

No. 21-51178

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**In the United States Court of Appeals  
for the  
Fifth Circuit**

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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.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION  
CIVIL ACTION NO. 1:21-CV-00840-RP

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***BRIEF FOR AMICI THE BABYLON BEE, LLC, NOT THE BEE, LLC, GIGANEWS, INC.  
AND GOLDEN FROG GMBH IN SUPPORT OF DEFENDANT-APPELLANT KEN PAXTON***

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Golden Frog GmbH***

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**SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS AND  
STATEMENT OF INTERESTED PARTIES**

Counsel for all parties have consented to the filing of this brief.

Pursuant to the applicable provisions in Fed. R. App. 26.1, 27, 29 and 32 and Fifth Circuit R. 28.2.1, 29 and 31.2, *Amici* provide this Supplemental Certificate of Interested Persons and Statement of Interested Parties.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

**THE BABYLON BEE, LLC (“*The Bee*”)** is organized under Florida law. **NOT THE BEE, LLC (“*Not the Bee*”)** is organized under Michigan law. *The Bee* and *Not the Bee* are privately-held and affiliated by overlapping ownership.

**GIGANEWS, INC. (“*Giganews*”)** incorporated in Austin, Texas. **GOLDEN FROG, GMBH (“*Golden Frog*”)** is organized under the privacy-protective laws of Switzerland. Their main offices are in Austin, Texas. Both are privately-held and affiliated by overlapping ownership.

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Counsel for *Amici* authored this brief in its entirety. No party's counsel authored this brief, in whole or in part, or contributed money intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel contributed money to fund preparation or submission of this brief.

***The Bee*** is a Christian-themed website that unabashedly proclaims itself “the world’s best satire site.”<sup>1</sup> *The Bee* sheds light on faith, politics, and culture through humor and parody relating to local, national, international news. *The Bee* is similar to its more left-oriented satirical counterpart, *The Onion*.<sup>2</sup> Initially

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<sup>1</sup> *What is The Babylon Bee?* The Babylon Bee, <https://babylonbee.com/about> (accessed Mar. 7, 2022).

<sup>2</sup> Emma Goldberg, ‘What ‘The Babylon Bee’ Thinks Is So Funny About Liberals,’ New York Times (Oct. 11, 2020), <https://www.nytimes.com/2020/10/11/us/politics/babylon-bee-conservative-satire.html> (accessed Mar. 7, 2022); EJ Dickson, *What Is the Babylon Bee? Trump Retweeted the Satirical Website*, (October 16, 2020),

launched in 2016 and inspired by *The Onion*, the concept for *The Bee* came from a general dissatisfaction with a lack of humor and parody from the conservative and religious right. *The Bee's* leadership believes that lampooning is more important now than ever. Political comedy can reveal facts that are frequently missed under the spin of “real” news and bias. Many of *The Bee's* posts go viral on Facebook. *The Bee* generates revenue primarily based on advertising and to a lesser extent branded merchandise. *The Bee* has an interest in the case because Facebook and Instagram have on occasion incorrectly flagged, miscategorized, and even removed posts as “misinformation” rather than recognizing it is satire. Some posts have been deemed “hateful” simply because *The Bee's* content pokes fun at the current orthodoxy. *The Bee* depends on social media platforms to carry content. *The Bee's* bottom line suffers when its content does not reach its audience. In other words, *The Bee* feels the effect of misclassification, removal, and de-amplification of content when it is unilaterally labeled as misinformation or “fake” news, with little to no process for dispute. *The Bee* realizes these effects because its revenues are directly correlated to the number of eyeballs that see its posts, as well as number of clicks, “likes” and impressions received on social media.

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<https://www.rollingstone.com/culture/culture-news/babylon-bee-satire-news-trump-tweet-1076701/> (accessed Mar. 7, 2022) .

*Not the Bee* is a Christian-oriented, humor-based news, opinion, and entertainment site. *Not The Bee* describes itself as “a source for headlines that should be satire that aren’t.” The news is accurate and factual.<sup>3</sup> *Not the Bee* painstakingly documents how America’s social media titans have shattered Congress’ expectations for a user-centric, free, and intellectually diverse Internet by repeatedly targeting conservative viewpoints for censorship through the selective and inconsistent application of ever-shifting “standards.”

*Giganews*, founded in 1994, provides a distributed discussion system or “Usenet” service.<sup>4</sup> *Giganews* is one of the largest global Usenet providers. It has customers (“members”) in over 170 countries. Unlike the technology giants that dominate Silicon Valley, *Giganews* offers a largely *unmoderated* forum for its news-going members. *Giganews* is not advertiser-supported. Members subscribe to and directly pay for use of the service. Customer data is not released unless compelled by court order. *Giganews* does not monitor members’ online activities or

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<sup>3</sup> Adam Ford, *Welcome to Not the Bee, a brand new site from the creators of The Babylon Bee and Disrn*, (August 31, 2020), <https://notthebee.com/article/welcome-to-not-the-bee> (accessed Mar. 7, 2022).

<sup>4</sup> User-sponsored newsgroups are among the most popular and widespread applications of Internet services and cover all imaginable topics of interest to users. Like listservs, Usenet newsgroups are open discussions and exchanges on particular topics. Users, however, need not subscribe to the discussion mailing list in advance, but can instead access the database at any time. “Usenet” predates the World-Wide Web and its underlying Hypertext Transfer Protocol Service.

monetize user data. *Giganews* has been around for a long time and is significantly different from those who came after, especially with regard to its privacy and neutrality policies and practices.

***Golden Frog*** offers world-wide applications and services that preserve an open, privacy-enhancing and secure Internet experience. VyprVPN™, one of *Golden Frog's* service offerings, provides “virtual private network” (VPN) based online privacy and security from “man in the middle” monitoring or attacks, by creating encrypted “tunnels” that ride on any Internet access connection. VyprVPN also offers Domain Name Server functionality. This privacy-enhancing feature obscures user location and activity. User transactional data is retained for only short periods and is not monitored or monetized. Golden Frog *never* views users’ content.

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## SUMMARY OF ARGUMENT

*Amici Curiae* the Babylon Bee, LLC (“*The Bee*”), Not the Bee, LLC (“*Not the Bee*”), Giganews, Inc. (“*Giganews*”) and Golden Frog, GmbH (“*Golden Frog*”) submit their views on behalf of themselves and the millions of ordinary consumers – the *users* of social media platforms – who depend on those platforms to carry their speech and be heard by the world, but are often mistreated and silenced because of their viewpoint, without recourse. *Amici* share a collective passion about First Amendment principles. They value and constantly work to support citizens’ liberty and privacy and seek an open Internet without dominant viewpoint-suppressing gatekeepers. An intellectually diverse social media universe in which all Americans have equal footing to speak and listen. Each believes that individual users and parents, not powerful firms with agendas, should be in control of the free flow of information they can post and receive on social media platforms. That is not what prevails today. Social media platforms discriminate based on viewpoint. *The Bee*, *Not the Bee* and others with conservative perspectives in particular have experienced viewpoint suppression at the hand of social media platforms that, if repeated, would be remediable under H.B. 20.

*Amici* oppose excessive and unconstitutional government regulation, but acknowledge the proper role for the State of Texas in addressing consumer and civic participation protection through House Bill 20. All consumers, regardless of



viewpoint, deserve basic consumer rights. It is necessary and in the public interest to preserve the right to fully participate in public discourse and openly debate the issues of the day. Texas has a legitimate interest in eliminating deceptive practices and protecting consumers by requiring honesty, transparency, and fairness of institutions integral to modern society. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651-653 (1985).

