not to answer to the extent it exceeds the scope of his declaration. You can answer, if

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you can. But to the extent it's not within the scope, that's outside the bounds of this deposition.
THE WITNESS: For purposes of my declaration, many -- perhaps most of the companies that are CCIA members who have trust and safety practices, and including companies who are DTSP members, have working definitions of hate speech that they apply.
BY MR. LYLE:
Q. All right. Why is it important to the partnership that these companies be allowed flexibility in creating their own definitions of hate speech?
A. Definitions of hate speech are not -- it's not specific to definitions of one particular type of content.
Q. But it includes hate speech?
A. It includes it, yes. And that is because their size varies, the nature of their products vary, and the nature of their communities

vary. The resources they have to deliver their services and devote attention to trust and safety varies.

Q. So the size of a company can determine whether or not something is hate speech?

MR. DISHER: Objection. Form.

THE WITNESS: No. No. The answer was no.

BY MR. LYLE:

Q. But didn't you just say that's why the companies should be able to have different definitions of things like hate speech?

MR. DISHER: Objection. Form.

THE WITNESS: Practices do not control what companies are able to do. Companies have committed to the practices as a way of demonstrating and documenting how their trust and safety operations work. They are voluntary. They do not constrain a company's actions other than to the extent the company wants to ensure it's compliant with the practices.

BY MR. LYLE:

Q. These -- these are best practices; right?

A. These are what the DTSP participants assessed to be best practices at the time of the drafting.

Q. And does that mean they are, in some sense, aspirational?

A. The practices may be aspirational for some companies. They are implemented by others.

Q. Which ones actually implement them?

MR. DISHER: Objection. Form.

THE WITNESS: That will -- that is what the ongoing assessment process is designed to assess, to determine.

BY MR. LYLE:

Q. And has it yielded up any results as of now?

A. The process is still ongoing.

Q. Is there a prediction of when it will be completed?

A. The internal scoping assessments are projected to be completed next year, early next year. The third-party assessment is hoped to be completed in 2022 or 2023.

Q. And who -- who will be the third party conducting the assessment?

A. It has yet to be determined, other than that this partnership has specified that it would be an independent third-party expert organization or entity in the assurance sector.

Q. And is it envisaged to release the results of that third-party assessment to the public?

A. The practices contemplate various measures of transparency. What the work product of the third-party assessor is going to be is yet to be determined, so I can't speak to whether it's going to be released. I don't know what the work product will be.

Q. What about the self-reporting?

A. The companies are working towards determining what of their internal assessments can

be made public, separate from their existing transparency reports which are, of course, already public.

Q. And what -- is there any schedule contemplated for releasing this stuff in the future? I mean, is it -- like, is there going to be a cycle for releasing it or --

MR. DISHER: Objection. Form.

THE WITNESS: I don't have any further information beyond what I've already told you.

BY MR. LYLE:

Q. Which of your members do you contend are covered by HB20?

MR. DISHER: Objection. Form.

THE WITNESS: All the companies that fall within the definition in Section 120.

BY MR. LYLE:

Q. Can you name some examples?

MR. DISHER: Objection. Form.

THE WITNESS: I believe my

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declaration is clear that at least some CCIA members would fall within the definition.
BY MR. LYLE:
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.

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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.
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.

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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.
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

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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 HB20 and who didn't?
MR. DISHER: Objection. Form.

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THE WITNESS: I don't recall.
BY MR. LYLE:
Q. At any point in time, have you known which of your members fall under HB20?
MR. DISHER: Objection. Form.
THE WITNESS: I know now that some of my members fall under HB20.
BY MR. LYLE:
Q. Have you ever known, like, precisely which ones fall under HB20?
MR. DISHER: Objection. Form. Go ahead.
THE WITNESS: I just identified precisely that some members fall under HB20. Are you asking me do I know at any moment in time each individual company and whether or not they are covered?
BY MR. LYLE:
Q. Has there ever been a point in time in which you knew which of your members would fall under HB20?
MR. DISHER: Objection. Form.

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THE WITNESS: I know now that some of my members fall under the bill.
BY MR. LYLE:
Q. I'm asking for an exhaustive list, if you've ever had an exhaustive list.
MR. DISHER: Hold on. Is that the question?
MR. LYLE: Yes.
MR. DISHER: Objection to form.
THE WITNESS: I do not believe that an exhaustive list of all the companies potentially within the definition of the statute has ever been compiled.
BY MR. LYLE:
Q. And have you ever just known that?
MR. DISHER: Objection. Form.
THE WITNESS: I have never at any moment in time known the monthly active users of all my members at that moment, no.

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BY MR. LYLE:
Q. Is CCIA seeking relief in this suit on behalf of all its members?
MR. DISHER: Objection. Form.
THE WITNESS: The association is seeking relief on behalf of all the members who are subject to the statute.
BY MR. LYLE:
Q. And who is that?
MR. DISHER: Objection. Form.
THE WITNESS: All of the companies that fall within the definition in Section 120.
BY MR. LYLE:
Q. But you've declined to give us a list of that.
MR. DISHER: Objection. Form.
THE WITNESS: I disagree.
MR. DISHER: Hold on. He has not declined to do -- to answer any of your questions. I just want to be clear that he has not declined to answer any of your

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questions other than those related to privilege that we talked about earlier.
THE WITNESS: I have identified -- I have listed for you companies that fall within the scope of the statute.
BY MR. LYLE:
Q. I'm asking for a specific list, not a partial list. Can you give a specific list?
MR. DISHER: Objection. Form.
THE WITNESS: I believe identifying Facebook and Google, among others, depending on their monthly active users, constitutes a specific list. It may not be an exhaustive list. I do not have an exhaustive list.
BY MR. LYLE:
Q. So you're unable to give an exhaustive list?
MR. DISHER: Objection. Form.
THE WITNESS: With the right -- I am unable at this very moment to provide an exhaustive list.

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BY MR. LYLE:
Q. Okay. Have you talked to any of your members about this lawsuit?
A. Yes.
Q. Who have you talked to?
A. I've communicated with all our members about the lawsuit.
Q. Each one?
A. Yes.
Q. How many of them are supportive of this lawsuit?
A. I am not aware of any company that does not support the lawsuit. If you're asking if I took a straw poll, the answer is no.
Q. So it's your testimony that none of your members are opposed to the lawsuit?
A. No, that's not my testimony.
Q. So you're unaware of any that do not support it, you said?
A. That's correct.
Q. Doesn't that mean that you're unaware of any who oppose it?

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MR. DISHER: Objection. Form.
THE WITNESS: No, because they could neither oppose nor support but have no position on it, and they wouldn't fall into either group.
BY MR. LYLE:
Q. Are you aware of any members who are opposed to the lawsuit?
A. None of my members have expressed opposition to the lawsuit to me.
Q. Has it come to your awareness in any other way?
A. No.
Q. Have any of the members expressed opposition to not you personally but your organization?
MR. DISHER: Objection. Form.
THE WITNESS: Not to my knowledge.
BY MR. LYLE:
Q. Have any of them expressed that they're not covered by HB20?
MR. DISHER: Objection. Form.

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THE WITNESS: To my knowledge, no company has -- I do not specifically recall whether or not any companies may have expressed the view that they are not covered.
BY MR. LYLE:
Q. Do you know why none of your plaintiffs filed -- or none of your members filed suit individually in this lawsuit?
MR. DISHER: Objection. Form.
THE WITNESS: I'm not privy to the legal decision-making of all our member companies.
BY MR. LYLE:
Q. Were there any discussions about that?
MR. DISHER: Objection. Form. I will also object and instruct the witness not to answer to the extent -- and I don't know if those conversations might be covered by some type of joint defense or common interest agreement, which would

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be privileged if it was related to legal decision-making.
But subject to that instruction, you can answer if none of those conversations would fall under a joint defense or common interest agreement.
BY MR. LYLE:
Q. None of them are defendants; correct?
MR. DISHER: I gave him the instruction. He can answer if he can.
THE WITNESS: Based on that instruction, I don't have much to tell you.
BY MR. LYLE:
Q. Are you -- are any of your members defendants in this lawsuit?
A. No.
Q. Do they have any common interest agreements from CCIA?
A. There are common interest agreements in place between the association and the other

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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.
A. Facebook.com. I have not done this in many years, and so the process may have changed,

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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

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Facebook accounts, Facebook.com accounts.
BY MR. LYLE:
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.

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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 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

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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?
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.

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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.
THE WITNESS: I mean, even if that question were specific as to a product --
BY MR. LYLE:
Q. The blue site.

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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.
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?

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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?
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.

