ORAL ARGUMENT NOT YET SCHEDULED

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

***BRIEF OF AMICI CURIAE* FLOOR64, INC. D/B/A THE COPIA INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES**

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae certifies that, in addition to those persons listed in the first filed brief's certificate of interested persons, and updated by amici curiae and plaintiffs-appellees' brief, the following is a complete supplemental list of interested persons as required by Fifth Circuit Rule 28.2.1:

1. Floor64, Inc., d/b/a The Copia Institute, *Amicus Curiae*

2. Gellis, Catherine, *Attorney for Amicus Curiae*

3. Masnick, Michael, *Founder and principal of Amicus Curiae*

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae Floor64, Inc. d/b/a The Copia Institute states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST[1]

Amicus Copia Institute is the think tank arm of Floor64, Inc., the privately-held small business behind Techdirt.com ("Techdirt"), an online publication that has chronicled technology law and policy for nearly 25 years. In this time Techdirt has published more than 70,000 articles regarding subjects such as freedom of expression, platform liability, copyright, trademark, patents, privacy, innovation policy and more. The site regularly receives more than a million page views per month, and its articles have attracted more than a million reader comments, which itself is user expression that advances discovery and discussion around these topics. As a think tank the Copia Institute also produces evidence-driven white papers examining the nuance and assumptions underpinning tech policy. Then, armed with its insight, it regularly files regulatory comments, amicus briefs, and other advocacy instruments on these subjects to help educate lawmakers, courts, and other regulators – as well as innovators, entrepreneurs, and the public – with the goal of influencing good policy that promotes and sustains innovation and expression. Many such filings have implicated the exact same issues as those at the fore of this litigation.

[1] Pursuant to FRAP 29(a), amicus curiae certifies that appellees have consented to the filing of this brief and that appellant does not oppose. Pursuant to FRAP 29(c)(5), amicus curiae further certifies that no party or party's counsel authored this brief in whole or in part, that no party or party's counsel provided any money that was intended to fund the preparation or submission of this brief, and no party or person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

The Copia Institute also itself depends on the First Amendment and the platform liability protection afforded by 47 U.S.C. § 230 ("Section 230") – subjects at the heart of this matter – to both enable the robust public discourse found on its Techdirt website and for its own expression to reach its audiences throughout the Internet and beyond. The Copia Institute therefore submits this brief amicus curiae wearing two hats: as a longtime commenter on the issues raised by the underlying Texas statute at issue, and as a small business whose statutory and constitutional rights are themselves threatened by this law.

SUMMARY OF ARGUMENT

The Texas statute, known as House Bill 20 ("HB20"), as well as the defense of it, betray a fundamental misunderstanding of the First Amendment, Section 230, and how each works to vindicate the very sorts of expressive interests the Texas law purports to support. Because the law fundamentally, and impermissibly, interferes with it all, if allowed to come into force HB20 will impinge on the critical statutory and constitutional rights all Internet platforms and speakers depend on, and rather than advancing online expression, this law will only suppress it, both through its own direct terms and by opening the door to similar legislation from other states to finish crushing what online platforms and expression are left.

ARGUMENT

I. HB20 contravenes the pro-expression policy values both the First Amendment and Section 230 are intended to advance.

HB20 may be styled as a law designed to further online expression, but in reality it takes aim at the entire Internet ecosystem and its ability to facilitate any online expression at all. Even to the extent that the goal of HB20 might genuinely be to help further a true diversity of expression online – which Section 230 itself calls for – and is not simply an attempt by the Texas legislature to place its governmental thumb on the scale favoring certain viewpoints, a law like HB20 is exactly how not to achieve this policy end.

While stalwart principles of the First Amendment apply just as much online as they do offline, *Reno v. ACLU*, 521 U.S. 844, 870 (1997), the Internet nevertheless has some unique qualities. In particular, for expression to get from one person to another it needs systems and services to help it. We call these helpers many things – "service providers,"[2] "intermediaries," or, as commonly used in this litigation, "platforms" – and they come in many shapes and sizes, providing all sorts of intermediating services, from network connectivity to messaging to content hosting,

[2] Section 230 defines them as Interactive Computer Service providers, which are "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2).

and more. But whether they are the sort of platform we might recognize as a "social media platform," as HB20 attempts to address, or any other sort of platform helping facilitate expression, all of them need to feel legally safe to provide that help, or else they won't be able to offer it.