At minimum, Texas reasonably and lawfully requires social media platforms to transparently announce and evenhandedly apply their moderation procedures and standards and have an internal private dispute resolution process. Texas H.B. 20 Section 2 is fully within state powers. It does not violate the First Amendment but rather preserves it.

## ARGUMENT

### I. H.B. 20 Requires Fair and Neutral Treatment of All Viewpoints.

#### A. **Social Media Platforms are “Affected With the Public Interest” But Assert Their Policies and Actions are Immune From Regulation or Even Basic Consumer Protections.**

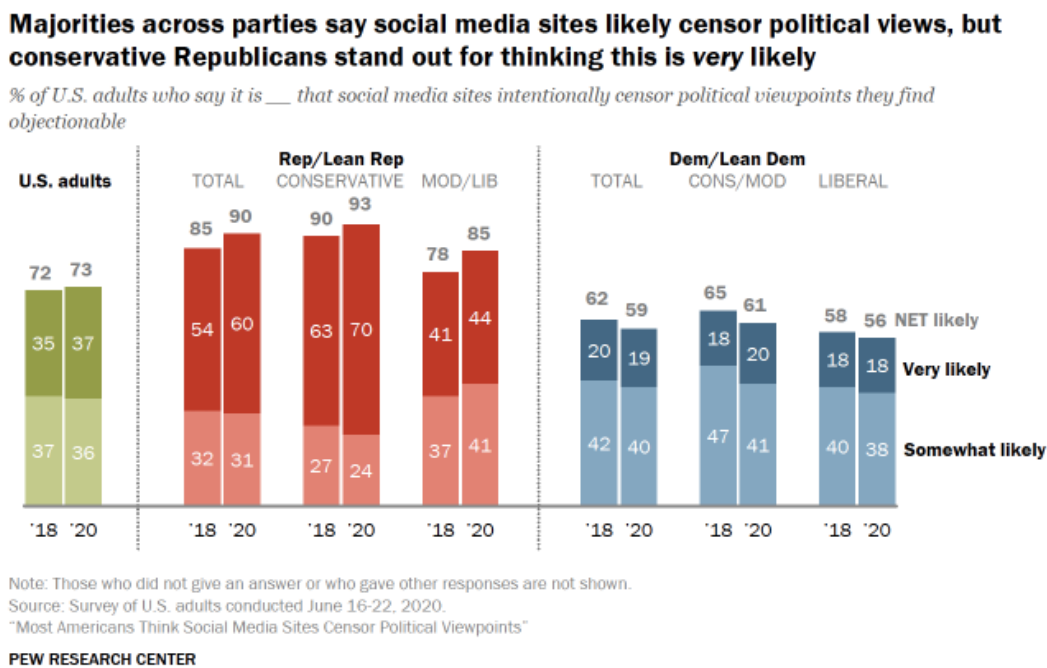
Plaintiff-Appellees’ member organizations are essential speech conduits “affected with the public interest.” Consumers and businesses rely on social media platforms to interact with their followers. For instance, 70 percent of *The Bee’s* audience is reached via Facebook. And yet these platforms assert the unlimited and unilateral right to suspend accounts and remove information they deem objectionable for any or no particular reason. These platforms frequently delete user content and accounts that express viewpoints they deem “objectionable” using any caprice they choose. They routinely use unevenly and arbitrarily applied opaque “standards” in biased fashion. Platforms suspend accounts and de-boost or remove user generated content using an unknown combination of algorithmically-based content analysis and human-based determinations regarding identity and association of the speaker.

Users have no bargaining power, and no true competitive alternatives. Platform “contracts” are non-negotiable and adhesive. They are also ambiguous to the point there is no real meeting of the minds. Users have few, if any, rights if

they suffer adverse action, and no real process to obtain meaningful relief in even the most egregious circumstances.

**B. H.B. 20 Constitutes a Reasonable Policy Choice to Prohibit Actions Deemed Contrary to the Public Interest**

A Pew Research Study conducted in 2020 found that most Americans believe that social media platforms censor political viewpoints.<sup>5</sup> Ninety percent of Republicans and even a majority of Democrats say it is likely that social media sites censor political viewpoints.



<sup>5</sup> Emily A. Vogels et al., *Most Americans Think Social Media Sites Censor Political Viewpoints*, PEW RESEARCH CENTER (Aug. 19, 2020), <https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/> (accessed Mar. 7, 2020) (“Pew Poll”).

H.B. 20 restores trust and consumer confidence in social media platforms that are essential to the lives of everyday Americans. H.B. 20 Section 7 protects and preserves individual citizens’ rights to participate in online social discourse regardless of viewpoint. Section 2 provides much needed disclosure and transparency regarding social media platforms’ actual practices and standards. This will benefit users and the platforms themselves by ensuring fair dealing and allowing for more competitive distinction among different platforms.

The Legislature took note of widespread viewpoint concerns, including but not limited to discrimination against conservative viewpoints. That is because, as shown below, it happens a lot. But the Legislature did not pick sides; instead, it chose a neutral, evenhanded, inclusive approach: all viewpoints deserve equal treatment. Above all else – and despite the political theater – H.B. 20 is a non-partisan bill that protects consumer welfare.<sup>6</sup>

### **1. Social Media Platforms Discriminate.**

There is reasonable concern and distrust that dominant social media firms systematically discriminate based on race, class, gender, alienage, national origin, religion, and viewpoint.<sup>7</sup> Facebook CEO Mark Zuckerberg stated the following in a public post to his Facebook account on January 7, 2021: “*But there are also a lot*

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<sup>6</sup> See generally Robert Bork, The Anti-Trust Paradox (Bork Publishing 2021).

<sup>7</sup> Ro Khanna, DIGNITY IN A DIGITAL AGE (Simon & Schuster 2022) at 167.

*of groups that we may not want to encourage people to join, even if they don't violate our policies.*" (emphasis added).<sup>8</sup> Social media platforms suppress conservative viewpoints in particular.<sup>9</sup> This belief has a reasonable basis. *Amicus* the *Babylon Bee* and others that express a conservative or religious viewpoint suffer routine viewpoint suppression and shadow-banning<sup>10</sup> by plaintiff-appellees' members' platforms. High-profile examples abound, including several involving *Amici* *The Bee* and *Not the Bee*. A sample is provided below. Numerous other account terminations and content removals affecting everyday citizens go unnoticed by all but the affected user.

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<sup>8</sup> Mark Zuckerberg, FACEBOOK.COM (Jan. 27, 2021), Facebook admitted on January 27, 2021 that it "hides" certain content. <https://www.facebook.com/4/posts/10112734959725421> (accessed Mar. 9, 2022) (requires login).

<sup>9</sup> Facebook prohibits "Praise," "Substantive Support" and "speak[ing] favorably" of what it deems "ideologies that promote hate" but freely allows posters to "condemn" them. Meta, *Dangerous Individuals and Organizations*, <https://transparency.fb.com/policies/community-standards/dangerous-individuals-organizations/> (accessed March 7, 2022); Meta, *Hate Speech*, <https://transparency.fb.com/policies/community-standards/hate-speech/> (accessed Mar. 8, 2022). Thus, those accused of "hate" are subject to platform-encouraged attack but denied any online means to explain, clarify or justify their viewpoint. Facebook effectively "license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *C.f.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

<sup>10</sup> "Shadow-banning" involves an administrator or system operator hiding posts from a particular user in order to minimize their effect on a readership. Techopedia Dictionary, "Shadow Banning," <https://www.techopedia.com/definition/33488/shadow-banning>, (accessed Mar. 7, 2022).