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BY MR. LYLE:
Q. What about -- is that the same for Twitter?
MR. DISHER: Objection. Form.
THE WITNESS: I do not know Twitter's Terms of Service off the top of my head.
BY MR. LYLE:
Q. But in terms of it being accessible to somebody who is prohibited by the Terms of Service creating an account?
A. Are we still --
MR. DISHER: Objection -- objection to form.
THE WITNESS: Sorry.
Are we still using the same definition of "accessible"?
BY MR. LYLE:
Q. Yes, possible to create an account.
MR. DISHER: Objection. Form.
THE WITNESS: It is possible.

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BY MR. LYLE:
Q. What about Facebook?
MR. DISHER: Objection. Form.
THE WITNESS: Again, it is possible.
BY MR. LYLE:
Q. Are you aware of any benefits that your members have gotten from the federal government?
MR. DISHER: Objection. Form.
THE WITNESS: No.
BY MR. LYLE:
Q. Are you aware of any subsidies your members have gotten from the federal government?
A. I'm not aware.
Q. Do you consider Section 230 of the Communications Decency Act to be a benefit that your members have gotten from the government?
MR. DISHER: Objection. Form.
THE WITNESS: No.
(Discussion held off the record.)

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BY MR. LYLE:
Q. Let's go to Paragraph 9, please, of your declaration.
A. (Witness complies with request.)
Q. You write here that the scale of users and activity on your members' services is significant. And you provide some numbers. You say Facebook and YouTube each has over 2 billion users. Every day, users watch over a billion hours of video. That and the other things in this paragraph, do you have personal knowledge of this?
MR. DISHER: Objection. Form.
THE WITNESS: I'm generally aware of these facts and that -- no. No, I don't have personal knowledge.
BY MR. LYLE:
Q. So what is the source of your knowledge of these?
A. There are reports made by the companies or -- yeah, or media accounts of those reports.
MR. DISHER: Can we take a

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10-minute break?
MR. LYLE: Yes.
THE VIDEOGRAPHER: We're going off the record. This is the end of media Unit No. 1. The time is 3:27 p.m.
(Recess)
THE VIDEOGRAPHER: We're back on the record. This is the beginning of media Unit No. 2. The time is 3:41 p.m.
BY MR. LYLE:
Q. All right. Let's -- let's go to 10A of your declaration. Let's go to 10A, Mr. Schruers, of your declaration.
A. It's "Shears," like the utensil.
Q. Schruers. Sorry. Mr. Schruers. 10A.
You talk about how "when the COVID-19 pandemic struck, many small businesses turned to social media services and online schools to continue operations, engage current and prospective customers, and cultivate loyalty in a socially-distant context. Many small businesses

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who succeeded in the shuttered economy did so by embracing social media services and digital tools."

Now, were any of your members providing the services and tools you describe in that paragraph?

A. Some, yes.

Q. Which ones?

A. The -- if you were to look at this post here that's linked to, I believe it discusses services, including -- in footnote 12, services including Twitter, Facebook, Google, Maps in particular, as well as a variety of other services which are not offered by association members but are also digital.

Q. And is that a result of your own personal knowledge or having read the post that you cite to?

MR. DISHER: Objection. Form.

THE WITNESS: The answer to that question is based on my direct observation of companies offering services that were being used by individuals to do this.

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BY MR. LYLE:

Q. Within your work at CCI or reading articles?

A. No, in the scope of my work, I directly observed companies offering services that individuals are taking advantage of.

Q. How did you directly observe that?

A. By seeing them live online is one such example. By patronizing them not in the scope of my work as another example. By discussing that with companies as a third example.

Q. Companies that include your members?

A. Association members, yes.

Q. Let's go to the next paragraph, B. You talk about "amid a quarantine of indeterminate length, schools and public health [sic] services turned to social media tools," and you include here Facebook Live as an example and remote learning via Google Meet and Zoom.

Are these things that you have personal knowledge of?

A. I believe so, yes.

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Q. How exactly?

A. I have observed these products being used in my work, as well as being aware of public accounts of them. I have observed family and friends utilizing products as described in this context. So I have what I consider to be personal knowledge that this is correct.

Q. Have you talked to these companies directly about this?

A. I have talked to employees at these companies about the use of these services in this context, yes. I should say some of these.

Q. Which -- which ones?

A. I characterize that because I don't believe I've spoken with Twitter or Venmo about their products.

Q. Let's go to 11A. You talk about the extensive efforts across the industry to remove the videos of the mass shootings at Christchurch.

A. Yes.

Q. Is that -- are those efforts something you have personal knowledge of?

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A. Yes.

MR. DISHER: Objection. Form. Go ahead.

THE WITNESS: Yes.

BY MR. LYLE:

Q. How do you have personal knowledge of that?

A. Having discussed these with -- these efforts with the companies implementing them and policymakers who were interested in them and seeing the results of those efforts online.

Q. Are there any other bases of your personal knowledge of that that you haven't described?

A. My general knowledge derived from having spent more than 15 years in this space, yeah.

Q. Right, but I'm talking about actual personal knowledge of these specific efforts with respect to these particular shooting videos.

MR. DISHER: Objection. Form.

THE WITNESS: Can you restate that

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question?
BY MR. LYLE:
Q. So I asked you how you had personal knowledge of the efforts across the industry to remove the videos of the Christchurch shooting.
A. Yes.
Q. And you responded partially with an account of your 15 years in the industry. And I'm asking you, specific to this, how you have personal knowledge of the industry effort.
MR. DISHER: Objection. Form.
THE WITNESS: I believe the bases that I have described substantially provide my knowledge of these efforts.
BY MR. LYLE:
Q. I'm talking not about like reading things on the internet, but you personally in your work coming about knowledge of these efforts.
MR. DISHER: Objection. Form.
THE WITNESS: I am not a content moderator myself. So if your definition of "personal knowledge" means I have to

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be a content moderator, well, then I don't think we have a shared understanding as to what a definition -- what personal knowledge is.
It is my view that based on what I have publicly and personally observed, what I have discussed with companies and policy makers and what I have witnessed online as an internet user, I have personal knowledge of these things.
If we need to hammer out a shared definition of "personal knowledge," maybe you can tell me what you think "personal knowledge" is.
BY MR. LYLE:
Q. Have you had conversations with the individual companies about their efforts?
MR. DISHER: Objection. Form.
THE WITNESS: I have had conversations with employees at these companies about their efforts.

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BY MR. LYLE:
Q. Let's go to 10C. This is the #ClearTheList movement to help teachers clear their online wish lists from platforms like Amazon. "Social media has also enabled Texas country musicians to raise money for teachers."
A. I'm sorry, which paragraph are we in?
Q. 10C. What you describe there, is your knowledge from that -- of that derived from conversations with your own members?
A. I do not precisely recall where my knowledge of this particular instance first arose. This is cited here because it substantiated my awareness of this particular issue.
Q. Let's go to 11B. This is the dark examples of content shared on the darker side of the internet. Videos and propaganda posts by ISIS to the recruit American teenagers.
A. Yes.
Q. Is that something you have knowledge of from conversations with your members?

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A. Yes, with personnel at the member companies.
Q. What about C, fraud schemes that specifically target older adults online? Do you have knowledge of that from conversations with your members?
A. I do not precisely recall where my knowledge of that online fraud arises from.
Q. How about 11D, have you had conversations with your members about the content of that paragraph: Sexual, graphic or otherwise disturbing content?
A. Yes.
Q. What about 11E, content that promotes or glorifies self-harm?
A. Yes.
Q. That's -- do you have knowledge of that from conversations with your members?
A. Yes.
Q. Now, in your declaration, the paragraphs we just talked about, you cite a lot of online articles for that, for the propositions

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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 that embody my general knowledge of trust and safety operations in the industry.

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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.

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THE WITNESS: And so outside of my conversations with counsel, the answer is no.
BY MR. LYLE:
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

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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 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.

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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

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thing, you know, 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

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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.
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

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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.
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

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it's content promoting self-harm, promoting the use of cannabis, celebrating adult content, depictions of extreme violence, all of that may constitute a viewpoint against which a company would be penalized for discriminating under HB20.

BY MR. LYLE:

Q. How would depictions of cannabis constitute a viewpoint?

MR. DISHER: Objection. Form.

THE WITNESS: Depends on the context. But there are certainly some depictions of cannabis that would constitute a viewpoint. It may be -- it may co-occur with the expression of the viewpoint.

BY MR. LYLE:

Q. Can you provide an example where a depiction of cannabis would constitute a viewpoint?

MR. DISHER: Objection. Form.

THE WITNESS: I'd have to

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speculate about scenarios, but I can think of some, yes.