When Congress contemplated the Internet in the mid-1990s it recognized that for it to fulfill its promise of providing "a variety of political, educational, cultural, and entertainment services," 47 U.S.C. § 230(a)(5), enabling "a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 U.S.C. § 230(a)(3), it was going to need to make it safe for platforms to take the chance of being in the business of helping that online world flourish. *See* 47 U.S.C. § 230(b)(2). At the same time, however, Congress also was concerned about the hygiene of the online world. *See* 47 U.S.C. § 230(b)(4); *see also Reno*, 521 U.S. at 849 (litigating the rest of the Communications Decency Act Section 230 was passed into law with).

In other words, Congress had two parallel and complementary goals: foster the most positive content online, and minimize the most negative. And the best way to meet both of these general aspirations was not to try to bludgeon platforms with prescriptive demands backed by fear of sanction, because that was never going to

produce good results[3] (or be Constitutional, as the First Amendment precludes the government from "making a law" that decides officially what the good or bad expression is). *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-42 (1994) (reinforcing the importance of content neutrality under the First Amendment). Instead Congress passed Section 230 to make it legally safe for platforms to do the best they could on both fronts to achieve both these general goals. Thanks to Section 230 immunity they can afford to be available to facilitate the most content possible – including the most beneficial content – because they don't have to worry about crippling liability if something ends up on their systems that is problematic. And they can afford to take steps to remove the most undesirable content, because they also don't have to worry about crippling liability if they happen to remove more user expression than may be ideal.

And this policy has worked as designed: by being an incentive-based "carrot" sort of law, where Congress aligned platforms' interests with its own, rather than a punitive "stick" sort of law, where their interests would inherently be in tension, platforms, as well as the user expression they facilitate, have been able to proliferate, just as Congress had hoped, because platforms have not had to fear being crushed

[3] The *Stratton Oakmont v. Prodigy* case, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), taught Congress that the fear of legal sanction was instead likely to deter platforms from doing what it wanted them to do, which pointedly included moderating user expression. 47 U.S.C. § 230(c)(2).

by threats of liability if they did not either facilitate or moderate user expression exactly as everyone else might want them to – assuming everyone could even agree.

What laws like HB20 themselves remind is that such agreement can rarely be presumed. When it comes to expression, views will often diverge – in fact, this law was passed because the views of certain platforms and of the Texas legislature were apparently in opposition. *See*, *e.g.*, Appellant's Br. ("Texas Br.") 10. But the First Amendment exists because such disagreement is inevitable, and so it prohibits the government from taking sides and creating sanction for views that it disfavors. And it is this resulting freedom of expression that is what allows diversity of discourse in America to thrive overall.

But HB20 does violence to both those Constitutional and statutory ideals. It proposes to punish those platforms whose expressive activities the Texas government disfavors, particularly as those expressive activities are reflected in moderation practices. In doing so it also stands to upend the critical balance Congress created with Section 230 by reintroducing the punitive the sticks Congress had purposefully eliminated from platform regulation. If allowed to come into force all platforms will be deterred from trying to perform any of the necessary helping tasks we need them to do, to either facilitate user expression or moderate it, because it will become too existentially threatening to them when they inevitably won't be able to achieve the impossible and do it all exactly how the Texas government

demands. The result will therefore be less online expression and less diverse discourse overall, with either more user expression being rejected from their systems or simply fewer platforms available to help facilitate any expression at all, as it will just be too dangerous to them to try.

II. HB20 would harm online expression by harming the platforms that facilitate it.

A. There is no assurance that HB20 would not affect platforms other than those Texas intended to target.

One prominent flaw of HB20 is that either it is of narrow applicability, in which case it will reach few platforms but be unconstitutional for singling out an arbitrary population of platforms to penalize, or its criteria for enforcement is broad and impinges the rights of all too many platforms. Of course, in the case of the Copia Institute, or another similarly situated platform, both may be the case. Because while today the law may not reach an entity like the Copia Institute, tomorrow it might.