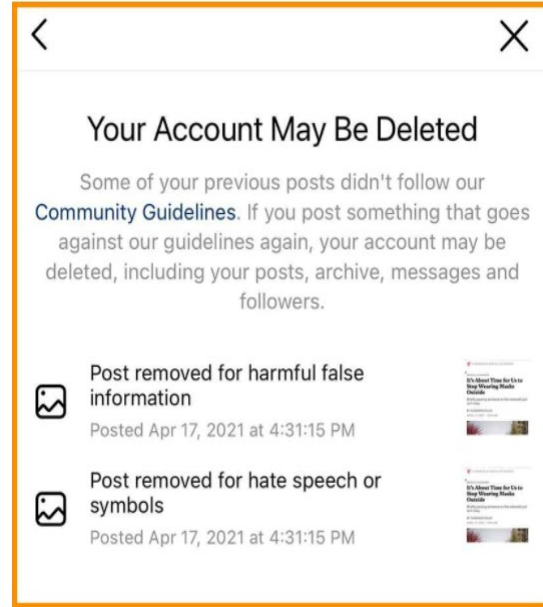
## 2. Censorship and Shadow-Banning of *The Bee* and *Not the Bee*.

On or about April 17, 2021, *Babylon Bee* CEO Seth Dillon shared on his Instagram account an article published in *Slate* magazine titled, “*It’s About Time for Us to Stop Wearing Masks Outside.*”<sup>11</sup> Dillon’s post contained the caption, “Sane people never did this.” *Slate Magazine* is a well-known progressive online magazine with a left-of-center point of view.<sup>12</sup> Nevertheless, Instagram misclassified Dillon as having violated community guidelines against “harmful false information” and “hate speech. Instagram took down the post, and Dillon received a strong warning that his account would be deleted if he posted “violative” material again. A screenshot of Dillon’s post along with the warning he received from Instagram are included below.

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<sup>11</sup> Shannon Palus, *It’s About Time for Us to Stop Wearing Masks Outside*, SLATE (Apr. 17, 2021), <https://slate.com/technology/2021/04/masks-outside-covid-risk-low.html> (accessed Mar. 8, 2022)

<sup>12</sup> Jessica Winter, *Slate Isn’t Too Liberal. But...*, SLATE (May 21, 2015), <https://slate.com/news-and-politics/2015/05/is-slate-magazine-too-liberal-or-conservative-what-members-said-about-the-magazines-bias.html> (accessed Mar. 7, 2022).



There is no public evidence Instagram gave a similar warning to Slate.<sup>13</sup>

Social media suppresses *The Bee*'s satirical viewpoint. After social media titans began censoring what they label "misinformation," the *New York Times* ran an article claiming *The Bee* "trafficked in misinformation," linking to a prior *New*

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<sup>13</sup> *Slate* has a robust social media presence even after promoting – and re-promoting – a podcast episode that advocated violent protest. The tagline to its Facebook post stated that "nice, peaceful protest may not bring about desired social change," and its tweet more directly states that "[n]on-violence is an important tool for protests, but so is violence." See *Best of 2020: A History of Violent Protest*, Slate, (Dec. 24, 2020), <https://slate.com/podcasts/what-next/2020/12/does-violence-make-protest-more-effective-makes-an-effective-protest>, (accessed Mar. 7, 2022); *A History of Violent Protest*, Slate, <https://slate.com/podcasts/what-next/2020/06/protests-blm-movement-american-history> (accessed Mar. 7, 2022); Slate, *If violent protests are getting your attention they are working*, <https://www.facebook.com/Slate/posts/if-violent-protests-are-getting-your-attention-are-they-working/10158732609846438> (Dec. 24, 2020) (requires login); Not the Bee, *Oops, looks like Twitter forgot to ban Slate for promoting violence*, <https://notthebee.com/article/oops-looks-like-twitter-forgot-to-ban-slate-for-promoting-violence> (accessed March 7, 2012).

*York Times* article that actually *refuted* the claim by acknowledging *The Bee* purveys legitimate satire.<sup>14</sup> When confronted with a demand to retract its defamatory statements about *The Bee*, the *Times* did so.<sup>15</sup> But that did not stop hostile attacks. Facebook announced in late 2021 it would censor satire that “punches down.”<sup>16</sup> Unsurprisingly, *Slate* cooperatively ran an article about the same time that accused *The Bee* of – you guessed it – “punching down,” without acknowledging that the large online publication itself was “punching down” by doing so.<sup>17</sup>

*The Bee* might have published a satirical article about Facebook banning anger-management therapy instructional advice about striking pillows<sup>18</sup> since it

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<sup>14</sup> Seth Dillon, *How The Babylon Bee Is Fighting Back*, (July 3, 2021), <https://www.nationalreview.com/2021/07/how-the-babylon-bee-is-fighting-back>, (accessed Mar. 7, 2022).

<sup>15</sup> See Corrections: June 12, 2021, N.Y. Times, <https://www.nytimes.com/2021/06/11/pageoneplus/corrections-june-12-2021.html> (accessed Mar. 7, 2022); see also Madeline Roth, *NY Times Corrects Story After Legal Threat, Admits Babylon Bee Is “Satirical Website” and not “Misinformation,”* (June 14, 2021), <https://www.yahoo.com/now/ny-times-corrects-story-legal-001112181.html> (accessed Mar. 7, 2022).

<sup>16</sup> “Punching down” means to attack or criticize someone in a less powerful position. Urban Dictionary, (February 19, 2018) “punching down,” <https://www.urbandictionary.com/define.php?term=punching%20down>, (accessed Mar. 9, 2022).

<sup>17</sup> Parker Bach, *Can the Right Make Good Satire Without Collapsing Due to Fake News?*, (June 22, 2021), <https://slate.com/news-and-politics/2021/06/babylon-bee-satire-from-right.html>, (accessed Mar. 7, 2022).

<sup>18</sup> *How can I control my anger?*, <https://www.medicalnewstoday.com/articles/162035> (accessed Mar. 7, 2022).



involves “punching down.” *Not the Bee*, however, got there first by exposing that Twitter freely allows major corporations in charge of definitions and a millionaire professional athlete to “punch down” on a now-acquitted 18-year old criminal defendant that was facing life imprisonment.<sup>19</sup>

Perhaps the most pernicious viewpoint censorship, however, happens below the social media surface at the algorithm level, as *The Bee*’s shadow-banning experience with Facebook shows. Facebook started “deprioritizing” and “shadow-banning” *The Bee* during the 2020 election season when *The Bee* was providing satirical coverage of election escapades. *The Bee* has seen a marked increase in its Facebook followers since 2020. But over the same time period, it has suffered a “drastic, steady decline in reach and engagement” on Facebook.<sup>20</sup> Historically,