BY MR. LYLE:

Q. Could you describe it, please.

A. A video displaying cannabis in which the content creator extols the use of cannabis would constitute a viewpoint.

Q. Can you provide an example of where a depiction of self-harm would constitute a viewpoint?

MR. DISHER: Objection. Form.

THE WITNESS: A video in which one user shows another user -- shows the viewer how to perform or hide self-harm could be construed as a viewpoint under the vague terms of the statute.

BY MR. LYLE:

Q. Could it also be construed as content, self-harm content?

MR. DISHER: Objection. Form.

THE WITNESS: Potentially. Whose definition of "self-harm content" are we

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using?

BY MR. LYLE:

Q. What about adult content?

A. What about it?

Q. Is that a viewpoint or is that a content?

MR. DISHER: Objection. Form.

THE WITNESS: Under the vague definitions of the statute, there is undoubtedly some adult content that could be construed as a viewpoint. And it may co-occur with promotion of that content, extolling it, saying it is a positive thing. That would undoubtedly be a viewpoint which could be regulated under the statute.

BY MR. LYLE:

Q. Can you provide an example of that?

A. Adult content? I'm going to need a working definition of "adult content."

Q. Say pornography.

A. Do I just --

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MR. DISHER: Objection. Form. Go ahead.

THE WITNESS: Do I know it when I see it?

BY MR. LYLE:

Q. I mean, case law is relatively clear.

MR. DISHER: Is there a question?

MR. LYLE: Yes.

MR. DISHER: What's the question?

MR. LYLE: The question is whether pornography is content or viewpoint.

MR. DISHER: I will object to the form of that question.

THE WITNESS: That question presupposes that one -- a thing cannot be both content and viewpoint, which is a -- a premise that I reject.

BY MR. LYLE:

Q. Are you aware that the Supreme Court of the United States has defined "content" and "viewpoint"?

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MR. DISHER: Objection. Form.
THE WITNESS: I am generally aware of Supreme Court definitions in the First Amendment context.
BY MR. LYLE:
Q. Do you -- is there any reason that CCIA sees the Supreme Court's distinction there as not applying?
MR. DISHER: Objection. Form.
THE WITNESS: It depends on the context in which we are analyzing the -- the statute and the -- the unity between the definitions of content in HB20 and Supreme Court jurisprudence, which is something we have not established.
BY MR. LYLE:
Q. Let's move on to paragraph 16. You talk about how in other circumstances, moderation includes giving users tools to decide for themselves what content they wish to avoid, such as warning labels, disclaimers or general commentary informing the user. How would HB20 prohibit this?

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MR. DISHER: Objection. Form.
THE WITNESS: Well, by one example, allowing users to -- well, all right. I think to give you the most precise answer, I'd like to look at the definition in the statute, if I may.
BY MR. LYLE:
Q. Yes.
A. Yeah. So if -- if the -- just hypothetically, if the service were to provide a means by which a user can not be served up particular categories of content, that, in my view, would create a risk of violation of the statute.
Given its ambiguities, I can't say for certain, but in light of its penalties, that necessarily chills the company's implementation of its trust and safety practices.
Q. So specific to this example, you're saying that HB20 would prevent a company from providing a user tools to curate their own content?
MR. DISHER: Objection. Form.
THE WITNESS: It may prevent it.

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It may also deter it by imposing a severe penalty based on a misinterpretation -- well, an inconsistent interpretation between the company and the court enforcing the statute.
BY MR. LYLE:
Q. All right. Let's go on to paragraph 18. You talk about how "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."
What does that have to do with a viewpoint?
MR. DISHER: Objection. Form.
THE WITNESS: The order in which a service ranks the content that it displays to a user is itself the service's viewpoint about relevance. And

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the notion that some potentially responsive content to the user is less valuable and less relevant to the user's query is potentially discrimination under the vague definitions of the statute. Saying this result is not as responsive as this result could be construed as discrimination.
BY MR. LYLE:
Q. And would that be true in terms of relevance based on, for example, geography?
MR. DISHER: Objection. Form.
THE WITNESS: Potentially. I'd have to think about all those myriad scenarios that would arise.
BY MR. LYLE:
Q. Well, solely geography, relevance based on geography, is that viewpoint?
MR. DISHER: Objection. Form.
THE WITNESS: I'm unwilling to rule out the idea that -- the notion that content might be served up to different

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geographies and would never constitute a viewpoint. I suppose I could construct a hypothetical wherein serving different results based solely on geography would be a viewpoint.
BY MR. LYLE:
Q. Can you provide one?
A. If you give me a few minutes to think about it.
One hypothetical I'll offer is if a service elected to not serve up a particular type of controversial content in a jurisdiction, which was, let's say, presume it to be lawful but politically contentious for that jurisdiction, that geography, not serving that would appear to be, under the terms of the statute, viewpoint discrimination.
Q. What about searching for, say, a piece of furniture to buy? Would the fact that you got a result in your area as opposed to on the other side of the country be viewpoint discrimination?
MR. DISHER: Objection. Form.

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THE WITNESS: That particular scenario, I'm not certain that I can -- I don't want to rule it out, but as a general proposition, I think that's less likely to constitute -- to represent any kind of viewpoint discrimination.
BY MR. LYLE:
Q. In paragraph 19, you talk about how content moderation is an important way that online services express themselves.
How is that content moderation expressive?
MR. DISHER: Objection. Form.
THE WITNESS: Content moderation is expressive because digital services make decisions about the order and arrangement in which they present content to the user. That reflects the service's view as to what is the most relevant and potentially interesting to the user.
It reflects the service's views about what is appropriate and conducive to a healthy community, all the while

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implementing the policies and guidelines and practices that it has. All of those choices, collectively the editorial discretion of the service, is -- are protected under the First Amendment.
BY MR. LYLE:
Q. Does it express the service's view about what will get more user engagement?
MR. DISHER: Objection. Form.
THE WITNESS: In some cases. Not necessarily.
BY MR. LYLE:
Q. In some cases?
MR. DISHER: Objection. Form.
THE WITNESS: In some cases what?
BY MR. LYLE:
Q. The content moderation expresses the service's view of what will get more user engagement.
A. In some cases, content moderation may or may not get more user engagement. That is independent from the service's editorial judgment

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about what it seeks to present to its users. Those two things may overlap. They are independent variables.
Q. How do these services make money?
MR. DISHER: Objection. Form.
THE WITNESS: Which services?
BY MR. LYLE:
Q. Let's just say Facebook, for example.
MR. DISHER: Objection. Form.
THE WITNESS: Facebook has a number of business models, but the majority of its revenues for Facebook, the blue site, are derived from advertising revenue.
BY MR. LYLE:
Q. And how does that work?
MR. DISHER: Objection. Form.
THE WITNESS: How does internet advertising work?
BY MR. LYLE:
Q. Yeah, for Facebook.

MR. DISHER: Objection. Form.
THE WITNESS: Facebook's advertising products are complicated, but at a -- it is a general level. Facebook and many other services allow advertisers to serve up ads on its sites based on metrics and variables to some extent chosen by the advertiser within certain boundaries about what you can and cannot focus your advertising on, and then uses its programming -- these ads are algorithmically served up to the users to whom those advertisements are expected to be most relevant.
When those ads are served, the advertisers effectively pay for it. They will generally pay by impressions, the number of times the advertising is -- you know, will either pay for a period of time or pay for an amount of impressions. It will probably vary product to product and service to service. But those

advertisements are then served up through the platform to the user, and the advertisers pay for that.
BY MR. LYLE:
Q. And is the user engagement on the platform important to those advertisers?
MR. DISHER: Objection. Form.
THE WITNESS: It depends.
BY MR. LYLE:
Q. What does it depend on?
MR. DISHER: Objection. Form.
THE WITNESS: Whether user engagement matters depends on the advertising goals of the particular advertiser.
Some advertisers simply want to raise awareness, in which case the extent to which users are engaging with the content may be less relevant.
Others are looking for activation or -- I'm sorry, user action, which may involve clicking on the ad to continue

through to a product or service or message or other matter.
And so that -- those two variables, those two conditions will change what the advertisers' objectives are. Advertisers, though, are heterogenous. It's difficult to paint them all with one brush.
BY MR. LYLE:
Q. How does HB20 prohibit services from giving their users what they want to see?
MR. DISHER: Objection. Form.
THE WITNESS: In many ways. HB20 prohibits services from discriminating on the basis of viewpoint. Some users may not want to see contents of a particular viewpoint. Some advertisers may not want their brands advertised adjacent to particular viewpoints.
And independently of that, the service may view particular viewpoints as inappropriate or dangerous or harmful to

its community, irrespective of whether or not the content or behavior is legal, and not wish to display that to its users.
All of those decisions are threatened by the vague and ambiguous definitions and the extreme penalties in HB20.
BY MR. LYLE:
Q. The viewpoints now that your members allow on their websites, what is the relationship of those viewpoints to the members? Are they fostering those viewpoints?
MR. DISHER: Objection. Form.
THE WITNESS: I don't believe it's accurate to say companies are fostering viewpoints, no. Companies seek to foster a particular type of community consistent with the Terms of Service and guidelines and commitments it's made to its users. That may have indirect effects on viewpoints.
Companies don't set out -- well,

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in my general understanding, companies aren't setting out to foster viewpoints. They are setting out to provide a service consistent with the representations they've made to their users and their advertisers about what will appear on their service. That, without a doubt, embodies the values of the service, but also the values of the users who are on the service and those of the advertisers who advertise on the service.