The Texas statute purports to apply only to platforms with "more than 50 million active users in the United States in a calendar month." TEX. BUS. & COM. CODE § 120.002(b); TEX. CIV. PRAC. & REM. CODE § 143A.004(c). Per this criteria, as of today, the Copia Institute might be beyond its reach. But such could easily

change. Even small sites like Techdirt can attract large audiences.[4] Indeed, the very point of the Copia Institute enterprise is to reach and influence people. Every platform aspires to grow, yet laws like HB20 create policy pressure stifling growth. Especially because platforms like Techdirt and others with relatively small revenue streams but potentially large userbases can end up on a collision course with the law as they grow more popular, where suddenly they find themselves taking on more and more regulatory obligations dictating how they may continue to engage with their readership but without necessarily a commensurate increase in resources necessary to comply with them, or cope with the consequences if they don't.

Because Techdirt would otherwise seem to meet the law's other criteria for being subject to its enforcement. For instance, its definition of the artificial construct "social media platform" is certainly broad enough to encompass Techdirt. TEX. BUS. & COM. CODE § 120.001(1); TEX. CIV. PRAC. & REM. CODE § 143A.001(4). After all, it is an Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images." But the specifics of the Texas law are not alone dispositive as to the infirmities of the law. The danger

[4] For instance, in 2005 Copia Institute founder and Techdirt editor Michael Masnick coined the term, "the Streisand Effect," as part of his commentary. It is a term that has had significant staying power, remaining in common parlance as a term for discussing the unwanted attention ill-considered attempts at censorship might unleash. *See* https://en.wikipedia.org/wiki/Streisand_effect.

to all platforms, including the Copia Institute, is that even if by its terms this particular law like this one may never reach them,[5] if such a law could be permitted then any other state could issue their own, with their own arbitrary enforcement criteria, creating chilling doubt and confusion about the expressive rights of a platform until the courts had a chance to weigh in to determine whether the specific regulatory language should be allowed. Thus the only way to effectively preserve the Constitutional and statutory rights of platforms is to not let any law get anywhere near them, as this law proudly does.

B. HB20 attacks the Constitutional and statutory rights all platforms depend on to facilitate any user expression.

i. How HB20 attacks these rights

The way HB20 would affect the Copia Institute, should it reach it, is illustrative of the serious Constitutional and statutory defects of the legislation, which would impermissibly hurt any online platform it did reach, including the ones Texas intended to target.

[5] It is also not clear that the exceptions to the "social media platform" definition mean HB20 would not apply to Techdirt. TEX. BUS. & COM. CODE § 120.001(1); TEX. CIV. PRAC. & REM. CODE § 143A.001(4). While Techdirt is a "website" that consists primarily of "news" "preselected by the provider," only some of the community-generated expression it allows to be published on its site exists as comments on posts. *See* discussion *infra* Section II.B. In any case, even if Techdirt might be covered by the exception today, it strangles its growth if it cannot grow and change as its expressive needs warrant if doing so might put it in the crosshairs of the Texas law.

In the case of the Copia Institute, its parent business, which dates back almost to the statutory birth of Section 230,[6] depends on the First Amendment and Section 230 in a number of ways. One prominent way is with regard to the Techdirt.com site, which publishes articles and commentary while also allowing reader comments on its articles, thus itself acting as a platform helping to facilitate others' user expression. These comments add to the richness of the discourse found on its pages, and by hosting this user expression the Copia Institute is able to build a dialog around its ideas. The comments also often help the Copia Institute's own expression be more valuable, with story tips, error checking, and other meaningful feedback provided by the reader community.[7]

To keep the discussion in the comments meaningful, the Copia Institute uses a system of moderation. This particular system can be described in broad strokes as being primarily community-driven, and one where the reader community can affect what appears on Techdirt's pages in several ways. One way is through "boosting" comments, and one source of revenue for the Copia Institute is derived from people purchasing credits to be put towards this boosting. Meanwhile all readers can rate

[6] See https://www.techdirt.com/articles/990317/0341214/august-17-23-1997.shtml for the first publication in 1997, and https://www.techdirt.com/articles/990312/1757227.shtml for its first article in its current blog publication form from 1999.

[7] In fact, so productive is the Techdirt comment section that the Copia Institute has even hired onto staff someone who had previously been a regular contributor to the discussion there.

comments as insightful or funny, and for several years Techdirt has published weekly summaries highlighting the most insightful or humorous comments that appeared on its stories for the previous week.[8] Crucially, readers can also designate comments as abusive or spam, which causes them to be removed from view.[9]

But while the Copia Institute's moderation practices can be described in broad strokes, they cannot be articulated with the specificity that HB20 would require. For instance the law requires that platforms disclose their moderation standards. *See, e.g.*, TEX. BUS. & COM. CODE § 120.051. And it also puts limits on how platforms can do this moderation. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 143A.002 (banning certain moderation decisions, including those based on the "viewpoint" of the user expression being moderated).

