No. 21-51178

In the United States Court of Appeals for the Fifth Circuit

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,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

BRIEF OF CHAMBER OF PROGRESS, CONNECTED COMMERCE COUNCIL, CTA®, ENGINE ADVOCACY, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, TECHNET, WASHINGTON CENTER FOR TECHNOLOGY POLICY INCLUSION, AND HISPANIC TECHNOLOGY AND TELECOMMUNICATIONS PARTNERSHIP, AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

W. Reid Wittliff
WITTLIFF | CUTTER PLLC
1209 Nueces Street,
Austin, Texas 78701
Tel.: (512) 960-4866
Fax: (512) 960-4869

Counsel for Amici Curiae

April 8, 2022

SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

As required by Federal Rule of Appellate Procedure 29(a)(4)(A), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order for the judges of this Court to evaluate possible disqualification or recusal.

1. Chamber of Progress, Member of *Amici Curiae*
2. Connected Commerce Council, Member of *Amici Curiae*
3. CTA®, Member of *Amici Curiae*
4. Engine Advocacy, Member of *Amici Curiae*
5. Information Technology & Innovation Foundation, Member of *Amici Curiae*
6. LGBT Tech Institute, Member of *Amici Curiae*
7. TechNet, Member of *Amici Curiae*
8. Washington Center for Technology Policy Inclusion, Member of *Amici Curiae*
9. W. Reid Wittliff, Wittliff Cutter PLLC, Counsel for *Amici Curiae*

Information Technology & Innovation Foundation, LGBT Tech Institute, and Washington Center for Technology Policy Inclusion are not-for-profit corporations exempt from income tax under section

501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). Engine Advocacy is a not-for-profit organization exempt form income tax under section 501(c)(4) of the Internal Revenue Code, 26 U.S.C. § 501(c)(4). Chamber of Progress, TechNet, Connected Commerce Council, and CTA® are not-for-profit organizations exempt form income tax under section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. § 501(c)(6).

None of amici has a parent corporation, and no publicly held company has a ten-percent or greater ownership interest in any of amici. *See* Fed. R. App. P. 26.1 and 29(a)(4)(A).

/s/ *W. Reid Wittliff*
W. Reid Wittliff

COUNSEL FOR *AMICI CURIAE*

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici[1] are non-profit organizations dedicated to ensuring that consumers can enjoy a healthy online environment where they can effectively and efficiently work, play, learn, shop, connect, and express themselves without harassment, disinformation, and incendiary content. To keep online services inclusive, useful, and safe, online providers take a variety of actions, often referred to collectively as "content moderation."[2] Online providers understand that these actions are necessary to support the innovation economy and promote equitable access to the benefits of technological innovations.[3]

Texas House Bill 20 ("H.B. 20" or the "Act," enacted September 9, 2021) poses a direct threat to healthy and safe online communities by

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[1] "Amici" include Chamber of Progress, Connected Commerce Council, CTA®, Engine Advocacy, Information Technology & Innovation Foundation, TechNet, Washington Center for Technology Policy Inclusion, and the Hispanic Technology and Telecommunications Partnership.

[2] "Content moderation" generally refers to the process by which online providers "decide to publish or remove third-party content." Eric Goldman, *Content Moderation Remedies*, 28 Mich. Tech. L. Rev. 1, 6 (2021), *available at* https://repository.law.umich.edu/mtlr/vol28/iss1/2. It also encompasses decisions to make such content less visible, more difficult to monetize, or similar actions short of removal.

[3] This Amicus brief is filed with the consent of all parties. Fed. R. App. P. 29(a)(4)(E). No party or its counsel authored any part of this brief, nor did any party, its counsel, or any other person besides Amici contribute any funding for this brief. Fed. R. App. P. 29(a)(4)(D).

restricting, undermining, and burdening the ability of online providers to exercise their First Amendment rights to moderate content on their private services. Laws that seek to regulate content moderation like H.B. 20 are extremely important to Amici, because the parties Amici represent routinely engage in or benefit from content moderation. Amici have a substantial interest in this action—the outcome will determine the ability of social media providers to offer safe online services and of consumers to access them.

Chamber of Progress is a tech industry coalition devoted to a progressive society, economy, workforce, and consumer climate. It is an industry organization that backs public policies that will build a fairer, more inclusive country in which all people benefit from technological leaps. Its work is supported by corporate partners, many of whom will be subject to the law at issue.[4]

The Connected Commerce Council (3C) is a nonprofit membership organization with a single goal: to promote small businesses' access to essential digital technologies and tools.

[4] Chamber of Progress' Partners are available at https://progresschamber.org/. Chamber of Progress' partners do not sit on its board of directors and do not have a vote on or veto over its positions.

As North America's largest technology trade association, CTA® is the tech sector. Its members are the world's leading innovators – from startups to global brands – helping support more than 18 million American jobs. CTA owns and produces CES® – the most influential tech event in the world.[5]

Engine Advocacy ("Engine") is a nonprofit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government representatives and a community of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship.

