No. 21A720

IN THE

Supreme Court of the United States

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

v.

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

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

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE CATO INSTITUTE IN SUPPORT OF APPLICANTS' EMERGENCY APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION PENDING RESOLUTION OF APPEAL IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND DISPOSITION OF A TIMELY PETITION FOR WRIT OF CERTIORARI

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May 18, 2022

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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

Pursuant to Supreme Court Rules 22 and 32(b), the Cato Institute respectfully moves for leave to file as amicus curiae the accompanying Brief of Law. The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Cato's only interest in this matter is the proper application of First Amendment principles to online media, a critically important issue in the digital age.

In light of the anticipated expedited briefing schedule set by the Court, it was not feasible to give the parties 10 days' notice of the filing of this brief. Both parties have consented to the filing of this brief without such notice.

This Court has long acknowledged that the First Amendment protects private platforms' right to decide what content they host, and lower courts have consistently applied the First Amendment's protections specifically to social media platforms. The Fifth Circuit panel's one-sentence stay departs sharply from that status quo, and abruptly eviscerates Applicants' members' well-established right to make this editorial judgment. Amicus seeks to support Applicants' showing that vacating the Fifth Circuit's stay of the district court's preliminary injunction is necessary to maintain the status quo and to protect the public interest in beneficial use of the

platforms. Because amicus believes it can help shed timely light on the issues raised by Applicant's emergency stay application, it requests leave of the Court to file the accompanying brief.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual Cato Supreme Court Review. This case interests Cato because it concerns the application of basic First Amendment principles to social media, a critically important issue in the digital age.

SUMMARY OF THE ARGUMENT

To stop social media platforms from purportedly discriminating against conservative speech, Texas passed HB20, which prohibits platforms from removing almost any lawful content users post. Applicants challenged HB20 immediately following its passage, and the district court issued an opinion preliminarily enjoining the Texas attorney general from enforcing it. Then, last Wednesday night, a divided Fifth Circuit panel issued a one-sentence order granting a stay motion filed by the Texas attorney general five months earlier, allowing him to immediately enforce HB20.

This Court has long acknowledged that the First Amendment protects private platforms' right to decide what content they host. *Miami Herald Pub. Co. v. Tornillo*,

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[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than amicus made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

418 U.S. 241, 258 (1974) (finding that "[t]he choice of material . . . the decisions made as to limitations on the size and content . . . and treatment of public issues and public officials—whether fair or unfair" constitute protected editorial judgment); *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (finding the First Amendment applies with full force to internet media). Lower courts have consistently applied the First Amendment's protections specifically to social media platforms. *See, e.g.*, *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021) (preliminarily enjoining Florida's "Stop Media Censorship Act" because plaintiffs would otherwise suffer irreparable injury to their protected editorial judgment); *La'Tiejira v. Facebook, Inc.,* 272 F. Supp. 3d 981 (S.D. Tex. 2017) (finding that the First Amendment extends to social media networks). Departing sharply from that status quo, the Fifth Circuit's stay abruptly eviscerates platforms' well-established right to choose what they host.

Applicants' request for an emergency vacatur of the Fifth Circuit's stay should be granted to preserve the status quo, pending appeal, and to protect the public interest in beneficial use of the platforms. Under HB20's viewpoint neutrality mandate, platforms will face liability for removing even horrific and harassing content—like animal torture, pro-terrorism material, and racial epithets—because doing so would qualify as illegal viewpoint discrimination. The public interest is harmed by allowing the law to go into effect because most users do not want to see animal abuse, terrorist recruitment material, or racial slurs when they go on Facebook, nor do Facebook and other social media platforms want to host such material. Conversely, the public interest is preserved by allowing the platforms to

continue exercising their longstanding right to choose the content they host. Further, Applicants' members' own interests are harmed irreparably by having their rights abruptly curtailed, pending appeal. To avert these substantial harms, the Court should vacate the Fifth Circuit's order and allow the district court's preliminary injunction to remain in place.

ARGUMENT

THIS COURT SHOULD VACATE THE FIFTH CIRCUIT'S STAY TO PROTECT THE PUBLIC INTEREST AND PRESERVE THE STATUS QUO

The First Amendment protects private platforms' right to decide what content they host. *Tornillo*, 418 U.S. at 258 (finding that "[t]he choice of material . . . the decisions made as to limitations on the size and content . . . and treatment of public issues and public officials—whether fair or unfair" constitute protected editorial judgment). Online businesses like Applicants' members have exercised this right consistently since their inception. *Reno*, 521 U.S. at 849 (finding the First Amendment applies with full force to internet media); *see generally* Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 Colum. L. Rev. 759 (2021) (describing the history and evolution of content moderation practices on social media).