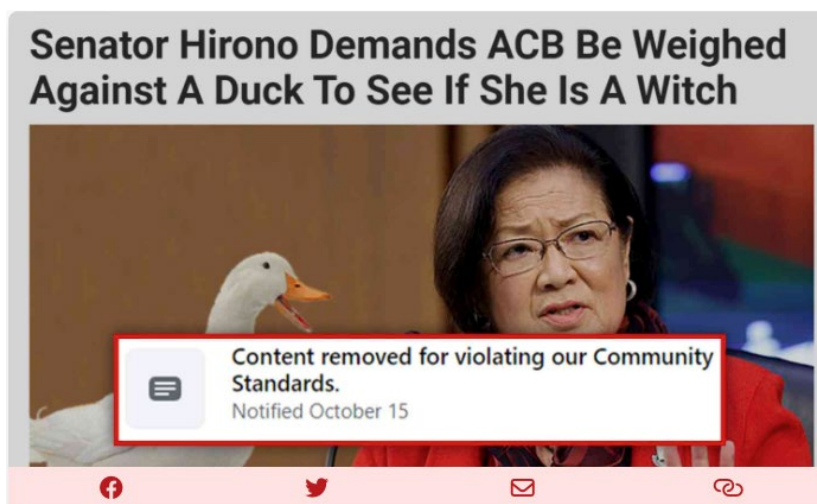
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<sup>19</sup> Daniel Payne, A major corporation just openly mocked Kyle Rittenhouse for breaking down while reliving the worst trauma of his life. This is the society we live in now, (November 11, 2021), <https://notthebee.com/article/a-major-corporation-just-openly-mocked-kyle-rittenhouse-for-breaking-down-while-reliving-the-worst-trauma-of-his-life-this-is-the-society-we-live-in-now>, (accessed Mar. 7, 2022); Hamilton Porter, *Coward LeBron James accuses Kyle Rittenhouse of fake crying on the stand ... and gets lit up for it*, (Nov. 11, 2021), <https://notthebee.com/article/lebron-accused-kyle-rittenhouse-of-fake-crying-on-the-stand--and-gets-lit-up-for-it> (accessed Mar. 7, 2022); The Bee did its own satirical twist. *Liberals Accuse Rittenhouse Of Trying To Avoid Punishment Through Legal Loophole Known As “Trial,”* (Nov. 12, 2021), <https://babylonbee.com/news/liberals-accuse-rittenhouse-of-trying-to-avoid-punishment-through-legal-loophole-known-as-trial> (accessed Mar. 7, 2022).

<sup>20</sup> Jennifer Graham, *Is Facebook censoring the Babylon Bee, or does Mark Zuckerberg just not get the jokes?*, (Aug. 23, 2021), <https://www.deseret.com/2021/8/23/22638183/is-facebook-censoring-the-babylon->

70% of its website traffic came from Facebook, and its articles often went viral. But today, it gets only 30% of its traffic from Facebook, and its articles no longer go viral. For example, an August, 2021 post to *The Bee*'s Facebook page reached only 11 users and had only one "like."<sup>21</sup>

In another instance, on or about October 15, 2020, Facebook took down a *Bee* cross-post from this article on its own site:



Facebook's "fact checkers,"<sup>22</sup> seemed to be incapable of understanding that that the post was *Monty Python* inspired satire. Or, as is more likely, it was simple displeasure over satirical treatment of two prominent Democratic politicians. So

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[bee-or-does-the-mark-zuckerberg-just-not-get-jokes-conservatives](#), (accessed Mar. 7, 2022).

<sup>21</sup> *Id.*

<sup>22</sup> These "fact-checkers" are actually just "viewpoint police." Jordon Boyd, *Facebook Quietly Admits Its Third-Party 'Fact-Checks' Are 'Opinions'*, (December 13, 2021), <https://thefederalist.com/2021/12/13/facebook-quietly-admits-its-third-party-fact-checks-are-opinions/>, (accessed Mar. 7, 2022).

Facebook decided the post violated “community standards” and de-monetized *the Bee*.<sup>23</sup>

### 3. List of Other Prominent Account Suspensions

#### ***Donald J. Trump*** (@realDonaldTrump)

Trump is the 45<sup>th</sup> President of the United States. On or about January 8, 2021, President Trump’s personal Twitter account was permanently suspended based on alleged violations of Twitter’s “Civic Integrity Policy” in the aftermath of the January 6, 2021 events at the U.S. Capitol Building.<sup>24</sup> At the time of his de-platforming, President Trump had over 88 million followers on Twitter.<sup>25</sup>

Subsequent to his Twitter suspension, Trump used the official account of the U.S. President (@POTUS). Twitter deleted these tweets, citing “ban evasion.” Twitter also suspended Trump’s presidential campaign account (@TeamTrump) after that

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<sup>23</sup> Babylon Bee Staff, *Facebook Comes For The Babylon Bee Again*, (August 31, 2020), <https://babylonbee.com/news/facebook-comes-for-the-babylon-bee-again> (accessed Mar. 7, 2020).

<sup>24</sup> *Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), [https://blog.twitter.com/en\\_us/topics/company/2020/suspension](https://blog.twitter.com/en_us/topics/company/2020/suspension) (accessed Mar. 6, 2022).

<sup>25</sup> Donald J. Trump’s Twitter Stats Summary Profile, Social Blade Twitter Statistics, <https://socialblade.com/twitter/user/realdonaldtrump> (accessed Mar. 6, 2022).

account reposted deleted tweets from @POTUS.<sup>26</sup> On or about January 12, 2021, President Trump's YouTube account was suspended for violating YouTube policy on "violence."<sup>27</sup> At the time of de-platforming, Donald Trump had over 2.75 million YouTube subscribers.<sup>28</sup> Facebook announced that President Trump was banned on or about January 7, 2021.<sup>29</sup>

***The Hill (@HillTVLive)***

*The Hill* is an American newspaper and digital media company based in Washington, D.C. that focuses on politics, policy, business, and international relations. Coverage includes U.S. Congress, the Executive branch, and election campaigns. *The Hill* was founded in 1994 by Democratic businessman Jerry Finkelstein and former *NY Times* correspondent Martin Tolchin. On or about March 2, 2022, YouTube suspended *The Hill's* channel for 7 days, preventing the

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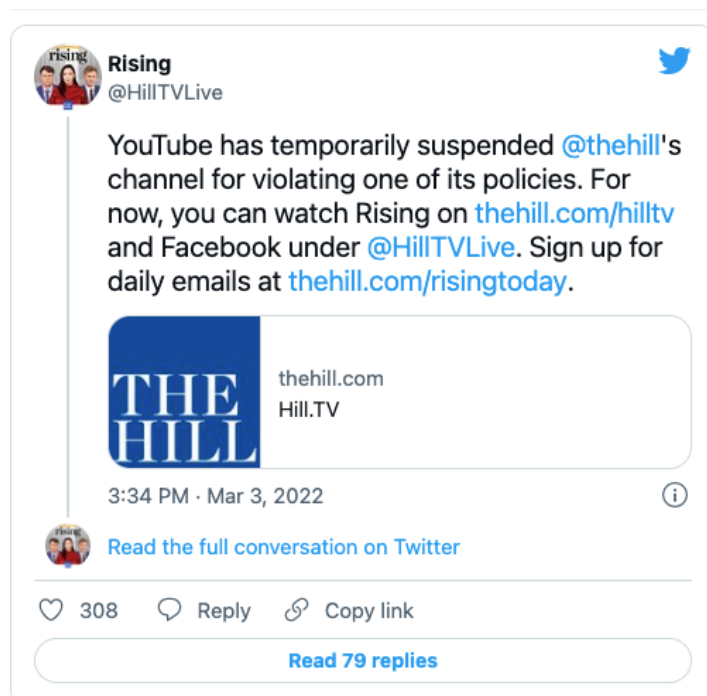
<sup>26</sup> *Twitter Deletes New Trump Tweets on @POTUS, Suspends Campaign Account*, REUTERS (Jan. 8, 2021), <https://www.reuters.com/business/media-telecom/twitter-deletes-new-trump-tweets-potus-suspends-campaign-account-2021-01-09/> (accessed Mar. 7, 2022).