Founded in 2006, Information Technology & Innovation Foundation (ITIF) is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and fifty-state levels.

[5] A complete list of the Consumer Technology Association's members is available at http://cta.tech/Membership/Membership-Directory.aspx.

TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet, representing over four million employees and countless customers.

The Washington Center for Technology Policy Inclusion (WashingTECH), a nonpartisan, nonprofit 501(c)(3) corporation, is an advocacy platform committed to civil rights, empowerment, justice, and inclusion in technology public policy making. As America's "inclusive voice of tech policy," WashingTECH's mission is to convene diverse technology public policy professionals to defend America's rich diversity with programs that promote an inclusive narrative about technology's impact on society.

The Hispanic Technology and Telecommunications Partnership ("HTTP") is the leading national Latino/a/x voice on telecommunications and technology policy. HTTP members serve as a nonpartisan coalition of national Latino civil rights organizations working to ensure that the full array of technological and telecommunications advancements are available to the Latino/a/x community across the United States.

ARGUMENT

This case asks the Court whether the First Amendment permits Texas to compel larger social media companies ("Providers") to disseminate individual user views the Providers have determined to be offensive to the community they seek to create or positively harmful to society in general. Texas took this step not out of unwavering attachment to principles of free speech, but because Texas officials wished to promote their own favored viewpoints through a few specific Providers. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578–79 (2011) ("The State may not burden the speech of others in order to tilt public debate in a preferred direction."); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 646 (1994) ("[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys."). The district court correctly enjoined Texas from enforcing its unconstitutional law and irretrievably upsetting the status quo before a final disposition. Nevertheless, Texas now asks this Court to conclude that Providers have no more constitutional interest in the messages spread by their services than a soap company has in what is said atop the proverbial soap box. Texas would stand the relationship enshrined in the

First Amendment on its head, leaving private actors constrained to viewpoint neutrality and governments free to force citizens to promote their preferred viewpoints.

NetChoice and CCIA have ably argued the primary constitutional points in this case.[6] Amici write separately to highlight the disastrous corollaries of Texas's decision to prohibit most content moderation and to burden even that moderation the government favors to the point of ineffectiveness. The shackles imposed by Texas's law are not limited to the three Providers Texas describes as plaintiffs here,[7] but would extend, directly or indirectly, to other social media companies. Even smaller Providers would have to structure their policies in the expectation of someday having to comply with the Act's draconian requirements.

Texas lumps the provisions of H.B. 20 into two categories: "Hosting" and "Disclosure."[8] Both descriptions are misleading, concealing the true extent of government interference in Providers' expressive activities. Providers and their customers would both lose as a result.

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[6] Appellee Br. at 17–56.
[7] Appellant Br. at 1 (Facebook, Twitter, and YouTube). In reality, H.B. 20 will immediately affect as many as fifteen to twenty providers.
[8] Appellant Br. at 18.

The so-called "Hosting Rules"[9] are nothing less than a total ban on any content moderation outside a handful of narrow categories where Texas favors moderation. Many Providers will be forced to allow content that violates their rules to overtake their services, because the law leaves little alternative.[10] Unless covered by an exception, if Providers do not wish to disseminate speech they consider inappropriate, offensive, or harmful to the community they desire to foster, their only option is to ban all discussion of any topic related to such content so that each "viewpoint" is treated "equally," a result that would silence far more speech than Providers' content moderation ever has. Whichever option Providers choose, their own expression would be curtailed and their customers

[9] Texas tries to analogize its effort to the anti-discrimination component of common carriage laws. Appellant Br. at 25–30. Providers already serve all individuals, subject to the same rules of conduct. FedEx need not carry packages that are leaking or that contain hazardous substances. Airlines routinely refuse boarding to passengers who appear intoxicated and ban unruly passengers from future flights. Providers' content moderation efforts serve the same function. Indeed, Texas's description of Providers' conduct as "*viewpoint* discrimination" (*i.e.*, on the basis of what was said, not by whom), Appellant Br. at 20 (emphasis added), flatly contradicts its efforts to cast H.B. 20 as no different from a law addressing a common carrier's refusal to serve a customer on the basis of an inherent trait like race.

[10] Attorney General Paxton has previously argued the government cannot force a baker to disseminate a message with which he disagrees on baked goods owned entirely by his customer and viewed only by that customer's friends and family. Brief for the State of Texas et al. at 8–28, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 4023111. Now he asks this Court to force Providers, against their will, to carry messages to hundreds of millions using their own property.

would either be gagged or forced to endure harassment, violent and offensive imagery, spam, disinformation, and other objectionable content, rendering Providers' services functionally useless and even unsafe.