BY MR. LYLE:

Q. And that determines what content they let on and what content they don't let on --

MR. DISHER: Objection. Form.

BY MR. LYLE:

Q. -- is that correct?

A. When you say "that," are you referring to all those value judgments that I --

Q. So in order to, as you put it in paragraph 19, foster the kind of community that companies have promised to their users, part of

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this is moderating what content they allow on their service. Is that correct?

A. Yes.

Q. And so there's a value judgment going into the curating of the content; correct?

MR. DISHER: Objection. Form.

THE WITNESS: Companies' curations of -- curation of content, at times, unquestionably reflects a value judgment -- multiple value judgments.

BY MR. LYLE:

Q. And the environments that are created by these services reflect the services' value judgments as well; correct?

A. Among other things, yes.

Q. Can you describe how that content moderation in paragraph 19 occurs with reference to software and to humans?

MR. DISHER: Objection. Form.

THE WITNESS: I believe we touched on this previously, but yeah. As a general matter, when a digital service

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sets out with a new product, they will make design choices, choices about potential risks that the product could present.

BY MR. LYLE:

Q. Let's just start from like when something pops up and it needs to be moderated. What happens? Let's say an image that is inconsistent with -- or may be inconsistent with the service's Terms of Service posted, what happens then?

A. That's not --

MR. DISHER: Objection. Form.

THE WITNESS: That's not really how this works. But I think if you're asking what happens when content or behavior runs against the governance, I think I can answer that question.

Generally speaking, there will be either automated systems or human systems, depending on the nature of the product, the resources that the company

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is able to devote to it, the type of risk and whether or not that risk is something that can easily be automated.

And, additionally, the context dependence of the content, which can be very volatile. So there may be either an automated process that will lead to actioning of content or behavior or it is -- it winds up before a content moderator person, a member of a trust and safety team, either because it's been flagged by a user or because the content moderators themselves observed the content which itself may be a function of an automated system that pops up in the queue.

And then if it's an automated system, the automated system will action the content according to the heuristics that have been established; but almost invariably, that will wind up before a human because even though those

programming decisions were made by humans, the automation process has false positives and negatives which need to be reviewed.

And if it's strictly a human process, we wind up in the same place where moderation action may be taken. It will vary. It could be any number of outcomes based on the -- again, the product and the tools used by the service.

And then based on that action, sometimes users will have an appeal mechanism or a review mechanism, which are not the same thing. And then the service may, you know, respond to that accordingly. Depending on the gravity of the offense, there may be actions taken with respect to the user's account.

BY MR. LYLE:

Q. Is that process expressive?

MR. DISHER: Objection. Form.

THE WITNESS: Yes.

BY MR. LYLE:

Q. How so?

MR. DISHER: Same objection.

THE WITNESS: How are choices about what content to present to your users expressive? They are expressive in the same way that any editorial choice about what to put before a user is expressive.

BY MR. LYLE:

Q. Let's go to paragraph 20. You list here things that social media companies regularly enforce their Terms of Service to remove. You've got illegal nonconsentual intimate imagery, depictions of child sex abuse, calls for genocide, a number of other things.

Does federal or state law prohibit showing any of these categories of content?

MR. DISHER: Objection. Form.

THE WITNESS: Some of the subjects listed in this paragraph may be covered

by federal or state law.

BY MR. LYLE:

Q. Do you know which ones?

MR. DISHER: Same objection.

THE WITNESS: I cannot, sitting here now, speak with complete specificity about every state and federal jurisdiction. However, there are -- a number of these categories, including child sexual abuse, are governed by -- well, are -- the federal law will read upon those categories.

BY MR. LYLE:

Q. Which others?

A. Well --

MR. DISHER: Sorry, what did you say?

MR. LYLE: Which others.

MR. DISHER: Oh. Objection. Form.

THE WITNESS: Wait. Which others what?

BY MR. LYLE:

Q. You said federal -- maybe I misunderstood. You said federal law will what upon the category of child sex --

A. Read on these categories.

Q. What does that mean?

A. By which I mean, depictions of child sex abuse may be broader than the federal definition for CSAM -- for child sexual abuse materials. In other words, the policy may extend to things that are adjacent to but not expressly prohibited by federal law.

Q. Are there any other examples in that paragraph that that is true of?

MR. DISHER: Objection. Form.

THE WITNESS: Yes.

BY MR. LYLE:

Q. Which ones?

A. So --

MR. DISHER: Objection. Form. Go ahead.

THE WITNESS: That's the case for

attempts to sell weapons and drugs. There may be regulated controlled substances or weapons whose sale are restricted by federal or state law in particular contexts, but in many cases, one may find that a service's TOS, Terms of Service, are broader than the federal regulations or state regulations, either because the sense is that better protects user safety or simply for administrability reasons.

BY MR. LYLE:

Q. Let's go on to Paragraph 21. You talk about how "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."

Is it your position that HB20 would prevent a search engine from presenting results in something other than a random or purely chronological order?

MR. DISHER: Objection. Form.

THE WITNESS: No. Do you want to restate that question?

BY MR. LYLE:

Q. So --

(Discussion held off the record.)

BY MR. LYLE:

Q. Is it your contention that HB20 would prevent services from prioritizing what was most relevant in the context of search engines?

MR. DISHER: Objection. Form.

THE WITNESS: It may, in at least some cases.

BY MR. LYLE:

Q. Can you provide some examples of those cases?

A. Where the choice about relevance runs up against a user's viewpoint regulated by -- regulated by HB20.

Q. Such as?

MR. DISHER: Objection. Form.

THE WITNESS: A choice by a

service to expressly downrank hate speech, anti-Semitism, or otherwise violent or vitriolic content directed at a group of individuals, irrespective of its relevance otherwise, could be construed as a violation of the prohibition on viewpoint discrimination and thereby run afoul of the statute.

BY MR. LYLE:

Q. Now, what about examples not involving vitriolic content?

A. Like --

MR. DISHER: Is that the end of your question?

MR. LYLE: Yeah.

MR. DISHER: Objection. Form.

THE WITNESS: Like hate speech or anti-Semitism?

BY MR. LYLE:

Q. Outside of these subject areas.

MR. DISHER: Objection. Form.

THE WITNESS: There are many other

categories of content that a service may choose to downrank whose presentation -- whose -- that may be construed by a user as a viewpoint and whose deprioritization would constitute viewpoint discrimination.

BY MR. LYLE:

Q. Is anti-Semitic speech, in your view, viewpoint or content?

MR. DISHER: Objection. Form.

THE WITNESS: I believe anti-Semitic speech can be both a viewpoint -- it would -- well, as I understand those terms, unless the content -- unless the material that we are speaking about is totally ephemeral, meaning it was never fixed at any point in time for more than a transitory measure, then it would be both content and viewpoint.

BY MR. LYLE:

Q. Let's go on to Paragraph 22.

MR. DISHER: Could we take another break?
MR. LYLE: Yeah.
MR. DISHER: 10 minutes.
THE VIDEOGRAPHER: We are going off the record. This is the end of media Unit No. 2. The time is 4:38 p.m.
(Recess)
THE VIDEOGRAPHER: We are back on the record. This is the beginning of media Unit No. 3. The time is 4:53 p.m.
BY MR. LYLE:
Q. Let's go to paragraph 22 of your declaration, Mr. Schruers.
A. 22?
Q. Yes. Here you say the members of the public associate digital services with third-party content that appears in their service.
A. Uh-huh.
Q. What's the basis for your knowledge of that?
A. Having discussed it with companies,

advertisers. Having observed boycotts. Having observed individual members of the public and policy makers stating as much, among other things.
Q. Is a basis of your knowledge conversations with your members?
MR. DISHER: Objection. Form.
THE WITNESS: Conversations with members inform my view that -- my knowledge that members of the public associate companies with content that appears -- and behavior that appears on their service.
BY MR. LYLE:
Q. Have your members told you that?
A. Some.
Q. What's the basis for your knowledge that advertisers associate digital services with the content that appears on their sites?
A. The same.
Q. Advertisers have told you that?
A. Some.
Q. Your members have told you that?