<sup>27</sup> Trip Mickle, *Trump is Still Banned on YouTube. Now the Clock is Ticking*, Wall Street Journal (May 6, 2021), <https://www.wsj.com/articles/trump-is-still-banned-on-youtube-that-could-change-11620293402> (accessed Mar. 7, 2022).

<sup>28</sup> Donald J. Trump's YouTube Stats Summary Profile, Social Blade YouTube Statistics, <https://socialblade.com/youtube/c/donaldjtrumpforpresident> (accessed Mar. 7, 2022).

<sup>29</sup> Mark Zuckerberg, Facebook.com (Jan. 7, 2021), <https://www.facebook.com/zuck/posts/10112681480907401> (accessed Mar. 7, 2022) (requires login).

publisher from publishing videos. The reason: publishing election “misinformation,” a *The Hill* post of raw video footage of a Trump speech discussing the 2020 election at a conservative PAC conference. The post was stricken even though the clear purpose was to *criticize* and *refute* Trump’s claims.<sup>30</sup> Included below is a screenshot of a Twitter post by *The Hill* capturing the de-platforming.



<sup>30</sup> Robby Soave, *YouTube Won't Distinguish Between Misinformation and Reporting, So It Suspended My Channel*, (March 2, 2022), <https://reason.com/2022/03/03/youtube-rising-the-hill-election-misinformation-suspension/> (accessed Mar. 7, 2022).

**The Conservative Party of New York State (@cpnys)**

CPNYS had its Twitter account temporarily suspended in July 2020 at a critical time leading up to the 2020 elections. Twitter claimed that the suspension was due to a misidentification as “spam” but it took Twitter two months to undo the “error.” The account was restored on or about September 10, 2020.<sup>31</sup>

**Alex Berenson (@alexberenson)**

Berenson is a commentator and former reporter for the *New York Times*. On or about August 29, 2021 Berenson was permanently banned from Twitter for alleged violations of the platform’s COVID-19 “misinformation” policy.<sup>32</sup>

Berenson was merely posting his viewpoint, but his opinions were for the most part based on data sourced directly from publicly-available government information. His posts were truthful and ultimately vindicated in several instances; but they were inconvenient to the orthodoxy of the moment so his perspective was

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<sup>31</sup> Jon Levine, *Twitter Apologizes to NY Conservative Party for Two-Month Suspension*, New York Post (Sep. 19, 2020), <https://nypost.com/2020/09/19/twitter-apologizes-to-ny-conservative-party-for-suspension/> (accessed Mar. 6, 2022).

<sup>32</sup> Jon Levine and Kenneth Garger, *COVID Vaccine Doubter Alex Berenson Permanently Banned from Twitter*, New York Post (Aug. 28, 2021), <https://nypost.com/2021/08/28/covid-vaccine-doubter-alex-berenson-permanently-banned-from-twitter/> (accessed Mar. 6, 2022).

deemed “misinformation.”<sup>33</sup> Berenson had over 343,000 followers on Twitter before the ban.<sup>34</sup>

***Rep. Jim Banks*** (@RepJimBanks)

Representative Banks is a Republican U.S. representative for Indiana’s 3rd Congressional District. On or about October 23, 2021 Congressman Banks was temporarily suspended from Twitter for “targeted misgendering” and “hateful conduct” toward transgender Assistant Health Secretary health Rachel Levine.<sup>35</sup> Banks’ statement was “[t]he title of first female four-star officer gets taken by a man” and “[c]alling someone that was born and lived as a man for 54 years the first ‘female’ four-star officer is an insult to every little girl who dreams of breaking glass ceilings one day.” To Twitter, viewpoints contesting the current orthodoxy mandating acceptance that a man can become a woman are “hateful” and “targeted misgendering.”

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<sup>33</sup> Cindy Roman, *Anti-vaccine influencer permanently suspended by Twitter*, (Aug. 28, 2021), <https://www.washingtonexaminer.com/news/anti-vaccine-influencer-permanently-suspended-by-twitter> (accessed March 7, 2022).

<sup>34</sup> Alex Berenson’s Twitter Stats Summary Profile, Social Blade Twitter Statistics, <https://socialblade.com/twitter/user/alexberenson> (accessed, Mar. 6, 2022).

<sup>35</sup> Joshua Rhett Miller, *Twitter Suspends Rep. Banks’ Account for Misgendering Trans Health Official*, New York Post (Oct. 25, 2021), <https://nypost.com/2021/10/25/twitter-locks-rep-banks-account-for-misgendering-trans-official/> (accessed Mar. 6, 2022).

### **Roger Stone (@RogerJStoneJr)**

Roger Stone is an American conservative political consultant and lobbyist. Stone has worked on several Republican Presidential campaigns, including Richard Nixon, Ronald Reagan, Jack Kemp, Bob Dole, George W. Bush, and Donald J. Trump. On or about October 29, 2017, Stone was permanently banned from Twitter for alleged harassment of CNN journalists.<sup>36</sup> At the time of his suspension, Stone had over 289,000 Twitter followers.<sup>37</sup>

### ***Sen. Rand Paul***

Senator Paul is a Republican from Kentucky. Prior to his campaign and election to the U.S. Senate in 2010, Senator Paul was a practicing physician and medical doctor. He is a graduate of Baylor University and the Duke University School of Medicine. On or around August 11, 2021, Senator Paul was temporarily suspended from YouTube for posting a video expressing his viewpoint that facemasks are ineffective in combatting the spread of COVID-19 even though

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<sup>36</sup> Salvador Hernandez, *Roger Stone Banned From Twitter After Railing Against CNN Anchor*, BuzzFeed News (Oct. 31, 2017), <https://www.buzzfeednews.com/article/salvadorhernandez/roger-stone-has-been-suspended-from-twitter-after-railing> (accessed Mar. 6, 2022).

<sup>37</sup> Roger Stone's Twitter Stats Summary Profile, Social Blade Twitter Statistics, <https://socialblade.com/twitter/user/rogerjstonejr> (accessed Mar. 6, 2022).



there was scientific evidence to support that position.<sup>38</sup> The suspension was based on a claim the video violated YouTube’s guidelines on COVID-19 “misinformation.”<sup>39</sup> To reiterate, Paul is a U.S. Senator and physician.

***Rep. Marjorie Taylor Greene (@mtgreenee)***

Rep. Greene is a U.S. Congresswoman representing Georgia’s 14th Congressional District. On or about January 17, 2021, Rep. Greene was suspended for 12 hours from Twitter for allegedly spreading misinformation about “voter fraud” in the 2020 U.S. election.<sup>40</sup> On or about March 19, 2021, Rep. Greene was suspended from Twitter due to a claimed “automation” error; Rep. Greene’s Twitter account was restored the same day.<sup>41</sup> On or about July 19, 2021, Rep.

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<sup>38</sup> Lawrence Richard, *Fauci said masks were not 'really effective' at blocking virus, emails reveal*, (June 2, 2021), <https://www.msn.com/en-us/news/us/fauci-said-masks-were-not-really-effective-at-blocking-virus-emails-reveal/ar-AAKDKsP>, (accessed March 7, 2022).