Serious harm will occur immediately upon implementation of the content moderation ban. Providers will have to decide whether to allow pro-suicide messages or remove all suicide prevention resources. They will have to choose between allowing discussion of racial equality and removing white supremacist and neo-Nazi messages promoting racialized violence. They will be able to disseminate the truth about Russia's invasion of Ukraine only at the cost of allowing state-sponsored Russian disinformation to proliferate unchecked. Providers will face innumerable other choices, each just as destructive of their ability to engage in free expression and to safeguard their communities.

H.B. 20's purported "Disclosure Rules" go well beyond disclosure, requiring an appeals process with rapid turnaround and detailed justification to be implemented for billions of content moderation decisions annually. This system would be prohibitively expensive, leaving Providers little choice but to drastically scale back moderation—even for the few categories of content where Texas actually wants

moderation. Moreover, Providers must disclose information that is hardly "factual and uncontroversial,"[11] but more analogous to trade secrets, such as details about every tool or method used to enforce content restrictions. Bad actors will exploit that information to evade monitoring, resulting in a proliferation of spam, malware, scams, and other illegal and dangerous content that will be difficult, if not impossible, to reverse.

Amici urge the Court to affirm the district court's preliminary injunction preventing H.B. 20 from taking effect. The threatened violation of Providers' First Amendment rights alone constitutes irreparable harm that outweighs any conceivable sub-constitutional benefit to Texas. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (citing *Elrod*); 11A Charles Alan Wright, Arthur R. Miller, & Mary K. Kane, *Fed. Prac. and Proc.* § 2948.1 (3d ed. 2008) ("When an alleged deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable injury is necessary.").

[11] Appellant Br. at 38.

Beyond constitutional injuries, H.B. 20 will dramatically and adversely affect Providers and consumers both inside and outside of Texas. Consumers' ability to seek out truthful, trustworthy, and safe online content and avoid harmful content will dramatically deteriorate. Providers will suffer irrevocable harm to their reputations and to customer goodwill as a result. *See, e.g.*, *Paulsson Geophysical Servs., Inc. v. Sigmar*, 529 F.3d 303, 313 (5th Cir. 2008) (holding that damage to goodwill could not be quantified, supporting irreparable injury); *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1056 (5th Cir. 1997) (holding "threat of injury to [plaintiff's] reputation . . . sufficient to satisfy irreparable injury"). Set against the harms to Providers and their customers, the minor inconvenience a small fraction of Providers' users face in having to use one of a number of other, readily identifiable social media or non-social media sites for certain types of speech, such as those advertising low- or zero-moderation services, barely registers; the equities fall squarely on the side of the Providers and the vast majority of their customers who neither post, nor are particularly interested in, speech that violates the terms of service to which they agreed in joining the Providers in the first place.

I. CONTENT MODERATION IS AN ESSENTIAL COMPONENT OF PROVIDERS' SERVICE AND VITAL TO CUSTOMERS' EXPERIENCE

Content moderation is both a method for Providers to supervise carefully selected outer bounds of speech they are willing to disseminate and a way to foster the type of community Providers and their users desire. Moderation is thus expressive activity protected by the First Amendment that differs only in degree, but not in kind, from the editorial discretion exercised by newspapers and similar media. If H.B. 20 takes effect, it will gut content moderation and cause irreparable injury to online Providers and their consumers.

Content moderation has long been an integral part of Providers' services. For example, Facebook's November 2007 Terms of Service rather comprehensively barred users from posting "any content we deem to be harmful, threatening, unlawful, defamatory, infringing, abusive, inflammatory, harassing, vulgar, obscene, fraudulent, invasive of privacy or publicity rights, hateful, or racially, ethnically or otherwise objectionable."[12] Facebook warned it "may delete or remove (without notice)" any content that "in the sole judgment of the Company violates

[12] Facebook Terms of Use (Nov. 15, 2007), *available at* www.law.washington.edu/students/streetlaw/lessons/casestudy2.pdf (accessed Mar. 10, 2022).

this Agreement or the Facebook Code of Conduct or which might be offensive, illegal, or that might violate the rights, harm, or threaten the safety of users or others."[13] Facebook reserved the right to terminate membership and bar users from the service "for any reason, or no reason, at any time in its sole discretion."[14] The Terms of Service, then and now, permit anyone to join, regardless of party identification or political ideology, as long as they abide by the same rules as everyone else. Texas's suggestion Providers engaged in a "bait and switch" is thus incorrect, even if it were legally relevant in defining the boundaries of Providers' First Amendment rights.