A. They have, some.
Q. Have you relied on any documents other than what you've produced to form the opinions in paragraph 22?
A. Not expressly that I can recall. But having formed a view over more than 15 years in this industry and observing that advertisers regularly associate -- are concerned about being associated with content that appears adjacent to their brands. There may be some documents that I don't recall that informed of this viewpoint.
Q. But everything that you recall was in the discovery production?
A. Yes.
Q. In paragraph 23 you -- you talk about how a service's policy on sensitive media is as equally expressive as a newspaper's calls about which stories make the front page. And then I'm not going to read the rest of it. And you say that the difference is that online service providers are called upon to make moderation decisions on a vast scale for immense volumes of content.

Is it your contention that that difference is the only difference between the calls social media services make as to what sensitive media to display and what a newspaper's editorials show?
MR. DISHER: Objection. Form.
THE WITNESS: My contention is that it is a difference. I do not think saying the difference is equivalent as saying the only difference.
BY MR. LYLE:
Q. What are the -- what are the other differences?
MR. DISHER: Objection. Form.
THE WITNESS: There are technological differences. There are timing differences. Digital services are generally making decisions in a very short time span. They are expected to get it right, where "right" is a highly subjective notion. They manifest those decisions in digital form online. Newspapers may only manifest those

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decisions in print, although recognizing that many newspapers also have websites.
BY MR. LYLE:
Q. Are newspapers protected under 230 of the Communications Decency Act?
MR. DISHER: Objection. Form.
THE WITNESS: Insofar as they are performing functions that are consistent with being an interactive computer service, yes, they are.
BY MR. LYLE:
Q. Functions that are not consistent with being an interactive computer service, are they protected for those?
MR. DISHER: Objection. Form.
THE WITNESS: Section 230 only -- Section 230's protections only apply to interactive computer services.
BY MR. LYLE:
Q. So newspapers' activities that are not part of interactive computer services are not protected by 230; correct?

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MR. DISHER: Objection. Form.
THE WITNESS: Insofar as a newspaper is not behaving as an interactive computer service, it is not protected by Section 230.
BY MR. LYLE:
Q. And what are those 230 protections from? Are they --
MR. DISHER: Objection.
BY MR. LYLE:
Q. -- from liability for third-party content?
MR. DISHER: Objection. Form.
THE WITNESS: Section 230 generally protects interactive computer services from liability for third-party content, yeah.
BY MR. LYLE:
Q. The same scale that you refer to in Paragraph 23 that online services must make moderation decisions for, is that huge scale also a source of huge revenue and resources for these

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companies?
MR. DISHER: Objection. Form.
THE WITNESS: It depends.
BY MR. LYLE:
Q. What does it depend on?
MR. DISHER: Objection. Form.
THE WITNESS: Among other things, how they choose to -- if -- including if they choose to monetize that service.
BY MR. LYLE:
Q. Do some choose to monetize that service?
A. Yes.
Q. What's an example of your member -- of a member of yours who has huge scale and attempts to monetize that service?
A. Define "huge."
Q. Well, what you're referring to here as "vast scale."
A. Okay. Is the scale within the scope of Paragraph 23?
Q. Yes.

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A. I think many of my member companies have the scale contemplated in Paragraph 23, including some who have already been described in the declaration, like Google and Facebook.
Q. And do Google and Facebook choose to monetize content?
MR. DISHER: Objection. Form.
THE WITNESS: Google and Facebook -- some -- some products. They -- do they -- I don't think it's accurate to say they monetize content. They monetize the product. There may be content presented within the product.
BY MR. LYLE:
Q. Let's go to paragraph 24. You have some numbers in here about the billions of people in the Facebook community, the number of stories, the active stories on Instagram. Are the various hard numbers you provide in paragraph 24 subsections pulled from the articles you cite?
A. I believe these numbers were pulled directly from Facebook transparency reports and

other public accounts. Other -- I'm sorry, other accounts to the public by Facebook.
Q. And are those cited here in your declaration or not?
A. I'm referring to the numbers cited in the declaration.
Q. But the citations for those numbers, are those --
A. Yes, yes.
Q. Okay. Those are in the declaration?
A. Indeed. Generally speaking, the footnotes here, 38 to 41.
Q. That information in the subsections of paragraph 24, how did each of those companies get that information?
A. I am not a content moderator for these companies. While I have a broad knowledge of how content moderation practices as a subset of trust and safety are implemented across the entire industry, I don't have granular visibility into their transparency and public accounting processes other than what I see as a member of the industry

association and in my role at DTSP and in my conversations with the companies.
But I cannot answer the question how did each company go about gathering this data other than to say that it is gathered as a part of its trust and safety or equivalent practice.
Q. Do you know how long it took them to gather it?
MR. DISHER: Objection. Form.
THE WITNESS: Other than that this kind of reporting is resource intensive, no.
BY MR. LYLE:
Q. Do you know who was responsible for compiling it?
MR. DISHER: Objection. Form.
THE WITNESS: Compiling the numbers described here in the declaration?
BY MR. LYLE:
Q. Yes.
A. I know the teams. I am aware of the

teams and divisions which are generally either the trust or trust and safety or content moderation teams of these companies traditionally are those charged with implementing and executing their transparency efforts.
Q. And did the companies do it internally?
MR. DISHER: Objection. Form.
THE WITNESS: As opposed to what?
BY MR. LYLE:
Q. Having an outside party.
MR. DISHER: Same objection.
THE WITNESS: I cannot rule out that some companies may have outside parties.
BY MR. LYLE:
Q. Are you aware of any companies having outside parties compile this information?
A. I am aware that some companies utilize contractors in their trust and safety practices. And those contractors, as one of their many responsibilities pursuant to the contract, may

have a data collection responsibility and a reporting function.
Q. Which companies are those?
A. At this moment, I could not say. Over time, I know as a fact that Facebook has utilized about third-party contractors in its trust and safety plan -- trust and safety practices.
Q. Do you know the names of any of those third-party contractors?
A. Not sitting here now, no.
Q. Do you know how much it cost the companies to compile that information?
MR. DISHER: Objection. Form.
THE WITNESS: Enough that smaller companies find transparency reporting to be a challenging endeavor. Beyond that, no.
BY MR. LYLE:
Q. What about larger companies? Do they find it to be a challenging endeavor?
A. It is certainly a costly and time-intensive undertaking. It is a challenging

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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.
A. Uh-huh.
Q. Sorry? Is that a "yes"?
A. Yes, I hear you and I agree, they do.

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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

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companies who offer user-facing 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

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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 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

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 exiting the marketplace rather than attempting to comply with the statute.

BY MR. LYLE:

Q. Which -- which members would that

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:

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

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

reporting?

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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whole process of user engagement and, I mean, figuring out like where their algorithms have gotten it right to increase user engagement and where they haven't?
MR. DISHER: Objection. Form.
THE WITNESS: Not necessarily.
BY MR. LYLE:
Q. So a company sort of tracking how it's deprioritized things doesn't play into its ongoing attempt to curate its content?
MR. DISHER: Objection. Form.
THE WITNESS: I'm not sure I know what you mean by "playing into."
BY MR. LYLE:
Q. So if, for example, a company instructs an algorithm that deprioritizes a certain kind of content. They wouldn't keep a record of that for terms of -- for purposes of tweaking the algorithm in the future to see if that kind of deprioritization worked, for lack of a better word?
A. They may. There is no guarantee that they do or that, if they do, that this

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information could be reported in any meaningful manner to the State of Texas --
Q. But do you --
A. -- twice a year.
Q. Do they keep the records?
MR. DISHER: Objection. Form.
THE WITNESS: Do who keep what records?
BY MR. LYLE:
Q. The services of deprioritizing certain kinds of content.
A. I can't speak to that across all companies or without knowing what types of content we're talking about.
Q. How about Facebook? Does it keep records of what it deprioritizes?
MR. DISHER: Objection. Form.
THE WITNESS: I can't speak specifically to Facebook's internal implementation of its trust and safety practices.