<sup>39</sup> Rebecca Shabad, *YouTube Suspends Sen. Rand Paul Over a Video Falsely Claiming Masks are Ineffective*, NBCNews.com (Aug. 11, 2021), <https://www.nbcnews.com/politics/congress/youtube-suspends-sen-rand-paul-over-video-falsely-claiming-masks-n1276534> (accessed Mar. 6, 2022).

<sup>40</sup> Rebecca Morin, *Live Politics Updates: Twitter Temporarily Suspends Account of Rep. Marjorie Taylor Greene*, USA Today (Jan. 7, 2021), <https://www.usatoday.com/story/news/politics/2021/01/17/live-politics-updates-joe-biden-inauguration-donald-trump-impeachment/4196264001/> (accessed Mar. 6, 2022).

<sup>41</sup> Kevin Breuninger, *Twitter Says Rep. Marjorie Taylor Greene Suspended ‘in error;’ Dems Push to Expel Her from Congress*, CNBC.com (Mar. 19, 2021), <https://www.cnbc.com/2021/03/19/twitter-suspends-gop-rep-marjorie-taylor-greene.html> (accessed Mar. 6, 2022).

Greene was thrice suspended from Twitter for 12 hours for sharing “misinformation” about COVID-19 vaccines.<sup>42</sup> On or about August 10, 2021 Rep. Greene was temporarily suspended from Twitter for one week for again allegedly sharing “misinformation” about COVID-19 and vaccines.<sup>43</sup> On or about January 2, 2022, Rep. Greene’s personal Twitter account was permanently suspended for continuing violations of Twitter’s “misinformation” policies. Greene was the first sitting member of Congress to have her personal Twitter account permanently suspended.<sup>44</sup> Rep. Green had over 465,700 followers.<sup>45</sup>

***Sen. Ron Johnson***

Senator Johnson is a Republican U.S. Senator from Wisconsin. Senator Johnson assumed office on January 3, 2011. From 2015 to 2021 Senator Johnson served as chair of the Senate’s Homeland Security and Governmental Affairs

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<sup>42</sup> Donnie O’Sullivan and Paul LeBlanc, *Twitter Temporarily Suspends Rep. Marjorie Taylor Greene for Vaccine Misinformation*, CNN.com (Jul. 20, 2021), <https://www.cnn.com/2021/07/19/politics/marjorie-taylor-greene-twitter-ban/index.html> (accessed Mar. 6, 2022).

<sup>43</sup> Brian Fung and Donnie O’Sullivan, *Twitter Suspends Marjorie Taylor Greene’s Account for One Week*, CNN Business (Aug. 11, 2021), <https://edition.cnn.com/2021/08/10/tech/twitter-marjorie-taylor-greene/index.html> (accessed Mar. 6, 2022).

<sup>44</sup> David Mack, *Rep. Marjorie Taylor Greene’s Twitter Account Has Been Permanently Suspended*, Yahoo! News (Jan. 2, 2022), <https://news.yahoo.com/rep-marjorie-taylor-greene-twitter-160621252.html> (accessed Mar. 6, 2022).

<sup>45</sup> Marjorie Taylor Greene Twitter Stats Summary Profile, Social Blade Twitter Statistics, <https://socialblade.com/twitter/user/mtgreene> (accessed Mar. 6, 2022).

Committee. On or about June 11, 2021 Senator Johnson was suspended for a week from YouTube for “misinformation” because he discussed Hydroxychloroquine and Ivermectin as potentially effective treatments for COVID-19 infection.<sup>46</sup>

YouTube also deleted a video from the Senator’s official YouTube account showing a December 2020 Senate Homeland Security and Governmental Affairs Committee hearing for the same claimed reason.<sup>47</sup>

### ***The New York Post***

The NY Post is a daily tabloid newspaper published in New York City and owned by News Corp. The tabloid was established in 1801 by Federalist Alexander Hamilton. In 2019, the *NY Post*’s distribution ranked 4<sup>th</sup> in the United States and 16<sup>th</sup> in overall traffic for news and information.<sup>48</sup> On or about October 15, 2020, the *NY Post*’s official Twitter account was locked after it tweeted articles about Hunter and Joe Biden, including alleged corruption and collusion with Ukrainian gas company Burisma, at a time when such exposure may have affected the

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<sup>46</sup> Dartunorro Clark, *YouTube Suspends GOP Sen. Ron Johnson’s Account, Says He Violated Covid-19 Policy*, NBC News (Jun. 11, 2021), <https://www.nbcnews.com/politics/politics-news/youtube-suspends-gop-sen-ron-johnson-s-account-says-he-n1270569> (accessed Mar. 6, 2022).

<sup>47</sup> Ron Johnson Press Release, <https://www.ronjohnson.senate.gov/2021/1/ohnson-discusses-youtube-censorship-on-fox-news-primetime> (Jan. 29, 2021) (accessed Mar. 6, 2022).

<sup>48</sup> *The Post Becomes New York’s Most-Read Sunday Tabloid*, New York Post (May 23, 2019), <https://nypost.com/2019/05/23/the-post-becomes-new-yorks-most-read-sunday-tabloid/> (accessed Mar. 7, 2022).

election outcome.<sup>49</sup> The asserted basis was that the information had been “hacked.” Twitter admitted the action was mistaken several weeks later and the account was then unlocked.<sup>50</sup> Facebook similarly restricted distribution of the tabloid’s posts based on “misinformation” claims – even though the story was legitimate.<sup>51</sup>

***Donald Trump Jr. (@DonaldJTrumpJr)***

Donald Trump Jr. is the eldest son of former U.S. President Donald Trump. On or around July 28, 2020, Don Jr. was temporarily blocked from Twitter for 12 hours after tweeting a video of medical professionals discussing their views about Hydroxychloroquine’s potential treatment benefits against COVID-19.<sup>52</sup>

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<sup>49</sup> Jordan Boyd, *Twitter Suspends New York Post Account Over Bombshell Hunter Biden Story*, (October 14, 2020), <https://thefederalist.com/2020/10/14/twitter-suspends-new-york-post-account-over-bombshell-hunter-biden-story/> (accessed Mar. 7, 2020).

<sup>50</sup> Joseph Wulfsohn, *Twitter backs down, lifts New York Post's suspension after lengthy standoff over Hunter Biden report*, (October 30, 2020), <https://www.foxnews.com/media/twitter-lifts-new-york-posts-suspension-after-lengthy-standoff-over-hunter-biden-report> (accessed Mar. 7, 2022).

<sup>51</sup> Todd Spangler, *Facebook, Twitter Put Restrictions on New York Post’s Hunter Biden ‘Smoking Gun’ Story*, (October 14, 2020), <https://www.yahoo.com/entertainment/facebook-twitter-put-restrictions-york-213610307.html>, (accessed Mar. 7, 2020).

<sup>52</sup> Jake Wakefield, *Donald Trump Jr Suspended from Tweeting After Covid Post* (Jul. 28, 2022), BBC News, <https://www.bbc.com/news/technology-53567681> (accessed Mar. 7, 2022).