Providers' and consumers' interests in online content moderation are inextricably intertwined. Consumers want reliable information and safe online communities.[15] Consequently, online Providers have an imperative to develop services that deliver beneficial online experiences to consumers.[16] Providers must identify the types of content and

[13] *Id.*
[14] *Id.*
[15] *See* NetChoice Decl. ¶ 14.
[16] The Declaration of LGBT Tech brings this into sharp focus, stating: "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." LGBT Technology Institute Decl. ¶ 13.

activities that will disrupt the online experience they want to cultivate. Providers' content moderation policies are carefully weighted judgments regarding the measures necessary to (1) attract and retain consumers and advertisers[17] and (2) limit corporate risk and reputational damage.[18] Each Provider must make these judgments[19] based on their service's unique situation, considering factors such as the nature of the service; the intended audience; the well-being of employees and contractors; and a range of cultural, political, and legal factors based on the company's global footprint.[20] The imperative to create healthy and trustworthy online communities operates to the benefit of consumers by reducing the amount of illegal, "lawful but awful," irrelevant, low quality, and

[17] *See* NetChoice Decl. ¶¶ 8–10; CCIA Decl. ¶¶ 22, 28.
[18] *See* NetChoice Decl. ¶¶ 16, 23.
[19] *See* CCIA Decl. ¶ 19 (describing content moderation as "normative judgments" and "important statements about the kind of community [the provider] wishes to foster").
[20] Because H.B. 20 regulates online content that Texas residents may want to receive, it purports to require covered providers to allow access to content that violates the laws of other jurisdictions. Tex. Civ. Prac. & Rem. Code § 143A.004(a). This could expose providers to liability in other U.S. states and foreign countries. The German Network Enforcement Act (Netzwerkdurchsetzungsgesetz) imposes liability on online services if they do not remove illegal content, such as Holocaust denial, after receiving a notice, but H.B. 20 prohibits Providers from doing so. *See*, Library of Congress, *Germany: Network Enforcement Act Amended to Better Fight Online Hate Speech* (2021), *available at* http://www.loc.gov/item/global-legal-monitor/2021-07-06/germany-network-enforcement-act-amended-to-better-fight-online-hate-speech/.

nuisance content they must wade through to conduct their daily activities.

To create a healthy, safe, and trustworthy environment, Providers adopt and enforce policies, including:

- screening for spam, viruses, malware, phishing, scams, child sexual abuse material, terrorist propaganda, coordinated inauthentic activity by hostile nation states, and other policy violations;
- responding to reports from the public, consumers, and trusted partners about the content described above, as well as, harassment, impersonation, grooming minors, and promotion of suicide and self-harm;
- responding to invasions of privacy such as posting non-consensual intimate images, doxxing, and deadnaming;
- labeling, restricting, rating, or otherwise identifying content that is inappropriate for certain audiences, is regulated, or is suspicious or potentially harmful; and
- removing, demoting, or limiting the spread of content that is disruptive to the type of environment they want to provide for

> their consumers, including hate speech, disinformation, and content that may be simply irrelevant to the function of the service.[21]

Any customers who feel content moderation is unacceptable under the terms set by one Provider have other options for speech. Providers have different approaches to content moderation; a message removed from one is often permitted on another. Gab, Parler, Truth Social, Telegraph, 8kun, and other Providers openly advertise varying degrees of refusal to moderate content in any meaningful way. Still other services allow users to build custom communities using their own rules.[22] Users whose desired speech is not permitted by the Providers H.B. 20 targets still have ready access to a "multiplicity of information sources"[23] without the least need for Texas's intervention.

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[21] For example, TripAdvisor's Traveler Review Guidelines require that reviews avoid including information unrelated to the experience with the business being reviewed. https://www.tripadvisorsupport.com/hc/en-us/articles/200614797-Traveler-review-guidelines. Amazon has a similar "relevance" policy for product reviews. https://www.amazon.com/gp/help/customer/display.html?nodeId=GLHXEX85MENUE4XF

[22] Examples include Groups.io and Dreamwidth.

[23] Appellant Br. at 43.

II. H.B. 20 PREVENTS EFFECTIVE CONTENT MODERATION, EXCEPT WHERE FAVORED BY TEXAS, FORCING PROVIDERS TO DISSEMINATE HARMFUL AND OFFENSIVE SPEECH TO USERS

With limited exceptions, H.B. 20 forces Providers to make a choice: either forego any viewpoint-based moderation in a content category or remove the entire category.[24] Texas's blithe acceptance of whole subjects of speech disappearing from social media suggests it has little true interest in preserving "an uninhibited marketplace of ideas."[25] If Providers elect not to eliminate content categories, H.B. 20 will force Providers to disseminate viewpoints Texas favors, despite Providers' belief such speech will harm their communities and their businesses. Alleged violations will result in lawsuits by the Attorney General and private citizens.[26] Given the litigation risk, Providers will be chilled from

[24] Appellant Br. at 11; Appellee Br. at 8–13 (detailing the Act's restrictions on content moderation); Tex. Civ. Prac. & Rem. Code § 143A.006 provides exceptions for: 1) censorship explicitly authorized by federal law; 2) content removed based on a referral from an organization dedicated to preventing child sexual exploitation; 3) content removed because it directly incites violence or threatens violence against an individual based on certain protected characteristics; and 4) unlawful expression. Section 143A.001(5) defines "unlawful expression" by reference to federal and Texas law, including tort law.