But even if Techdirt wanted to comply with the Texas law, it could not. For instance, it could not disclose its moderation policy because its moderation system is primarily community-driven and subject to the community's whims and values of the moment. Which also means that it could not guarantee that moderation always comported with a pre-announced "Acceptable Use Policy," which HB20 also

[8] *See, e.g.*, Leigh Beadon, *Funniest/Most Insightful Comments Of The Week At Techdirt*, TECHDIRT (Apr. 3, 2022), https://www.techdirt.com/2022/04/03/funniest-most-insightful-comments-of-the-week-at-techdirt-4/.

[9] Being removed from view generally means hidden but available to readers interested in seeing what had been demoted from automatic display with an extra click. But such comments may also be deleted from the system entirely by site operators.

requires. TEX. BUS. & COM. CODE § 120.052.[10] And that it would be infeasible to meet any of the Texas law's additional burdensome demands, including to provide notice to any affected user, TEX. BUS. & COM. CODE § 120.103, a complaint system, TEX. BUS. & COM. CODE § 120.101,[11] and a process for appeal, TEX. BUS. & COM. CODE § 120.103, which the Copia Institute does not have the resources or infrastructure to support.[12] In other words, the Texas law sets up a situation where if the Copia Institute cannot host user-provided content exactly the way Texas demands, it effectively does not get to host any user-provided content at all.

The effects of this regulation are therefore dire to expressive freedom. But the whole pretense behind this law is as well, because even if any platform moderation were to be driven by bias, the existence of expressive bias is not something for regulation to correct; it is something for regulation to *protect*. Bias is evidence of expressive freedom, that we could be at liberty to have preferences,

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[10] As the Copia Institute has also long chronicled, content moderation at scale is always impossible to deliver consistently. *See* Michael Masnick, *Masnick's Impossibility Theorem: Content Moderation At Scale Is Impossible To Do Well*, TECHDIRT (Nov. 20, 2019), https://www.techdirt.com/articles/20191111/23032743367/masnicks-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well.shtml; https://www.techdirt.com/blog/contentmoderation/ (collecting case studies of moderation challenges).

[11] Requiring a turn-around time of 48 hours. TEX. BUS. & COM. CODE § 120.102.

[12] There is also the additional consideration that the more that laws like HB20 create legal risk for platforms, the more likely platforms will remove content on the advice of counsel, which should be a reason privileged from disclosure, and thus not be something that can be subject to an appeal.

which we can then express. This law targets that freedom by denying platform operators the ability to express those preferences.[13] While it may be good policy to encourage a diversity of ideas online (as even Section 230 itself does), or even certain ideas, the government cannot conscript platforms to achieve that end, which is what this law openly aims to do.

The Copia Institute chooses to host user comments, and moderate them in the way it does, because doing so fulfills its own expressive objectives.[14] It could just as easily choose not to host them, or to moderate them with a different system prioritizing different factors.[15] The First Amendment ensures that it can make these

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[13] Ironically, to the extent that this bill was driven by animus towards Facebook, Techdirt has articulated its own displeasure towards the company's practices. *See, e.g.*, Michael Masnick, *Facebook Banning & Threatening People For Making Facebook Better Is Everything That's Wrong With Facebook*, TECHDIRT (Oct. 12, 2021), https://www.techdirt.com/articles/20211009/01035347721/facebook-banning-threatening-people-making-facebook-better-is-everything-thats-wrong-with-facebook.shtml. But this law is about more than Facebook; it is about the entire ecosystem of online platforms that this law threatens to devastate.

[14] Many publications have opted to not host their own comments, which is obviously a choice they are entitled to make. However, studies have noted that by not doing so, they lose engagement with their readership. Elizabeth Djinis, *Don't read the comments? For news sites, it might be worth the effort.*, POYNTER., (Nov. 4, 2021), available at https://www.poynter.org/ethics-trust/2021/dont-read-the-comments-for-news-sites-it-might-be-worth-the-effort/. The irony is that, without comment sections, what reader engagement there is tends to go to the larger social media sites that have attracted the Texas legislature's ire. *Id.* ("[W]hether or not news outlets choose to play the commenting game, that game will still go on without them. Conversations on Twitter, Facebook and Instagram won't stop.").