*Prager University* (“PragerU”)

PragerU is “a nonprofit educational and media organization with a mission to ‘provide conservative viewpoints and perspective on public issues that it believes are often overlooked.’ ... [T]he organization creates short videos for high-school, college, and graduate school-age audiences and shares them on the Internet. PragerU has posted hundreds of its videos on a broad range of socio-political issues on YouTube.”<sup>53</sup> YouTube decided to place certain PragerU videos in “restricted mode” “which, when activated by a user, makes unavailable certain age-inappropriate content” and “‘demonetized’ (prevented advertising placement) these and others.”<sup>54</sup>

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<sup>53</sup> *Prager Univ. v. Google LLC*, 951 F.3d 991, 995 (9th Cir. 2020). PragerU unsuccessfully sued YouTube for violations of the First Amendment and the Lanham Act. In pertinent part the Ninth Circuit held that YouTube is not a state actor, and therefore not directly subject to the First Amendment. This may or may not be good law, but the Ninth Circuit’s decision on this point has no relevance here. H.B. 20 does not subject social media platforms to the First Amendment or convert them into state actors; it prohibits viewpoint discrimination by private entities that operate enterprises affected by the public interest in the same way scores of other laws prohibit private discrimination based on other designated classifications.

<sup>54</sup> *Id.* at 906. The videos in issue are listed and described in Rachel del Guidice, *Watch the 21 Prager U Videos that YouTube is Censoring*, (October 14, 2016), <https://www.dailysignal.com/2016/10/14/watch-the-21-prageru-videos-that-youtube-is-censoring/>, (accessed March 7, 2022). They were created “with the sole intent of educating people of all ages about America’s founding values.” Steve McDonald, *Press Release – YouTube Censoring Prager U Videos*, October 12, 2016, <http://granitegrok.com/blog/2016/10/press-release-youtube-censoring-prager-u-videos> (accessed March 7, 2022).

### ***Aubrey Huff***

Huff is a conservative-leaning two-time World Series baseball champion who has criticized mandatory vaccination and mask mandates. He also defended Kyle Rittenhouse. Twitter suspended him in early August, 2021 for still-unclear reasons after a series of tweets.<sup>55</sup>

### ***Chad Prather***

Prather is a media personality and conservative GOP candidate for Texas Governor who was recently de-platformed 8 days prior to the Republican Party's primary election that took place on March 1, 2022. On or about February 21, 2022, with early voting already underway, Facebook suspended Prather from its social media platform for seven days because he allegedly "bullied" a commentator by noting she was "using victimhood in her favor."<sup>56</sup> Prather has over 500,000 followers on Facebook. Prather sought and obtained a Temporary Restraining Order from a state court – using the viewpoint discrimination protections afforded

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<sup>55</sup> Alex Raskin, *Anti-vaxxer and ex-Giants slugger Aubrey Huff blames 'liberal Karens' for getting him suspended from Twitter: 'I consider this a badge of honor!'*, (August 10, 2021), <https://www.dailymail.co.uk/news/article-9881043/Ex-Giants-slugger-Aubrey-Huff-blames-liberal-Karens-getting-suspended-Twitter.html> (accessed March 7, 2022).

<sup>56</sup> Jenny Goldsberry, *'This is Interference': Facebook Locks GOP Candidate's Page Days Ahead of Primary*, Washington Examiner (Feb. 25, 2022), <https://www.washingtonexaminer.com/news/this-is-interference-facebook-locks-gop-candidates-page-days-ahead-of-primary> (accessed Mar. 7, 2022).

by H.B. 20.<sup>57</sup> Political speech and advocacy strike at the core of the First Amendment.<sup>58</sup> Facebook’s action demonstrated that its actions can impact free and open political debate and that it can influence Texas election outcomes.

**C. H.B. 20 Is Content-Neutral, Inclusive, and Protects *All* Viewpoints;**

The Texas Legislature heard about extensive discrimination and arbitrary “standards” application against specific viewpoints. It reasonably chose to not favor or disfavor any. It made the lawful policy decision to protect every citizen’s right and ability to participate in public discussion. Pundits and personalities make the headlines but the rest, including those in marginalized communities, are the glue that binds our society<sup>59</sup> and the Legislature decided all people’s viewpoints deserve equal protection.

Social media users do not consider platforms as akin to private newspapers. Instead, they correctly view platforms as *public fora*, the modern public square, a

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<sup>57</sup> The Preliminary Injunction runs only against the Texas Attorney General, so private parties can still file actions invoking H.B. 20.

<sup>58</sup> *Id.*

<sup>59</sup> When Facebook deplatformed President Trump the ACLU noted, “President Trump can turn his press team or Fox News to communicate with the public, but others – like many Black, Brown, and LGTBQ activists who have been censored by social media companies – will not have that luxury.” Natalie Colarossi, *ACLU Counsel Warns of ‘Unchecked Power’ of Twitter, Facebook After Trump Suspension*, Newsweek (Jun. 29, 2021), <https://www.newsweek.com/aclu-counsel-warns-unchecked-power-twitter-facebook-after-trump-suspension-1560248> (accessed Mar. 8, 2022).

speakers' corner. When users learn their post has been removed or de-prioritized by a platform they consider an abridgment of their free speech rights. Users are understandably offended when they learn they have been shadow-banned or de-platformed. Many users are startled when their own speech is vaguely and ambiguously deemed "misinformation" or "hate speech" by anyone. These misclassifications also cause users' – 99% of whom are not public figures – reputational harm.

There is ongoing debate whether Black Lives Matter ideology is racist, extremist, hateful or even terroristic. This sentiment has been expressed by private parties<sup>60</sup> and the government,<sup>61</sup> but others can legitimately disagree and they have. Similar arguments obtain for "Blue Lives Matter"<sup>62</sup> and "All Lives Matter."<sup>63</sup> The question is whether a cartel of powerful private actors are the proper ones to decide

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<sup>60</sup> Rudy Giuliani, *Face Facts: 'Black Lives Matter' Is All About Hate*, New York Post (Sep. 24, 2020), <https://nypost.com/2020/09/24/face-facts-black-lives-matter-is-all-about-hate/> (accessed Mar. 8, 2022).

<sup>61</sup> Ryan J. Foley, *Police Guide That Calls BLM a Terrorist Group Draws Outrage*, AP (Dec. 2, 2020), <https://apnews.com/article/police-guide-calls-blm-terrorist-group-8dc0afce2ce6b60dbaa0d1d9c53ce1e3> (accessed Mar. 8, 2022).

<sup>62</sup> Fionnuala O'Leary, *BLM Backlash: What is Blue Lives Matter and Why Do Some People Consider it Racist?* The Sun (Aug. 19, 2020), <https://www.the-sun.com/news/992088/blue-lives-matter-racist-flag-blm-protests/> (accessed Mar. 8, 2022).

<sup>63</sup> Karen Stollznaw, *Why Is It So Offensive to Say 'All Lives Matter'?* Conversation (Jan. 13, 2021), <https://theconversation.com/why-is-it-so-offensive-to-say-all-lives-matter-153188> (accessed Mar. 8, 2022).



on behalf of everyone else. The Pew Poll found that Americans most Americans are now “skeptical that these sites can accurately determine what content should be flagged.”<sup>64</sup>

Courts decide law, but policy is reserved for the legislative branch. Here, Texas has legislatively decided that the best policy is one that imposes neutral nondiscrimination protection for viewpoints expressed on certain online service establishments. A legislature may provide civil rights protection beyond that afforded by the Constitution and the Civil Rights Act, 42 U.S.C. §1981. For example, both Congress and the Texas Legislature have afforded additional nondiscrimination protections for those with disabilities in the private sphere. Americans With Disabilities Act, Title III, 42 U.S.C. §§12181-12189; Texas Hum. Res. Code, §§121.003 - 121.006. The Texas law applies to “common carriers” and “housing accommodations.”