Yet last week, the Fifth Circuit eviscerated platforms' longstanding right to moderate content with a one-sentence order lifting the district court's preliminary injunction. Not only is this a sharp departure from the longstanding protection of editorial rights, it also deprives Applicants of the "careful review and meaningful decision" to which they are "entitle[d]." *Nken v. Holder*, 556 U.S. 418, 427 (2009)

(describing the traditional stay factors this Court considers in an emergency application); *see also Tornillo*, 418 U.S. at 258; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 567–70 (1995) (finding that editorial privilege extends to parade organizers); *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997) (noting that the First Amendment protects an online bulletin board's decision "to publish, withdraw, postpone or alter content").

This Court recognizes that "traditional stay factors govern a request for a stay pending judicial review," including "where the public interest lies" and "whether issuance of the stay will substantially injure the other parties interested in the proceeding." *Nken*, 556 U.S. at 425, 426. "The maintenance of the status quo" is also an important consideration in this request. *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978) (Rehnquist, J., in chambers). Here, these factors counsel strongly in favor of Applicants, whose members and their users will be greatly harmed by HB20 going into effect. To avoid these harms and preserve the public interest, this Court should vacate the stay pending the Fifth Circuit's decision on the merits and allow the district court's carefully-reasoned opinion to remain in effect.

A. Relief Is Necessary to Protect the Public Interest in Beneficial Use of the Platforms

Forcing users to interact with horrific content is not "where the public interest lies." *Nken*, 556 U.S. at 425. Yet that is what will happen if the Fifth Circuit's stay is left in place, as platforms can be required under HB20 to host and display to users virtually all lawful speech. HB20 prohibits social media platforms from removing or deprioritizing any lawful content based on the "viewpoint" it expresses. Tex. Civ.

Prac. & Rem. Code §§ 143A.001; 143A.002(a)(1)-(3). The Texas attorney general or any aggrieved user—whether or not that user personally posted the content—may sue if they believe a platform violated this rule. *Id.* §§ 143A.007; 143A.008.

HB20 makes these suits especially easy to bring and especially difficult for platforms to defend. "A user may bring an action . . . regardless of whether another court has enjoined the attorney general from enforcing this chapter or declared any provision of this chapter unconstitutional[,]" and social media companies are barred from asserting nonmutual issue and claim preclusion as defenses. Tex. Civ. Prac. & Rem. Code § 143A.007(d)-(e). Texans collectively post millions of times each month. By making platforms liable for removing any post, however vile it may be, HB20 effectively forces platforms to host virtually all lawful speech.

Implementing HB20 will flood the websites with all the disturbing content that falls within the First Amendment's broad ambit of protection. This includes footage of "horrific acts of animal cruelty—in particular, the creation and commercial exploitation of 'crush videos,' a form of depraved entertainment that has no social value." *United States v. Stevens,* 559 U.S. 460, 482 (2010) (Alito, J., dissenting). Social media platforms receive thousands of posts depicting torture and mutilation of animals each day. Casey Newton, *Bodies in Seats,* The Verge (Jun. 19, 2019) (descripting a video of a screaming iguana being smashed to death, which was repeatedly reposted by Facebook users)[2]; *see also* Aristos Georgio, *YouTube, TikTok Videos Showing Animals Tortured, Buried, Eaten Alive Viewed 5bn Times*, Newsweek

[2] Available at https://bit.ly/3Mk6R37.

(Aug. 15, 2021) (describing requests by animal rights groups for social media companies to develop more aggressive algorithmic moderation to prevent dissemination of animal torture footage).[3] Animal abuse material is not excepted from HB20's ban on "censorship," and anyone responsible for posting the content may sue the platforms for removing it.

Removing terrorist recruitment material, or material that glorifies terrorism, is likewise prohibited under HB20 because it is (usually) not illegal and always expresses a viewpoint. *Brandenburg v. Ohio.* 395 U.S. 444, 447 (1969) (finding the First Amendment protects advocacy of violence unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). In fact, the Texas legislature specifically voted against an amendment to HB20 to allow the platforms to remove content that "promotes or supports any international or domestic terrorist group or any international or domestic terrorist acts." Complaint for Declaratory and Injunctive Relief at 3, *NetChoice v. Paxton*, No. 1:21-cv-00840, 21 WL 5755120 (W.D. Tex. Dec. 1, 2021) ("Texas legislators rejected amendments that would explicitly allow platforms to exclude . . . terrorist content."). Many users will find this content shocking and repellant, but HB20's anti-censorship clause prohibits platforms even from "de-boosting" or decreasing visibility of it. Tex. Civ. Prac. & Rem. Code § 143A.001(1). Users will soon be faced with a choice between ceasing the use of platforms like Facebook, Twitter, and TikTok, or risking exposure to disturbing content.