[15] The decision to close comment sections has frequently been driven by concerns over their moderation. Djinis ("The language in these announcements was sometimes similar, portraying a small group of people taking over a forum meant

editorial and associative choices as most appropriate for its own expressive priorities at that moment, including expressive choices that strive to foster the greatest amount of discourse, which may ironically be served by more moderation.[16] The First Amendment also ensures that these expressive choices can't be chilled by mandatory disclosures. Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, HASTINGS LAW JOURNAL, Vol. 73, 2022 (forthcoming) at 9-12, available at SSRN: https://ssrn.com/abstract=4005647. While moderation transparency can be a positive value,[17] mandatory transparency is a censorial one that effectively strips the moderator of their discretion by chilling it. The First Amendment therefore stands against it, because it would have such a chilling effect on any platform's own expressive rights.

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for the public. They used words like 'hijack' and 'anarchy.'"). But because moderating ability is so critical to whether a publication can self-host that user engagement, it is critical that moderation decisions remain legally protected so that these sites can be free to discover the most effective way of moderating that best serves them and their users.

[16] Michael Masnick, *Why Moderating Content Actually Does More To Support The Principles Of Free Speech*, TECHDIRT (Mar. 30, 2022), https://www.techdirt.com/2022/03/30/why-moderating-content-actually-does-more-to-support-the-principles-of-free-speech/.

[17] Cathy Gellis, *A Paean To Transparency Reports*, TECHDIRT (Aug. 31, 2020), https://www.techdirt.com/2020/08/31/paean-to-transparency-reports/ (reflecting the Copia Institute's position).

ii. The crippling consequences of how HB20 attacks these rights

Section 230 serves to make platforms' First Amendment rights a practical reality, providing them with critical statutory protection by making it safe to both host user comments at all, as well as remove any unwanted ones without having to fear each of these decisions being challenged in court, even meritlessly, should someone should happen to object to them.[18]

Such legal challenges are not an idle concern. As this litigation illustrates, technology policy can be contentious subject, and Techdirt's trenchant (and First Amendment-protected) commentary can ruffle feathers. Those who are ruffled can be tempted to threaten litigation,[19] but thanks to the First Amendment and Section 230 those threats are ordinarily little more than toothless bluster. But on the occasion that a threat from an unhappy reader slipped through and turned into a live lawsuit, the results were devastating to the Copia Institute and its entire enterprise. The price of defending the speech in question, which included a related user comment, was lost time and money, lost sleep for the company's principal and editor, lost

[18] Cathy Gellis, *Section 230 Isn't A Subsidy; It's A Rule Of Civil Procedure*, TECHDIRT (Dec. 29, 2020), https://www.techdirt.com/2020/12/29/section-230-isnt-subsidy-rule-civil-procedure/ (reflecting the Copia Institute's position).

[19] *See, e.g.*, Michael Masnick, *Hey North Face! Our Story About You Flipping Out Over 'Hey Fuck Face' Is Not Trademark Infringement*, TECHDIRT (Nov. 15, 2021), https://www.techdirt.com/articles/20211112/14074147927/hey-north-face-our-story-about-you-flipping-out-over-hey-fuck-face-is-not-trademark-infringement.shtml

opportunity to further develop the company's business, and a general chilling of the company's expressive activities.[20] And that was just the damage caused by one lawsuit, which still resulted in protected expression remaining online.[21]

Smaller entities like the Copia Institute cannot afford to defend against the onslaught of litigation that the Texas law would invite by effectively nullifying their Section 230 protection in order to target their First Amendment rights to moderate as they see fit. Civil litigation is notoriously expensive. The cost of defending even one frivolous claim can easily exceed a startup's valuation. Engine, Primer: Value of Section 230 (Jan. 31, 2019), https://www.engine.is/news/primer/section230costs. Simply responding to demand letters can cost companies thousands of dollars in lawyer fees, not to mention any obligations to preserve documents demand letters might trigger, which themselves impose non-trivial costs, especially for smaller companies without the infrastructure larger companies may have to manage them. *Id.* And if these cases somehow manage to go forward, the costs threaten to be even more ruinous. A motion to dismiss can easily cost in the tens of thousands of dollars.