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BY MR. LYLE:
Q. Is that because you don't know the answer?
A. Yes. I do not have that level of granular visibility into their policy implementations.
Q. Is that true of YouTube as well?
A. It is the same for YouTube.
Q. What about Twitter?
A. Likewise.
Q. Let's go to paragraph 31 where you talk about much of moderation must be done algorithmically because of the scale.
MR. DISHER: Sorry, what paragraph?
MR. LYLE: 31.
BY MR. LYLE:
Q. What's -- what's the basis of your -- for your knowledge of that to make that claim?
A. Discussions with industry experts, familiarity with the operational literature on

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content moderation and trust and safety practice. My general knowledge of being in this space for many years and helping to found the Digital Trust & Safety Partnership. And my basic observation, like anyone else, that there is a very large amount of content and behavior on nearly all the services that we're talking about.
Q. And is that true of the basis of your knowledge that algorithmic processes are needed to screen content?
A. Can you point to me where in the declaration I say they are needed?
Q. Well, "the capacity to make moderation decisions algorithmically in the first instance is vitally important to many services offered by CCIA members" and its moderation of incalculable content online. There.
MR. DISHER: I'm sorry, where are you reading?
MR. LYLE: So 32, the first two sentences.
THE WITNESS: I do not agree that

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algorithmic is needed in all instances.
And, in fact, some services do rely principally on human moderation or community moderation.
BY MR. LYLE:
Q. Which services are those?
A. It can vary from product to product over time, but although they are not a CCIA member, Reddit is frequently pointed to as the service who most directly utilizes community moderation.
Q. Of your members, which ones principally rely on nonalgorithmic moderation?
MR. DISHER: Objection. Form.
THE WITNESS: Well, they all rely on human moderation in conjunction with algorithmic software code-driven processing. Are you asking me about exclusively?
BY MR. LYLE:
Q. Well, which are the ones that must do much of their moderation algorithmically in order to function that you referred to in

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Paragraph 31?
A. In that case, I think that statement accurately describes products, although not all products, offered by Google -- at least some products offered by Google, Facebook, Apple, Amazon, Twitter, Pinterest and others.
Q. Go to Paragraph 35, please. The one that begins with "H.B. 20 bans 'censorship' of 'viewpoint.'"
A. Yes.
Q. When your members ban Taliban extremist content, is that banning based on viewpoint?
MR. DISHER: Objection. Form.
THE WITNESS: Yes.
BY MR. LYLE:
Q. What about when they ban medical disinformation aimed at the public by foreign government propagandists?
MR. DISHER: Objection. Form.
THE WITNESS: What about it?

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BY MR. LYLE:
Q. Is that discrimination based on -- is that banning based on viewpoint?
MR. DISHER: Same objection.
THE WITNESS: Can you restate that question.
BY MR. LYLE:
Q. So when your members ban medical disinformation aimed at the public by foreign government propagandists, is that a ban based on viewpoint?
MR. DISHER: Objection. Form.
THE WITNESS: It is a ban that -- it -- it is banning content based on the viewpoint the content expresses.
BY MR. LYLE:
Q. And when your members allow viewpoint -- or they allow content, is that allowing content based on the viewpoint the content expresses?
MR. DISHER: Objection. Form.
THE WITNESS: Not necessarily.

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BY MR. LYLE:
Q. Is it sometimes?
A. In some cases.
Q. Let's go to paragraph 36. This talks a bit about platforms appending warning labels. If the term "discrimination" was eliminated from HB20, is there anything else in the language of HB20 that you contend eliminates the ability to attach warning labels or other tags to user-generated content?
MR. DISHER: Objection. Form.
THE WITNESS: Can you point me to where the statute uses the word "discrimination."
BY MR. LYLE:
Q. Yeah, just a second. It's 143A.001(1). Subsection 1.
A. You'll forgive me if I haven't memorized the statute. Is this the only instance of "discriminate" in the statute?
Q. Yeah.
A. Okay. And your question -- I'm

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sorry. Now that we've identified what we're talking about, can I ask you to restate the question?

Q. Yeah. If the term "discrimination" were eliminated, is there anything else in the language of HB20 what you contend eliminates platforms' ability to attach warning labels or other tags to user-generated content?

MR. DISHER: Objection. Form.

THE WITNESS: Yes.

BY MR. LYLE:

Q. What?

MR. DISHER: Objection. Form.

THE WITNESS: Is your question what else in the statute?

BY MR. LYLE:

Q. Yes.

A. What else in the statute what?

Q. What else in the statute prevents services' abilities to attach warning labels or other tags to user-generated content other than discrimination?

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MR. DISHER: Objection. Form.

THE WITNESS: I got it. Thank you. I believe denying -- at the least, denying equal access or visibility to would -- could be interpreted to read on attaching warning labels. And, of course, warning labels may sometimes involve interstitials where the content is blurred. Some users may find this content emotionally troublesome and whatnot. And so at the least, denying equal access or visibility to would also implicate warning labels and interstitials.

Q. Is there a way to attach warning labels to user-generated content that doesn't deny visibility?

MR. DISHER: Objection. Form.

THE WITNESS: I think that would require me to guess what a Texas court would interpret, you know, "deny visibility" or "reduce visibility to."

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BY MR. LYLE:

Q. Well, in your view, would a -- would a warning label appearing in a scrolling sidebar, for example, deny visibility in a way inconsistent with the statute?

MR. DISHER: Objection. Form.

THE WITNESS: We're now, you know, constructing a hypothetical product which may or may not be in the marketplace. And that doesn't really seem to be consistent with my understanding of how companies label or provide interstitials to content.

But as I understand your question, it is: Does putting a label in the sidebar adjacent to the content constitute denying visibility?

I think I'd have to decide what a Texas court is likely to think that that means. I don't know that I'm comfortable predicting what a Texas state court would interpret "deny visibility to" means.

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BY MR. LYLE:

Q. Well, in your view, is there a difference between the extent to which just -- a user's -- is there a difference in a user's experience of content with which they're interacting when the warning label is in a scrolling sidebar or if it's actually, like, interfering with their viewing of the content?

MR. DISHER: Objection. Form.

THE WITNESS: Yes. You have described two different product experiences.

BY MR. LYLE:

Q. Okay. Go to paragraph 38, please. You talk about decisions to remove a particular item of content uploaded by a user.

A. Uh-huh. Yes.

Q. Are those -- when you say "decisions," are those decisions made by a computer or by a person?

MR. DISHER: Objection. Form.

THE WITNESS: It depends. It

could be both or either. Ultimately almost all computer-implemented decisions reflect human input at the front end to produce the results.

BY MR. LYLE:

Q. Can you explain that?

A. Generally speaking, when a software -- machine-based content moderation is deployed, there are choices made at the front end by the trust and safety or equivalent team about how to populate the variables in that machine-based system, how it will work.

Those choices reflect the human team's efforts to implement the governance. And then the system effectuates those -- those viewpoints of the personnel, and it tends to be an iterative process.

Q. Meaning?

A. "Iterative" meaning you do it once, you look at the results you're getting, you go back, you do it again, and the cycle repeats potentially ad infinitum.

Q. "You" meaning the human?

A. The trust and safety team that is programming the machine-based system that supports their work.

Q. So when I asked you who is making the decision, a computer or machine, you said it could be both or it could be either. Was that an example you just gave me of where it's both?

A. Ultimately all decisions are made by the humans. The machines simply are effectuating through their programming those decisions. So in the moment, the decision might be a machine-implemented decision, but that is just one instantiation of the choice the programmers made.

Now, you could also have programmers going into the back end of the system and saying, our automated filtering technology is generating false positives or negatives for a copyright protection technology that we have licensed, and we need to fix that to prevent these false positives.

And they might individually restore or remove content based on whether it's a false positive or negative. That's happening

concurrently with the development of the programming.

Q. Let's go to paragraph 43, please. This paragraph talks about the requirement for a report dealing [sic] every piece of content over which a covered member upheld its policies. Do you see the one I'm talking about?

A. I do, yes.

Q. How is that different from what you described the companies as doing in 24A to 24E where some of the members' efforts to, you know, suspend accounts and other -- and remove channels are detailed?

MR. DISHER: Objection. Form.

THE WITNESS: They're totally different. 24A refers to the enforcement. Paragraph 43 refers to reporting on the enforcement. Those are apples and oranges.

MR. LYLE: Right. But aren't 24A to 24E, these are reports of enforcement; right?

MR. DISHER: Objection. Form.

THE WITNESS: These are numbers. "No" is the answer. No, these are not. These are not reports of enforcement.

BY MR. LYLE:

Q. Okay. So could you describe the difference, please.

A. Paragraph 43 of the declaration refers to a report detailing every piece of content over which policies were implemented, which would include such things as are defined in Section HB 20.

What is described in paragraph 24 are top-level aggregate numbers for content, particular classes of policy enforcement with respect to particular types of content on some products.

Q. The requirement you describe in 43, could -- could an algorithm be created to perform that function?

MR. DISHER: Objection. Form.