[3] Available at https://bit.ly/39Y1fNL.

Social media platforms constantly remove content containing "threatening behavior" and "targeted abuse," like doxxing or referring to other users with racial epithets. Twitter, *The Twitter Rules*.[4] Protecting users from this content has proved essential to sustained viability of the platform, to maintenance of its user base, and even to promote the civic value of free speech. Douek, *supra*, at 240 (discussing the public expectation that platforms effectively moderate offensive content); Danielle Keats Citron, *Restricting Speech to Protect It*, *in* Free Speech in the Digital Age 122, 122 (Susan J. Brison & Katherine Gelber eds., 2019) (explaining content moderation is vital to promote free speech values because "Cyber harassment is now widely understood as profoundly damaging to victims' expressive . . . interests"); Danielle Keats Citron & Jonathon W. Penney, *When Law Frees Us to Speak*, 87 Fordham L. Rev. 2317, 2319 (2019) ("[O]nline abuse has a profound chilling effect."). But racial slurs and harassment, too, are lawful speech, and do not fall under any of HB20's exceptions to the viewpoint neutrality mandate. Tex. Civ. Prac. & Rem. Code § 143A.006(a)(1)-(4); *Virginia v. Black*, 538 U.S. 343 (2003) (finding that threatening behavior only falls outside the First Amendment's protection when it "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"); *United States v. Bartow*, No. 19-4496, 2021 WL 1877821 (4th Cir. May 11, 2021) (finding that even the most egregious racial slur is not a "fighting word" per

[4] Available at https://bit.ly/3PrM93g.

se that falls outside of the First Amendment's free speech protection). Thus, social media platforms can now be barred from removing it.

HB20 aims to combat the purported "discriminatory dystopia" of social media companies' "censorship." But prohibiting companies from shielding users from footage of a kitten that "shrieks in pain as a woman thrusts her high-heeled shoe into its body, slams her heel into the kitten's eye socket and mouth loudly fracturing its skull" or from Ku Klux Klan advocacy material, is likely not the free speech utopia many users want. *Stevens*, 559 U.S. at 491 (Alito, J., dissenting). Instead, HB20 may make using dominant social media platforms so distasteful they become virtually unusable for most of the public.

The prospect of the world's most popular social media platforms turning into cesspools of offensive content after the Fifth Circuit's stay is not merely speculative. Case studies from unmoderated or lightly moderated platforms—including recent attempts to create "free speech" alternatives to Facebook and Twitter—show that proliferation of vile material reliably occurs under a "viewpoint neutrality" moderation rule. Keith A. Spencer, *Why unmoderated online forums always degenerate into fascism*, Salon (Aug. 5, 2019) (explaining that selection bias and online psychology always lead unmoderated or lightly moderated "free speech" sites to become overrun with vile content).[5] For example, conservative social media sites Parler and GETTR initially promised to only moderate speech that violated United States law. Mike Masnick, *Parler Speedruns The Content Moderation Learning*

[5] Available at https://bit.ly/3NdgZuA.

Curve; Goes From 'We Allow Everything' To 'We're The Good Censors' In Days, Techdirt (July 1, 2020).[6] Both platforms were promptly overrun by obscene, violent, and racist content. Mike Masnick, *It Appears That Jason Miller's GETTR Is Speed Running The Content Moderation Learning Curve Faster Than Parler,* Techdirt (July 12, 2021).[7]

Though some users like being able to post extremely offensive content, many others were put off from using Parler and GETTR, limiting the exercise of free speech on those platforms to an exceptional few. *See, e.g.*, Rachel DeSantis*, Parler, an App That's Becoming a Hit with Trump Supporters, Is Compared to an 'Echo Chamber'*, People*,* (Nov. 17, 2020) (explaining that politically moderate users were dissuaded from using "free speech" social media platforms).[8] The same happened with "free speech absolutist" website, 8chan, which was eventually removed from the internet by its host for refusing to remove content that celebrated the 2019 El Paso shooting. Diana Rieger, et al., *Assessing the Extent and Types of Hate Speech in Fringe Communities: A Case Study of Alt-Right Communities on 8chan, 4chan, and Reddit*, Social Media + Society, (Oct.–Dec. 2021) (explaining that "free speech absolutist" site, 8chan, which practiced very little content moderation, became rife with right-wing extremist, misanthropic, and White-supremacist ideas).[9]

What HB20 calls "viewpoint discrimination" is necessary for platforms to serve a broad and diverse group of users for whom virulent racism, animal crush videos,