[25] Appellant Br. at 4. Texas implicitly assumes that removing an entire category of speech is a neutral result. Instead, silencing debate ordinarily favors whomever prefers the status quo.

[26] Tex. Civ. Prac. & Rem. Code § 143A.007(b)-(c) & § 143A.008(b).

taking action against harmful content unless it unquestionably falls within one of the exceptions.[27]

This result creates immediate, irreparable harm in several different ways. There are many reasons why a Provider or consumer may want to limit content that is potentially harmful but not illegal. Providers seek to protect the type of community they wish to build, in the process safeguarding the goodwill of their customers. *Paulsson*, 529 F.3d at 313. Regardless of the reason, H.B. 20 presents a significant roadblock.

Concrete examples of the harm H.B. 20 would inflict are easy to come by. Parents and adult caregivers frequently seek out safe spaces online that children can visit without exposure to content that may not be appropriate for the child's age or the family's values.[28] H.B. 20

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[27] *See*, YouTube Decl. ¶ 14; Stop Child Predators Decl. ¶ 11. The risk of lawsuits for removing content is not hypothetical; these types of suits are happening now. *See Daniels v. Alphabet, Inc.*, No. 20-cv-04687, 2021 WL 1222166 (N.D. Cal. March 31, 2021) (conspiracy theories); *Children's Health Defense v. Facebook Inc.*, 546 F. Supp.3d 909, 2021 WL 2662064 (N.D. Cal. June 29, 2021) (vaccine and health misinformation); *Domen v. Vimeo, Inc.*, 991 F.3d 66 (2021) (sexual orientation conversion therapy).

[28] Millions of parents and caregivers regularly allow the children in their care to visit or use sites and apps such as Youtube and Roblox. *See* Aaron Smith et al., *Many Turn to Youtube for Children's Content, News, How-To Lessons*, (Nov. 7, 2018), https://www.pewresearch.org/internet/2018/11/07/many-turn-to-youtube-for-childrens-content-news-how-to-lessons/; *Factbox: The Nuts and Bolts of Roblox*, REUTERS (Nov. 19, 2020), https://www.reuters.com/article/us-gaming-roblox-factbox/factbox-the-nuts-and-bolts-of-roblox-idUSKBN27Z1FZ.

undermines this by preventing sites that are geared toward children from screening out pornographic content. Likewise, these sites would not be able to prohibit content containing violence, animal cruelty, profanity, or other age-inappropriate features. Through its broad definition of censorship, the Act also prohibits age-gating or providing warnings to users for these types of content.[29]

Recently, federal lawmakers on both sides of the aisle pressured Meta (formerly Facebook) to take greater action to support teen users' mental health.[30] Senator Blumenthal highlighted concerns over the "easily findable accounts associated with extreme dieting and eating disorders."[31] Proponents of a federal bill, the KIDS Act,[32] complain of teen access to "unhealthy content" promoting self-harm or containing violence or influencers' marketing messages.[33] Today, Facebook and other

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[29] Both of these activities would "restrict" or "deny equal access to" content under the definition of "censor." Tex. Civ. Prac. & Rem. Code § 143A.001(1). *See also*, YouTube Decl. ¶ 36.

[30] Amanda Silberling, TechCrunch, *Facebook Grilled in Senate Hearing over Teen Mental Health* (Sept. 30, 2021), https://techcrunch.com/2021/09/30/facebook-grilled-in-senate-hearing-over-teen-mental-health/.

[31] Cong. Rec. Vol. 167, No. 170, S6759 (Sept. 29, 2021).

[32] S. 3411 (116th Cong.), https://www.congress.gov/bill/116th-congress/senate-bill/3411?q=%7B"search"%3A%5B"KIDS+Act","KIDS","Act"%5D%7D&s=2&r=7.

[33] Senators Markey and Blumenthal, Rep. Castor Reintroduce Legislation to Protect Children and Teens from Online Manipulation and Harm (Sept. 30, 2021), https://www.markey.senate.gov/news/press-releases/senators-markey-and-

Providers prohibit a range of legal content that could be dangerous for impressionable users, including content promoting eating disorders, cutting, and suicide. H.B. 20 would prevent removal of this type of content unless Providers are also willing to remove related mental health and suicide prevention resources (*i.e.*, the entire category of content).[34] If Providers cannot make judgments about what policies best serve their users, consumers will lose the ability to choose which service best suits their needs. For vulnerable consumers, this could have serious consequences.

Content moderation is also a crucial part of Providers' response to crises such as the Russian invasion of Ukraine. Providers have aggressively removed disinformation intended to skew public perceptions

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blumenthal-rep-castor-reintroduce-legislation-to-protect-children-and-teens-from-online-manipulation-and-harm.