This choice is fully consistent with the underlying purposes of the First Amendment. “each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.” *Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 595 (2002) (“The economics and the technology of each

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<sup>64</sup> The poll found that 66% of Americans (52% Democrat, 84% Republican) have little confidence in platforms’ ability to identify “inaccurate or “misleading” posts, while 31% have a great or some confidence.

medium affect both the burdens of a speech restriction and the Government's interest in maintaining it.”). The Second Circuit recently noted:

[W]e write at a time in the history of this nation when the conduct of our government and its officials is subject to wide-open, robust debate. This debate encompasses an extraordinarily broad range of ideas and viewpoints and generates a level of passion and intensity the likes of which have rarely been seen. This debate, as uncomfortable and as unpleasant as it frequently may be, is nonetheless a good thing. . . [W]e remind the litigants and the public that if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less.<sup>65</sup>

User discontent with platform viewpoint suppression is understandable.

There is no doubt that individuals consider suppression of their own speech – however odious it may be – as a manipulation of public debate “through coercion rather than persuasion,” and an attempt to “effectively drive certain ideas or viewpoints from the marketplace.” *See Turner Broadcasting System v. FCC*, 512 U.S. 622, 641 (1994). This is so even when the suppression comes from a private party and not the government. Citizens intuitively understand that viewpoint suppression by the elite benefits already-powerful individuals and groups and disadvantages marginalized groups.

Former ACLU president and constitutional law scholar Nadine Strossen noted that equal rights and social justice movements have gained traction time and

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<sup>65</sup> *Knight First Amendment v. Trump*, 928 F.3d 226, 240 (2d Cir. 2019), *vacated, remanded by Biden v. Knight First Amendment*, 141 S. Ct. 1220 (2021).

time again in the United States (and other nations) by using free speech rights to advocate, demonstrate, litigate, and lobby. Censorship is frequently employed by those in power to stifle these causes. Abolitionists, women’s suffragists, birth control advocates, labor union organizers, anti-war activists, socialists, Communists, and civil rights protestors have all been prime targets of censorship throughout American history.<sup>66</sup> The current level of hostility and intolerance to their views gives conservatives with perspectives held “in good faith by reasonable and sincere people”<sup>67</sup> valid reason to feel like an oppressed community.

This brief outlines suppression of conservatives but the Legislation does not single them out for special treatment. H.B. 20’s entire goal and purpose is to ensure *everyone* – regardless of viewpoint – gets to participate. The law is expressly viewpoint-neutral. It protects each individual without distinction.

## **II. H.B. 20 Section 2’s Disclosure & Transparency Requirements Do Not Unreasonably Burden Social Media Platforms.**

Section 2 does not violate platforms’ First Amendment rights. Section 2 is a consumer protection measure that addresses the platforms’ own commercial speech and conduct. Section 2 requires social media firms to disclose and make clear their terms of use and removal procedures, including notice and appeal instructions.

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<sup>66</sup> Nadine Strossen, The Interdependence of Racial Justice and Free Speech Rights for Racists, 1 J. OF FREE SPEECH L. 51, 56-57 (2021).

<sup>67</sup> *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015).

Section 2 requires that social media platforms disclose how they filter and target information to users, and give notice when certain content is promoted using algorithms. Tex. Bus. & Com. Code § 120.051(a). Section 2 is simply a consumer protection measure that compels disclosure of factual and uncontroversial information. It's as American as the apple pie that comes with an ingredient and nutrition label.

The user enters into a contract of adhesion with the platform with each login. The user agrees to abide by a set of Terms of Use and Community Standards and receives the benefit of using the platform. In return, the user confers a benefit on the platform by allowing it to collect thousands of data points about the user and then use that information for commercial gain. The Terms and Standards are universal. The same contract applies to every user and therefore should apply evenly to each user. Even when the user ceases to use the platform, the platform still leverages data about the user. If the platform can enforce Terms and Standards against the user, then the user can enforce the same against the platform. If not, then the contract is unconscionable.

Even-handed enforcement of varying Terms of Use and Community Standards among platforms with diverse speakers and listeners, including the transparency requirements contemplated by Section 2, mitigate the backlash that social media businesses often face after taking action. By having explicit standards

of what does and does not constitute appropriate platform use, transparency prevents misunderstandings, disputes and discrimination from occurring. Moreover, clear Terms of Use and Community Standards will encourage competition between social media platforms. Without clear notice regarding what the product is or is not, consumers do not know if they are bargaining for Coke or Diet Pepsi.

Social media platforms' current viewpoint discrimination practices undermine public confidence that individuals have a fair chance to participate in public debate. Their practices have led to sincere questions about whether elections are fair and legitimate. Simple transparent disclosures by social media platforms as contemplated by Section 2 will assuage such concerns and protect platforms from their own "teclash."

Section 2 allows consumers to select between different platform approaches to content moderation based on their preferences because they will know what each platform's approach is. Consumers must know where they stand so they can make a healthy choice regarding which platform will host their speech. Platform policies already vary in practice,<sup>68</sup> but consumers do not know how any individual

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<sup>68</sup> Twitter blocked the New York Post story about Hunter Biden in October 2020. Facebook instead relegated it to the bottom of the News Feed. *See* Matt Perault, Section 230 Reform: A Typology of Platform Power, CPI Antitrust Chron., May 2021, at 18.

platform truly applies them. Transparency will “enable users to make choices based on their moderation preferences.”<sup>69</sup>

The platforms’ opposition to Section 2’s disclosure requirements overlooks the material difference between disclosure requirements and outright prohibitions on speech. *See Zauderer, supra*, 471 U.S. at 650. Section 2 does not attempt to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Id* at 651. Instead, Section 2 seeks to prescribe what has always been traditional in the regulation of commercial speech: ensuring overall consumer welfare. Any constitutionally protected interest in not providing factual information is minimal. *Id.* Disclosure requirements “trench much more narrowly” on their interests than do flat prohibitions on speech. *Id.* “The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.” *In re R. M. J.*, 455 U.S. 191, 202 n.12 (1982).

The mere existence or presence of third-party content does not immunize social media companies’ own material and conduct, which they create and distribute on their own volition. Section 2 merely holds platforms accountable for their own words, deeds, omissions, and failures, and not those of any other third party.

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<sup>69</sup> *Id.*

Section 2 is neither punitive nor overburdensome. The Appellees' complaint asserts they "will incur significant costs" to comply with Section 2. ROA.23. But given their sheer reach and size, the cost is relative and there is no evidence it will hurt their bottom line. Moreover, it was error to assume that Section 2 will damage Facebook's, Twitter's, and YouTube's respective brand and goodwill, ROA.24. The Pew Poll indicates the public as a whole already has little trust and confidence in social media platforms.<sup>70</sup> Section 2's disclosure and transparency requirements will *increase* brand trust, safety and awareness, user health and overall consumer welfare because consumers will be better able understand the outcome.

### CONCLUSION

For the foregoing reasons, Plaintiff-Appellees are unlikely to succeed on the merits. This Court should vacate the district court's preliminary injunction. At minimum, this Court should vacate the district court's preliminary injunction insofar as it prevents enforcement or operation of H.B. 20 Section 2.

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<sup>70</sup> Pew Poll, *supra*.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

This *Amicus* brief contains 6,298 words, excluding the parts exempted by rule. This filing complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word.

/s/ W. Scott McCollough

### **CERTIFICATE OF SERVICE**

I certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on March 9, 2022. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ W. Scott McCollough