THE WITNESS: I don't know, but assuming that it were possible, it would

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be -- it would impose the same costs that we're talking about here. But I don't know that such a thing would be possible.
BY MR. LYLE:
Q. The same costs as what?
A. The -- the burden that we've been discussing through the course of our conversation today.
Q. Let's go to paragraph 44 where you discuss the notice requirement.
A. Yes.
Q. So as it stands now, can your members send notices to users?
A. Define "can." Are they -- do you mean are they capable of --
Q. Is it something they ever do?
A. Some companies will provide some form of notice to users based on moderation decisions.
Q. And how -- how is it typically done?
A. It varies based on the product and the service. In some cases, an email could be sent

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to the address on file. In other cases, the user might receive a message in an in-product inbox. The product may simply be tombstoned, which is a term meaning that there is a notification placed on the content. One example of this would be YouTube videos that are removed for copyright violations, and you'll see the little red box with the frown face saying this content was removed due to a copyright complaint by XYZ. Those are in-product notifications.
But, you know, given the diversity and size and scale of industry and the heterogeneity of the products, it's difficult to speak uniformly about how they notify users as to content removal.
Q. How would complying with HB20's notice requirement require your members to do something different from what you just described?
A. What I described was for some classes of content removal in some products. HB 20 doesn't just refer to content removal. It also refers to demonetization, deprioritization, addition of an assessment, suspension, removal or

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any other action.
I think informing users of any other action you took after viewing content would be far more burdensome than putting up a YouTube tombstone notice when you took something down because it algorithmically was determined to violate a copyright hash.
Q. Could an algorithm be created to fulfill this notice requirement?
MR. DISHER: Objection. Form.
THE WITNESS: I don't know, but I doubt that it could be done in any reliable way that would satisfy compliance with the statute. And if in some moonshot universe that were possible, it would be extraordinarily expensive to operationalize.
BY MR. LYLE:
Q. Do algorithms currently fulfill the function of, say, tombstoning YouTube videos?
A. When -- if -- in that particular context, the narrow context of copyright hash

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resolution, it is highly automated and still not without substantial error costs. But it can be highly automated because there are licensable databases of copyright hashes that can be matched against an ingest filter and the content can be compared against that hash database with relatively high clarity against certain ranges of tolerances, and if there's a hit, automatically either prevent the content from being uploaded, in which case the user gets a notice before it's even posted, or perhaps it wasn't filtered at ingest for any number of reasons, but then subsequently is discovered. When that happens, it is my understanding that that particular process is highly automated.
Q. What about the other examples you've described of sending notices to users?
MR. DISHER: Objection. Form.
THE WITNESS: No. Copyright is perhaps the most -- well, it is certainly one of the most automatable systems because there are identifiable databases that can be supplemented and do not

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change. There are general, albeit disputed, notions around the ranges of tolerance that can be used for implementing those databases. And even there, there are tons of error costs that affects users, individual users and Heads of State. And that still requires human intervention on the back end to address the error cost.

BY MR. LYLE:

Q. Let's go to paragraph 46. This is where you talk about how a substantial proportion of the value provided to users is the service's arrangement of information in the way it provides the sort of content and experience that the user is seeking.

How -- how do your members know when they've given the user what the user is seeking?

MR. DISHER: Objection. Form.

THE WITNESS: One never knows that you've met a user's preferences unless they explicitly tell you, but it can be

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inferred based on users' behavior.

BY MR. LYLE:

Q. How -- how is that? Can you explain that process?

MR. DISHER: Objection. Form.

THE WITNESS: The extent to which they continue to use the product. Perhaps they leave positive reviews in other contexts. Other indirect indicia: Site traffic, time on site. Various analytical variables that are used in the internet community to assess user engagement.

BY MR. LYLE:

Q. Which of what you just -- okay. So user -- does user engagement bear any relationship to advertising revenue?

A. It can. Yes.

Q. Where -- where?

MR. DISHER: Objection. Form.

THE WITNESS: All else equal, a more -- the more a user engages with the

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site, the more likely they will be to -- well, I should say this applies for advertisement-based services. If it's monetized through a different model, then we would have to talk about that.

But assuming we're talking about an advertisement-based service, user engagement increases the likelihood that the site can serve to the user advertisements that are relevant to the user's interests with which the user may interact. And that is a -- when that happens, the matchmaker function of the platform has been achieved, and that is value to the user. That is what a ad-supported digital service looks to do.

BY MR. LYLE:

Q. And is it true that higher rates of user engagement appeal to the advertisers that are paying to place their ads there?

MR. DISHER: Objection. Form.

THE WITNESS: In many contexts,

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not necessarily all.

BY MR. LYLE:

Q. What kind of efforts did CCIA make when HB 20 was in the legislative process against it?

A. Because that advocacy was not within the scope of my declaration, I cannot, off the top of my head, tell you precisely what the association did. However, in the -- the association, at the least, may have issued public statements about the statute.

Q. Did the association issue public statements?

A. I'd have to go back and verify. I believe we did, but I do not precisely recall.

Q. Did the association do anything more?

A. I believe we did, but I do not precisely recall the scope of our advocacy ex-ante.

Q. So you're not going to describe any more advocacy actions CCIA took with respect to HB 20 apart from they issued public statements?

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MR. DISHER: Objection. Form.
THE WITNESS: I can only describe to you what I remember.
BY MR. LYLE:
Q. Did CCIA provide funding to opposition groups?
A. Define "opposition groups."
Q. Groups opposing the bill.
MR. DISHER: Objection. Form.
THE WITNESS: The association did not provide funding to any organization with the instruction that it should oppose the bill.
BY MR. LYLE:
Q. Did CCIA provide funding to any organizations that did oppose the bill?
A. The association supports a variety of entities in its role, and I'm not in a position to tell you what each and every one of those people may have said about the statute.
Q. Do you know if CCIA provided money to any organization that opposed the bill?

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A. To my knowledge, I am not aware of any organization that the association has supported that opposed the enactment of the bill.
Q. What about opposing various provisions of the bill?
A. The same. To my knowledge, no.
Q. Did CCIA provide funding to any legislators?
A. Funding?
Q. Yes, like campaign contributions.
A. Ah. That's a little bit different. In Texas, no.
Q. Anywhere else?
A. The association itself does not provide campaign contributions to anyone. The association has an associated PAC which may provide contributions. That PAC has made no contributions to state legislators in Texas.
Q. What is the name of that PAC?
A. CCIA PAC.
Q. Who has it made contributions to in connection with HB 20?

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A. In connection with --
MR. DISHER: Go ahead.
THE WITNESS: In connection with HB 20? No one.
BY MR. LYLE:
Q. Are there any attempts to kill HB 20 in any way that we haven't discussed that CCIA or the CCIA PAC engaged in?
MR. DISHER: Objection. Form.
THE WITNESS: Excluding this lawsuit?
BY MR. LYLE:
Q. Yeah.
A. Define "kill."
Q. To prevent the bill from being passed.
A. Outside of what we have discussed here, I'm not aware of the association having taken any other steps but for this litigation.
Q. What about the CCIA PAC?
A. The PAC only contributes to federal candidates at present, and sparingly so.

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Q. What attempts has CCIA engaged in to alter the text of HB 20?
A. Other than this lawsuit?
Q. Yes.
A. Other than this lawsuit and any public statements the association may have made prior to enactment and potentially some public correspondence that I may or may not recall, nothing.
Q. Okay. So no other lobbying activities?
A. Not to my recollection.
Q. Do you know the specifics of how each one of your members' algorithms works to moderate content?
MR. DISHER: Objection. Form.
THE WITNESS: I cannot speak to the specifics of each member's machine-implemented policies, assuming that's what you mean by "algorithms," in content moderation. I understand them at a general level as an industry executive

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and expert.
BY MR. LYLE:
Q. Are there significant differences between them, company to company?
A. There can be. They vary based on -- their sophistication varies based on the size and resources of the company. What they operate against based -- varies based on the underlying governance which, as we've discussed, can vary considerably based on the kind of products, the user base, the type of community that the service is attempting to cultivate with that product or products. It's difficult to paint them all with one brush.
Q. When did NetChoice and CCIA enter into a common interest agreement?
A. I cannot tell you the date of that agreement off the top of my head. But prior to planning for this lawsuit.
Q. Do you have any estimate as to how many -- was it like a year, a year or more?
A. I don't recall.