[34] *See, e.g.*, Facebook Community Standards: Suicide and Self-Injury, https://transparency.fb.com/policies/community-standards/suicide-self-injury/; Twitter Rules and Policies: Suicide and Self-harm Policy, https://help.twitter.com/en/rules-and-policies/glorifying-self-harm. It is worth noting that other services choose to allow these types of content to ensure individuals who struggle with these issues are able to participate in supportive communities. *See, e.g.,* Reddit Content Policy, https://www.redditinc.com/policies/content-policy(which does not contain a prohibition on this content). *See also* Sarah Mitroff, *Reddit Now Lets You Report Users Who May Be at Risk of Self-harm* (March 4, 2020), https://www.cnet.com/health/reddit-now-lets-you-report-users-that-you-worry-might-self-harm/.

of the reasons for the invasion and of conditions on the ground.[35] They have also implemented protective measures for vulnerable users, including hiding Ukrainian and Russian users' names in follower lists.[36] At the same time, Providers are a valuable avenue for news and images of events transpiring in Ukraine. Content moderation thus enables Providers to ensure they fulfill their intended purpose rather than being used as tools of war. Even in less dire circumstances, moderation allows Providers to resist manipulation by authoritarian regimes intent on oppressing their own people and on attacking democratic opponents.[37]

Prohibiting Providers from taking action against legal, but harmful, content will adversely affect consumers of all ages. There is a wide gulf between the types of speech the government can prohibit[38] and the speech

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[35] *See, e.g.*, Shannon Bond, *Facebook, YouTube and Twitter Remove Disinformation Targeting Ukraine*, Nat'l Pub. Radio (Feb. 28, 2022), https://www.npr.org/2022/02/28/1083401220/facebook-uncovers-disinformation-and-hacking-campaigns-targeting-ukraine.

[36] *See, e.g.*, Taylor Hatmaker, *Instagram Warns Users Who Share Russian State Media, Hides Following Lists in Russia and Ukraine*, TechCrunch (Mar. 8, 2022), https://techcrunch.com/2022/03/08/instagram-russia-ukraine-mutual-follows-stories/.

[37] Miles Parks, *Foreign Interference Persists and Techniques are Evolving, Big Tech Tells Hill*, Nat'l Pub. Radio (Jun. 18, 2020), https://www.npr.org/2020/06/18/880349422/foreign-interference-persists-and-techniques-are-evolving-big-tech-tells-hill.

[38] *See* Cong. Research Serv., Rep. No. IF11072, *First Amendment Categories of Speech* (Killion 2019), https://crsreports.congress.gov/product/pdf/IF/IF11072.

consumers want to see.[39] Providers seek to fill this gap with policies against:

- all manner of threats,[40] not merely "true threats;"[41]
- content that dehumanizes or discriminates against individuals based on perceived membership in a protected class,[42] not merely threats or acts of violence based on such membership;[43]
- content that sexualizes children,[44] even if it doesn't involve actual children (*e.g.*, virtual child pornography or cartoons).[45]

The results of H.B. 20's prohibition on enforcement of such policies are amply described in the declarations supporting Plaintiffs' request for a

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[39] *See* Facebook Decl. ¶ 2; NetChoice Decl. ¶ 14. *See also, e.g.*, Anti-Defamation League, *Online Hate and Harassment: The American Experience 2021*, What Solutions do Americans Want? (2021), https://www.adl.org/online-hate-2021-what-solutions-do-americans-want; Sophie Bertazzo, Trust Magazine, *Online Harassment Isn't Growing—But It's Getting More Severe* (June 28, 2021), https://www.pewtrusts.org/en/trust/archive/spring-2021/online-harassment-isnt-growing-but-its-getting-more-severe(discussing measures consumers would like to see online services take).

[40] *See, e.g.*, Twitter Rules: Abusive Behavior, https://help.twitter.com/en/rules-and-policies/abusive-behavior.

[41] *See, e.g., Virginia v. Black*, 538 U.S. 343 (2003).

[42] *See, e.g.*, Facebook Community Standards: Hate Speech, https://support.google.com/youtube/answer/2801999?hl=en&ref_topic=9282679.

[43] *See, e.g.*, Texas Civ. Prac. & Rem. Code § Sec. 143A.006(a)(3) (exception to prohibition on censorship for "specific threats of violence" based on a protected characteristic).

[44] *See, e.g.*, YouTube Community Guidelines: Child Safety Policy, https://support.google.com/youtube/answer/2801999?hl=en&ref_topic=9282679.