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[6] Available at https://bit.ly/3ljOe3H.
[7] Available at https://bit.ly/3Lk1bFc.
[8] Available at https://bit.ly/38xYQZZ.
[9] Available at https://bit.ly/3PoUJjk.

and terrorist recruitment material precludes enjoyable use. Dominant social media platforms' ability to remove this content has played a critical role in making them so popular among the general public. Douek, *supra*, at 240 (discussing the public expectation that platforms effectively moderate offensive content). Even Texas Attorney General Paxton's website acknowledges the necessity of viewpoint-based content moderation. His website prohibits members of the public from sharing information on an Office of the Attorney General social media page which is "obscene, threatening, harassing, discriminatory, or would otherwise compromise public safety or incite violence or illegal activities." Texas Attorney General, *Site Policies*.[10] If Paxton's page were forced to display racial epithet-laden rants, the purpose of the page would be greatly undermined.

Emergency leave from the Court is necessary to protect the functionality of platforms and the public's interest in beneficial use of them. Allowing Applicants' members to exercise the long-established First Amendment editorial right to remove offensive content, pending appeal, is critical to protect the public interest in beneficial use of the platforms. *Nken*, 556 U.S. at 434 (explaining that the public interest is a factor in considering a stay).

B. Relief Is Necessary to Preserve the Status Quo and to Prevent Irreparable Harm

"The maintenance of the status quo is an important consideration" in resolving emergency applications. *Dayton*, 439 U.S. at 1359 (1978) (Rehnquist, J., in chambers). Further, in evaluating applications for emergency relief, this Court assesses the

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[10] Available at https://bit.ly/3lgn8dD.

"likelihood that irreparable harm will result" if relief is not granted. *Hollingsworth v. Perry,* 558 U.S. 183, 190 (2010). Implementing HB20 departs from the status quo by sharply curtailing platforms' well-established First Amendment rights to moderate content. And, as a result of the Fifth Circuit's stay, irreparable harm to Applicants' members is certain because "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)).

Social media platforms have a longstanding First Amendment right to choose the content they host. *Tornillo*, 418 U.S. at 258 (finding the First Amendment protects editorial discretion over what content to publish and how to arrange it); *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019) (recognizing that the First Amendment gives private entities "rights to exercise editorial control over speech and speakers on their properties or platforms"); *Reno,* 521 U.S. at 849 (finding the First Amendment applies with full force to internet media); *see also La'Tiejira*, 272 F. Supp. 3d at 981 (finding that the First Amendment extends to social media networks).

Accordingly, courts have consistently rejected efforts to impinge on social media platforms' editorial judgments. *See, e.g.*, *NetChoice v. Paxton,* No. 21-51178, 2021 WL 5755120 (W.D. Tex. Dec. 1, 2021) (preliminarily enjoining HB20 because plaintiffs would otherwise suffer irreparable injury to their protected editorial judgment); *Moody,* 546 F. Supp. 3d 1082 (preliminarily enjoining Florida's "Stop

Media Censorship Act" because plaintiffs would otherwise suffer irreparable injury to their protected editorial judgment); *Illoominate Media, Inc. v. Cair Fla., Inc.*, 841 Fed. Appx. 132 (11th Cir. 2020) (upholding the dismissal of a lawsuit by a political personality over her Twitter ban); *Domen v. Vimeo, Inc.,* 991 F.3d 66 (2d Cir. 2021) (upholding the dismissal of a Vimeo account termination); *Fyk v. Facebook, Inc.,* 808 Fed. Appx. 597 (9th Cir. 2020) (finding dismissal of a user's suit against Facebook for removing his content was proper); *Zeran,* 129 F.3d at 330 (noting that the First Amendment protects an online bulletin board's decision "to publish, withdraw, postpone or alter content"). The Fifth Circuit departed sharply from this status quo when it stayed the district court's injunction. In Texas, platforms may now be sued for exercising their well-established First Amendment right to choose what content they host.

The Fifth Circuit denied Applicants' members the "careful review and meaningful decision" to which they are "entitle[d]" when it lifted the preliminary injunction without explanation. Applicants' Br. 1; *Nken* 556 U.S. at 427. And this sudden "loss of First Amendment freedoms" "unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67. To ensure Applicants' members' injuries do not continue to amass pending appeal, emergency relief is necessary.

CONCLUSION

This Court should grant Applicants temporary administrative relief from the Fifth Circuit's stay pending consideration of this Application and vacate the Fifth Circuit's stay of the district court's preliminary injunction pending both the Fifth Circuit's issuance of a decision on the merits and the opportunity to seek timely review of that decision from this Court on a petition for writ of certiorari.

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