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Q. Two years or more?
A. Probably not more than two years.
Q. How certain are you about that?
A. On a scale of 1 to 10?
Q. Yes.
A. Like two years, I'd say like nine.
Q. Okay. Was it as recently as six months ago?
A. I don't recall.
Q. Three months ago?
A. I am terribly busy, and I do not have the ability to pluck dates like this out of my memory. I applaud those of you who do.
Q. So you're declining to give even an estimate of when you entered into a common interest agreement with NetChoice?
MR. DISHER: Objection. Form.
THE WITNESS: I cannot provide you an accurate assessment, and I'm declining to give you an inaccurate one.
BY MR. LYLE:
Q. Was it prior to CCIA's litigation in

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Florida?
A. The common interest agreement predated the litigation in Florida.
Q. Should CCIA be seen by the public as agreeing with the viewpoints expressed by its members?
MR. DISHER: Objection. Form.
THE WITNESS: In some cases, but not all cases.
BY MR. LYLE:
Q. Which cases?
MR. DISHER: Objection. Form.
THE WITNESS: Our members express many viewpoints. They are a very heterogenous group. The association does not endorse any and all messages that its members make. Much of what they say is irrelevant to the association's advocacy on behalf of the technology sector.
Insofar as the member companies' viewpoints are consistent with the association's advocacy for open markets,

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open systems and open networks, then perhaps; but I think it is a mistake to assume that the association is invariably aligned with its members. But it seeks to advocate to advance that mission and industry's general interests and the interests of their users.
BY MR. LYLE:
Q. Are there any of your members whose views you would view CCIA would like to be seen as endorsing?
MR. DISHER: Objection. Form.
THE WITNESS: I don't believe the association's role is to endorse members' opinions, and I do not set out or get up in the morning looking to endorse what companies say. The association seeks to foster its mission, the users -- the interests of -- of industry and its users.
BY MR. LYLE:
Q. Are there entities that have sought

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membership in CCIA who you have not allowed in because you want to be disassociated from --
MR. DISHER: Objection. Form.
Q. -- that they expressed?
MR. DISHER: Objection. Form.
THE WITNESS: Albeit not in recent memory, there have been instances that I do not precisely recall wherein the companies pursuing membership have been rejected.
BY MR. LYLE:
Q. Do you remember who those were?
A. Not -- not all of them specifically. I do know that perhaps within the last decade, the association refused an application for membership by Huawei.
Q. By who?
A. Huawei.
Q. If Porn Hub applied for membership in CCIA, would CCIA accept their application?
MR. DISHER: Objection. Form.
THE WITNESS: The application

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process involves the leadership recommending membership to the board and approval by the board. I only control one of those two phases. I cannot speak to what the board would do.
BY MR. LYLE:
Q. Would you, in your phase of assessing membership, accept Porn Hub as a member?
A. That is a very --
MR. DISHER: Objection. Form.
THE WITNESS: That's an interesting question. I think it would -- it would depend on the circumstances, but my instinct is that notwithstanding the legality of its content, that an adult service could generate brand damage for an association like mine.
MR. LYLE: So would you recommend they be accepted or not?
MR. DISHER: Objection. Form.
THE WITNESS: Predicting the

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future, sitting here today, if I were to receive an application from Porn Hub, I believe I would recommend the board not entertain it.
BY MR. LYLE:
Q. What about Alt Right chat rooms like 4Chan, what would your recommendation there be as far as accepting them as a member?
MR. DISHER: Objection. Form.
THE WITNESS: It would depend on whether or not the service indicated that they were willing to subscribe to the mission and support the association's advocacy.
BY MR. LYLE:
Q. How could they credibly indicate that to you?
MR. DISHER: Objection. Form.
THE WITNESS: Are you suggesting that they don't have the credibility to make that representation?

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BY MR. LYLE:
Q. No, I'm just asking you.
MR. DISHER: Same objection.
THE WITNESS: It would require a series of conversations and some discussions about how a particular company pursues public policy and what policies it pursues and expects to pursue.
BY MR. LYLE:
Q. All right. Let's go back to your declaration generally. Can you give me the names, please, of everybody that was involved in the preparation of your declaration?
A. Including counsel?
Q. Yes.
MR. DISHER: Just to be clear, I'll instruct you not to answer the substance of those conversations, but simply to identify who you talked to or may have talked to about the declaration, I'll allow.

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THE WITNESS: The declaration was -- was prepared -- I spoke with our senior policy counsel in the preparation of the declaration.
BY MR. LYLE:
Q. What's his or her name?
A. Ali Sternburg. And I think as well as members of our outside counsel at Lehotsky Keller.
Q. Which people?
A. I have to think. Counsel here, Todd Disher. I don't precisely recall which other members of the Lehotsky team I spoke with in preparation of this -- the declaration.
Q. Do you remember how many you spoke with?
A. Not precisely.
Q. So apart from Mr. Disher, these few members of Lehotsky that you don't remember, and Ms. Sternburg, did you speak to anyone else about your declaration?
A. Not that I recall, no.

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Q. Did anybody else see drafts of your declaration?
A. Not that I'm aware of.
Q. Did you correspond with anybody else about your declaration?
A. Outside of counsel?
Q. Outside of the people you've just described.
A. Not that I recall.
Q. Do you remember when you spoke to each of these people?
A. Within two to three weeks prior of the filing of the Complaint.
Q. How many revisions did your declaration go through?
MR. DISHER: No, I will instruct you not to answer that question.
MR. LYLE: That doesn't have to do with communications, though.
MR. DISHER: It does, in fact, have to do with communications. You're getting into what we might or might not

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have told him, what we might or might not have provided him in terms of attorney work product.
So to the extent you want to ask him who he talked to, that is totally fine. To the extent you want to ask him what input he was provided by his counsel on his declaration, that is absolutely protected, and I will instruct the witness not to answer those questions.
MR. LYLE: Mr. Disher, I'm asking for the number of revisions, which has nothing to do with the content of your communications.
MR. DISHER: It does indeed, because purely the simple fact that you're implying there was any revisions reveals communications that he might or might not had with counsel in addition to work product that counsel might or might not have provided to him.
So I absolutely will shut down

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this line of questioning right here. You're entitled to know who he talked to and when he talked to us, but you're not entitled to know anything related to the substance of those communications, including if there were -- the mere fact of whether there were or were not revisions to his declaration.
That is privileged. And, quite frankly, we've allowed you quite a bit of leeway, but this is where we draw the line, and this is where I instruct the witness not to answer.
MR. LYLE: Our position is that the question about the number of drafts the declaration went through doesn't speak to content and is not privileged and that your objection is improper.
MR. DISHER: I disagree.
MR. LYLE: We're going to preserve it.

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BY MR. LYLE:
Q. To form the opinions you express in your declaration, what -- what did you consult apart from the people that we've discussed?
A. Let's see. I consulted the bill. I, as we've discussed, consulted with counsel. I consulted the documents in the Florida litigation. And generally my memory of industry practice and how these processes work. I consulted the documents that are cited in the footnotes to the declaration insofar as they substantiate the assertions that I'm making in the declaration.
Q. Did you consult any documents that you didn't produce?
A. Not other than what I've listed.
Q. Did you consult anything not produced to refresh your memory of 15 years of industry practice?
A. Not that we haven't produced.
MR. DISHER: Let's take a quick break.
THE VIDEOGRAPHER: We are going

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off the record. This is the end of media Unit No. 3. The time is 6:07 p.m.
(Recess)
THE VIDEOGRAPHER: We're back on the record. This is the beginning of media Unit No. 4. The time is 6:12 p.m.
MR. LYLE: Pass the witness.
EXAMINATION BY
MR. DISHER:
BY MR. DISHER:
Q. Mr. Schruers, I just have a few questions for you. Thank you for your time today so far.
Earlier today you mentioned fostering specific viewpoints and content moderation generally. I just want to be clear about one thing.
In your opinion, are content moderations -- excuse me, are content moderation decisions expressive?
A. Yes, unquestionably.
Q. What are your members trying to

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express when they make those content moderation decisions?
A. They are attempting to express the values embedded in their policies and to deliver on the commitments that they've made to their users about the kind of community, the kind of content that those users can expect in the -- in the product.
MR. DISHER: Thank you. I have nothing further.
THE VIDEOGRAPHER: We're off the record at 6:13 p.m. And this concludes today's testimony given by Matthew Schruers.
(Proceedings adjourned at 6:13 PM)

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DISTRICT OF COLUMBIA: SS
I, Barbara Moore, a Registered Court Reporter of the District of Columbia, do hereby certify that these proceedings took place before me at the time and place herein set out, and the proceedings were recorded stenographically by me and this transcript is a true record of the proceedings.

I further certify that I am not of counsel to any of the parties, nor an employee of counsel nor related to any of the parties, nor in any way interested in the outcome of this action.

_____
BARBARA MOORE, CRR, RMR

_____
My Commission Expires:
July 31, 2023