[45] *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding ban on virtual child pornography unconstitutional).

preliminary injunction in the district court.[46] It cannot be overstated, however, that allowing Providers to be overrun with harmful content will essentially render them unusable for all consumers, and particularly for communities that may be vulnerable[47] or that may be specifically targeted with hate and harassment.[48]

III. H.B. 20 CRIPPLES CONTENT MODERATION EVEN IN THE FEW CASES WHERE TEXAS WOULD PERMIT IT, BURDENING PROVIDERS AND HARMING CONSUMERS

Texas describes the remainder of H.B. 20 as "Disclosure Rules,"[49] downplaying the requirements to implement an appeals process, with onerous mandates on timing and formal justification, for potentially billions of moderation decisions annually. Even provisions accurately described as disclosures would undermine the communities Providers seek to foster, irrevocably driving customers away.

[46] *See, e.g.*, NetChoice Decl. ¶¶ 16, 23; YouTube Decl. ¶¶ 61–62; Facebook Decl. ¶ 2.
[47] In addition to posing safety concerns for kids and teens, H.B. 20 will also interfere with efforts to protect seniors from scams specifically targeting them. *See* CCIA Decl. ¶ 12.
[48] *See* LGBT Tech Decl. ¶ 13.
[49] Appellant Br. at 37.

A. H.B. 20 Compels Disclosure of Monitoring Methods to Bad Actors

H.B. 20 obligates Providers to engage in speech that is contrary to their interests and the interests of their consumers in violation of the First Amendment.[50] In particular, the requirement to disclose detailed information about the methods used to enforce content policies will undermine the efficacy of Providers' enforcement activities.[51] Sophisticated bad actors continually change their playbooks for phishing, malware, scams, spam, coordinated inauthentic activity, trading child sexual abuse material, sex trafficking, terrorist recruiting and fundraising, selling drugs, and other illegal activities.[52] Whether dealing with organized crime, government intelligence services, state-sponsored hacking groups, foreign terrorist organizations, gangs, or drug cartels, Providers must continually update and refine their approaches to detecting and countering such content. Even seemingly small leaks of

[50] *See* Appellee Br. at 49–55 (discussing standard for determining whether compelled disclosures are consistent with the First Amendment).
[51] *See* Tex. Bus. & Com. Code § 120.053(a) (7) (requiring disclosure of "description of each tool, practice, action, or technique used in enforcing the acceptable use policy").
[52] *See, e.g.*, Jean Whitmore, *The Arms Race of Models: Complexify or Die* (June 24, 2021), https://ssrn.com/abstract=3867464("Both the spammers and spam filter-builders are under pressure to evolve or die."); Steven Gosschalk, *AI vs. AI: The Digital Arms Race to Fight Fraud* (Oct. 24, 2019), https://aithority.com/guest-authors/ai-vs-ai-the-digital-arms-race-to-fight-fraud/.

information regarding enforcement methods can result in large amounts of harmful content making it onto a Provider's service.

Online Providers remove millions (and in some cases billions) of pieces of content for violating policies every year. For example, Facebook removed over 794 million pieces of spam[53] in a quarter;[54] in a six-month period Twitter challenged 143 million suspected spam accounts;[55] and in one quarter YouTube removed over 630 million comments for violations related to spam.[56] It is hard to see how consumers would benefit from even a fraction of such content being available on the services they use for work, school, keeping up with friends and family, and getting news or entertainment. Certainly, Providers should be able to keep this content out of their communities.

Texas claims Providers need only disclose "factual and uncontroversial" information akin to calorie counts.[57] It is not even clear

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[53] Each Provider defines "spam" uniquely for their service. These definitions are usually not restricted to unsolicited commercial emails typically regulated by anti-spam laws, and therefore encompass a significant amount of harmful, but not illegal, content and activity.

[54] Facebook Transparency Report, https://transparency.fb.com/data/community-standards-enforcement/spam/facebook/.

[55] Twitter Transparency Report, https://transparency.twitter.com/en/reports/platform-manipulation.html-2020-jul-dec.

[56] Google Transparency Report, https://transparencyreport.google.com/youtube-policy/removals?hl=en.

[57] Appellant Br. at 38.

that the process through which a Provider's content policies are enforced is "commercial speech," because its relationship to a commercial transaction is attenuated at best. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980) (defining commercial speech as "speech proposing a commercial transaction"). But, even if moderation were commercial speech, mandating disclosure of every method used to moderate content is less like requiring Coca-Cola to reveal calories and more like opening the vault so any passer-by can peruse its secret formula. That bell cannot be unrung if NetChoice and CCIA later prevail on the merits. *See, e.g.*, *N. Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 49 (2d Cir. 1999) ("loss of trade secrets cannot be measured in money damages because [a] trade secret once lost is, of course, lost forever") (internal quotation marks omitted). In addition, enforcement methods are subject to rapid and frequent change in order to address evolving needs of the business. For example, at the start of the pandemic in 2020, many companies were forced to rely more heavily on

algorithms for enforcement in order to prioritize the safety of their content moderation personnel.[58]

B. H.B. 20's Reporting and Appeals Requirements Render Content Moderation Functionally Impossible

The Act contains several provisions that burden content moderation until Providers cannot engage in the full range of policy setting and enforcement necessary for the proper operation of their services and the protection of consumers.[59] These burdens include new requirements like individual user notices, appeals, complaint systems, and transparency reporting that must accompany potentially billions of content moderation actions.[60]