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[20] *See* Michael Masnick, *The Chilling Effects Of A SLAPP Suit: My Story*, TECHDIRT (Jun. 15, 2017), https://www.techdirt.com/articles/20170613/21220237581/chilling-effects-slapp-suit-my-story.shtml.

[21] Michael Masnick, *Our Legal Dispute With Shiva Ayyadurai Is Now Over*, TECHDIRT (May 17, 2019), https://www.techdirt.com/articles/20190516/22284042229/our-legal-dispute-with-shiva-ayyadurai-is-now-over.shtml.

Id. But at least if the company can get out of the case at that stage they will be spared the even more exorbitant costs of discovery, or, worse, trial. *Id.*

Because it is not just a damage award that can be fatal to these small companies. *See UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F. 3d 1006 (9th Cir. 2013) (finding the already bankrupted platform ultimately immune from liability pursuant to the weaker statutory protection of the Digital Millennium Copyright Act, 17 U.S.C. § 512).[22] Having Section 230 deter these lawsuits outright, or at least help companies get out of them relatively inexpensively, helps ensure that a company won't die a "death by ten thousand duck-bites." *Fair Housing Coun. Of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1174 (9th Cir. 2008). If laws like Texas's are allowed to weaken Section 230 platforms will now need to worry about increased and more expensive litigation, as well as potential damage awards, depleting their bank accounts and scaring off needed investment – including investment for activities that will ultimately foster online expression. *See* Michael Masnick, Don't Shoot The Message Board, June 2019,

[22] *See* Peter Kafka, *Veoh finally calls it quits: layoffs yesterday, bankruptcy filing soon*, C|NET (Feb. 11, 2010), http://www.cnet.com/news/veoh-finally-calls-it-quits-layoffs-yesterday-bankruptcy-filing-soon/ (describing how the *Shelter Capital* litigation dried up the startup platform's funding and forced it out of business while it was litigating the lawsuit it eventually won). Claims of copyright infringement are one of the few kinds of claims where Section 230 provides platforms no protective benefit. 47 U.S.C. § 230(e)(2). As *Shelter Capital* demonstrates, however, the results of that gap in protection can be devastating to platforms, as well as the competitive landscape for platform diversity.

https://copia.is/library/dont-shoot-the-message-board/ (documenting how weakening legal protections for platforms deters investment in technology and online services).

None of these resulting harms – chilling platforms if not outright obliterating them through the enforcement of unconstitutional requirements – is consistent with Texas's claimed goal of getting more voices online. *See, e.g.*, Texas Br. 17. In fact, with HB20 Texas is outright calling for *increased* civil litigation over what should be protected First Amendment activity by the platform. TEX. CIV. PRAC. & REM. CODE § 143A.007. And if that legal danger isn't deterring enough to platforms, HB20 also threatens state attorney general enforcement against the exercise of expressive, should the way platforms choose to exercise theirs be out of step with the state's current politically-driven policy preferences. TEX. BUS. & COM. CODE § 120.151.

Ultimately HB20 exposes platforms to enormous legal risk, which is exactly what Congress had sought to avoid when it passed Section 230. HB20 will therefore not do anything to enhance online speech. Instead it will only pressure platforms to refuse their users' expression, just as Congress feared. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) ("Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.").

C. By deterring platforms from facilitating user expression, HB20 harms all online expression.

Laws that chill platforms won't just hurt the Copia Institute as a platform. It will also be hurt as a user of *other* platforms it depends on for its own expression to be facilitated, just as it will hurt every other user of these now-chilled platforms. Indeed it would be of little comfort or utility to the Copia Institute if the Texas law spared it as a platform but drove offline any of the other platforms it currently uses to support its own expressive activities.

For instance, the Copia Institute needs other platforms to help it deliver its expression to audiences. Sometimes these are backend platforms, like web hosts and domain registrars. Other times they are specialized platforms that host other forms of content the Copia Institute produces, such as SoundCloud and the AppleStore, which serve its podcasts to listeners. In the past the Copia Institute has also used ad platforms to monetize its Techdirt articles, and in general its monetization activities themselves require the support of payment providers and other platforms like Patreon that help facilitate the monetization of expression in innovative ways. As an example, one way the Copia Institute makes money is by allowing readers to become "Insiders" in exchange for certain perks, including being part of an exclusive reader community, and the Copia Institute is currently using the Discord platform to provide that community a forum to interact. But none of these platforms could exist to support the Copia Institute's expressive business were it not

for the First Amendment and Section 230 enabling them to provide these services. Affecting their protection will inevitably affect the Copia Institute as well.