H.B. 20's regulations apply to a broad range of actions taken to benefit consumers besides removal of content or banning of accounts. For example, the requirements will burden Providers' efforts to:

[58] Marc Faddoul, COVID-19 Is Triggering a Massive Experiment in Algorithmic Content Moderation (Apr. 28, 2020), https://www.brookings.edu/techstream/covid-19-is-triggering-a-massive-experiment-in-algorithmic-content-moderation.
[59] *See* YouTube Decl. ¶ 33; CCIA Decl. ¶¶ 42–44.
[60] *See* Appellee Br. at 11–13.

- label, age gate, or provide an interstitial warning before sensitive content like graphic photos of terrorist attacks, pornography, or regulated content;[61]
- label "State-owned Media" as such to help consumers evaluate content from sources like the former RT America, which consumers may not have recognized as a media operation backed by the Russian government;[62]
- downrank or demote content that is of lesser quality, that is likely to generate complaints, or that poses a potential threat to users (*e.g.*, comments similar to prior comments that were subject to complaints).[63]

Under H.B. 20, these activities are subject to many of the same burdensome obligations as other content moderation decisions, like removing content and banning users.[64]

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[61] *See* CCIA Decl. ¶ 15. *See also, e.g.*, Twitter Rules: Media Policy, https://help.twitter.com/en/rules-and-policies/media-policy.
[62] *See* CCIA Decl. ¶ 17. *See also, e.g.*, Twitter Rules: State-Affiliated Content, https://help.twitter.com/en/rules-and-policies/state-affiliated.
[63] *See* Guideline Details: Comments that are likely to be reported or hidden, https://transparency.fb.com/en-gb/features/approach-to-ranking/content-distribution-guidelines/comments-likely-reported-hidden/.
[64] Tex. Com. & Bus. Code § 120.053.

The Act imposes new burdens on content moderation activity that will make it impossible for many covered entities to afford to comply with the new requirements or—because of the high volume of content on their sites—unable to satisfy the requirements for all types of content moderation regulated by H.B. 20. These service Providers will face stark choices, the consequences of which will flow directly or indirectly to consumers. Providers may choose to stop moderating content altogether unless required by law, or scale down their content moderation policies and enforce such policies only against the worst of the worst of violations. Or they may choose to change aspects of how their service operates. For example, Providers could collect more personal information from consumers for identity verification or charge a fee for the service to reduce the risk of inappropriate behavior or to cover the increased cost of offering the services.

Consumers disadvantaged by these consequences will lose:

- the variety of online services that they can choose from, as high compliance costs and significant legal risks make it more difficult for small and medium-sized sites to continue to operate

and create a barrier to entry for new services that will have to comply when they meet the 50 million user threshold;

- the low friction of using many online services that have no registration requirement, or registration with minimal collection of personal information; such services provide opportunities to speak anonymously or pseudonymously and help a more diverse set of communities access online services than could if, for example, Providers were to verify identities through processes that require credit cards or government-issued identification; and
- wide access to free services, which ensure online services are available not just to those who can afford to pay, as companies seek to cover the costs of compliance and address increased litigation risk.

CONCLUSION

If allowed to take effect, H.B. 20 will practically destroy Providers' ability to moderate their private services and will change the way hundreds of millions experience the internet, exposing consumers to scams, fraud, and other harmful content that is now subject to

moderation efforts. The nature of the internet makes it impossible to confine the Act to only Texas users. The district court's injunction preserves the current state of the internet, including all the actions that Providers presently take and to which consumers are accustomed, at least until the courts conclusively determine whether H.B. 20 passes constitutional muster.

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Respectfully Submitted,

/s/ W. Reid Wittliff

W. Reid Wittliff
Texas State Bar No. 00791951
reid@wittliffcutter.com

WITTLIFF | CUTTER PLLC
1209 Nueces St.,
Austin, Texas 78701
Tel.: (512) 960-4866
Fax: (512) 960-4869

COUNSEL FOR *AMICI CURIAE*

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April 2022, the foregoing *Brief of Amici Curiae* was filed with the Clerk of the Court and served on all counsel of record in this case using the Court's CM/ECF system.

/s/ *W. Reid Wittliff*
W. Reid Wittliff

COUNSEL FOR *AMICI CURIAE*

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,856 words, excluding portions exempted by Federal Rule of Appellate Procedure 32(f), according to the word count function of Microsoft Word.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it has been prepared using Century Schoolbook, a proportionally spaced typeface, with 14-point font in the main text and 12-point font in footnotes, as allowed by Fifth Circuit Rule 32.1.

/s/ *W. Reid Wittliff*
W. Reid Wittliff

COUNSEL FOR *AMICI CURIAE*