While Texas argues unconvincingly that such platforms are beyond the reach of HB20, Texas Br. 32, even simply affecting the "social media platforms" the law definitely does reach – which the Copia Institute uses to promote its expression, find audiences, and enable the easy sharing of its ideas – would also negatively impact the Copia Institute and any other user of those platforms. Because of the First Amendment and Section 230 none of these users were ever going to be guaranteed access to these platforms, but at least being able to use them was a viable possibility, which HB20 only serves to make less likely. Its provisions restraining those platforms' moderation ability and increasing their liability risk would still provide no real benefit to the Copia Institute as a speaker because they will only serve to reduce these other platforms' availability altogether and thus shrink the universe of outlets for the Copia Institute to use to spread its own expression.

III. If laws like HB20 are not pre-empted by Section 230 then other states will pass their own with arbitrary criteria and potentially conflicting terms impossible for Internet platforms to comply with.

A. State regulation of the Internet will create a smothering nightmare for Internet platforms.

Section 230 contains an explicit pre-emption provision. 47 U.S.C. §230(e)(3) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”). The Texas law is itself a

relevant example of why Congress included it, because here we have Texas deliberately trying to regulate interstate communications for the nation, when that prerogative belongs with Congress.[23]

Even if Texas were correct to be concerned about national Internet policy it would still be a problem for it or any other state to superimpose its own policy choices on it. Because Texas is not the only one that is trying to: in fact, at least 30 state legislatures have recently proposed some sort of content moderation bill or other bills designed to give states regulatory oversight over the Internet.[24] It is enough of a problem when any one state wants to take on this authority but an even bigger problem when the provisions of these bills are often at odds with each other.[25]

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[23] Texas keyed its law to platforms with more than 50 million users. TEX. BUS. & COM. CODE § 120.002(b); TEX. CIV. PRAC. & REM. CODE § 143A.004(c). But there are only 29 million people in Texas, including infants, toddlers, and non-Internet using adults. *See* United States Census Bureau, Quickfacts: Texas (last accessed Apr. 7, 2022), https://www.census.gov/quickfacts/TX. Thus the only platforms that Texas is overtly seeking to regulate are those whose userbases inherently cross state lines.

[24] Jennifer Huddleston & Liam Fulling, *Examining State Tech Policy Actions in 2021*, AM. ACTION FORUM (Jul. 21, 2021), https://www.americanactionforum.org/insight/examining-state-tech-policy-actions-in-2021/. ("[S]tates risk creating a disruptive patchwork that deters innovation and limits what consumers can access. Because of the interstate nature of the internet and many other technologies, state laws regulating the internet can have a national impact. […] Without uniform regulation on many issues, however, tech companies may face a patchwork of regulation and have to repeatedly engage in costly compliance, with the ultimate result that consumers may be denied access to beneficial features available in other jurisdictions.").

[25] Michael Masnick, *State Legislators Are Demanding Websites Moderate Less AND Moderate More; Federal Law Prohibits Both*, TECHDIRT (Apr. 8, 2022),

While the tendency for states to attempt this sort of legislation is alarming, it is not at all surprising. The liability Section 230 insulates platforms from is often rooted in state law, and states can be tempted to change their laws to make sure liability can still attach to platforms. But recognizing that temptation, and the unlimited legal risk it presented to platforms, is why Congress included a broad pre-emption provision to get states out of the business of regulating them. Because the Internet inherently transcends state boundaries, without Section 230 immunity platforms could be exposed to regulators in every jurisdiction they reach, which is inherently all of them. But if each state and local jurisdiction could meddle with the operation of Section 230, then Section 230 couldn't work to protect platforms at all.[26]

If it is possible for a law like Texas's to reach any platforms, then it is possible for any other state, or even any local jurisdiction, to reach them as well, regardless of how well or how poorly that state might choose to regulate them, or what sort of challenges platforms would face in complying with their laws, or whether the requirements among all these regulations were even consistent, even with their own laws, let alone with other states'. Pre-emption is therefore also important because

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https://www.techdirt.com/2022/04/08/state-legislators-are-demanding-websites-moderate-less-and-moderate-more-federal-law-prohibits-both/.

[26] Attempted state regulation was not an idle concern to Congress, given that *Stratton Oakmont* itself was a case where a state court, interpreting state law, had created an enormous risk of platform liability based solely on local law. *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003).

not every jurisdiction will agree on what the best policy should be for imposing liability on platforms.[27] Even if it were practical for platforms to comply with the rules of one state, they could easily find themselves with the impossible task of having to please multiple states, or face existential legal risk if they could not, as is likely to be the case. Which means that there would be a race to the bottom, where the bottom would be the most limiting state policy, as some states could effectively set Internet policy for all others, regardless of whether the others liked that policy or not, if their state's regulatory teeth were the most frightening.

There is often simply no practical or cost-effective way for a platform to cabin compliance with a specific jurisdiction's rules, much less the potentially countless specific rules of potentially countless jurisdictions this law would invite, and not others. Platforms would instead have to try to adjust their platforms and monitoring practices to accommodate the most restrictive rules. Thus, if one jurisdiction can effectively chill certain types of speech facilitation with the threat of potential liability, it will often chill it for every jurisdiction everywhere, even in places where that speech may be perfectly lawful or even desirable.[28]

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[27] *See* Huddleston ("[T]he interstate nature of most user interactions on platforms raises concerns about the extra-territorial implications of these policies.").

[28] This fear is particularly acute when platform rules are keyed to viewpoint, as they are with HB20. There are clearly some very strong and differently-held political opinions held by various state majorities. If one state could set the viewpoint-based rules as it chose, it would be choosing the viewpoints allowed in other states, where they are not necessarily reflective of the local political will.

As a result, when it comes to platform liability, the only policy that is supposed to be favored is the one Congress originally chose "to promote the continued development of the Internet and other interactive computer services," 47 U.S.C. §230(b)(1), and all the expression these services offer. And the only way to give that policy the effect Congress intended is to ensure local regulatory efforts such as HB20 are unequivocally pre-empted so they cannot distort the careful balance Congress codified to achieve it.

B. States should not be able to extinguish a platform's constitutional and statutory rights.

There is no sensible rationale, let alone any offered by Texas, that could justify why the constitutional and statutory rights of platforms can be extinguished when they attract the arbitrary size of audience that this law targets. If these rights are ever to be trumped there has to be some rationale that could survive at least some raised level of scrutiny. *Turner*, 512 U.S. at 642. Yet the Texas legislature has provided none; it has simply decided that sites meeting its criteria are too popular for their constitutional or statutory rights to remain protected, without articulating any sort of state interest, let alone a compelling one, to warrant this abrogation.

Ironically such a situation could end up disadvantaging the very viewpoints Texas might like to favor with its law, should HB20 be allowed to negate the effect of Section 230 to preclude other such state interference. *See, e.g.*, *Daniel v. Armslist*, LLC, 926 NW 2d 710 (Wis. Sup. Ct. 2019) (finding Section 230 barred a liability claim against a website brokering gun sales, following briefing and argument from the parties and amici, including the Copia Institute, in support of this holding).

There is also no language within Section 230 to suggest that any "interactive computer service provider" is to be excluded, no matter how big they are. On the contrary, the plain language of the statute and the majority of precedent make clear that the definition of covered platforms is purposefully expansive and in no way revenue- or audience-dependent. The Texas law essentially proposes editing Congress's own language to make the deliberately broad statutory immunity it had provided now conditional.

But even if such an exercise were not so ill-advised, so contrary to Congress's expressed intent in passing the law, or so unconstitutional, it is not for states to take it upon themselves to rewrite the statute for Congress, especially in light of the pre-emption provision Congress also consciously chose to include in its legislation. *See Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1753 (2020) ("The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress."). Congress is fully capable of rewriting its statutes itself, if it so desires and good policy – particularly to foster expression – calls for it.

Ultimately, if platforms like Techdirt are going to be able to stay the expressive ventures the Constitution and Section 230 are designed to foster then laws like Texas's cannot be allowed to erode their protections.

CONCLUSION

The injunction should be sustained.

Dated: April 8, 2022

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Dated: April 8, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on April 8, 2022.

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