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-840

BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION, NATIONAL COALITION AGAINST CENSORSHIP, AND WOODHULL FREEDOM FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Thomas S. Leatherbury
VINSON & ELKINS L.L.P.
2001 Ross Avenue
Suite 3900
Dallas, Texas 75201-2975
Tel.: (214) 220-7700
Fax: (214) 999-7792
Email: tleatherbury@velaw.com

David Greene
Mukund Rathi
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Tel.: (415) 436-9333
Email: davidg@eff.org, mukund@eff.org

Counsel for Amici Curiae Electronic Frontier Foundation, National Coalition Against Censorship, and Woodhull Freedom Foundation

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to this Court's Rule 28.2.1, the undersigned counsel of record for *amicus curiae* certify that the following additional persons and entities have an interest in the outcome of this case:

1. Electronic Frontier Foundation, *amicus curiae*. *Amicus curiae* is a nonprofit organization recognized as tax exempt under Internal Revenue Code § 501(c)(3). It has no parent corporation and no publicly held corporation owns 10 percent or more of their stock.
2. National Coalition Against Censorship, *amicus curiae*. *Amicus curiae* is a nonprofit organization recognized as tax exempt under Internal Revenue Code § 501(c)(3). It has no parent corporation and no publicly held corporation owns 10 percent or more of their stock.
3. Woodhull Freedom Foundation, *amicus curiae*. *Amicus curiae* is a nonprofit organization recognized as tax exempt under Internal Revenue Code § 501(c)(3). It has no parent corporation and no publicly held corporation owns 10 percent or more of their stock.
4. David Greene, attorney for *amici curiae*.
5. Mukund Rathi, attorney for *amici curiae*.
6. Thomas S. Leatherbury, attorney for *amici curiae*.

Dated: April 8, 2022

/s/ David Greene
David Greene

Counsel for Amici Curiae Electronic Frontier Foundation, National Coalition Against Censorship, and Woodhull Freedom Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST[1]

Amici curiae file this brief on behalf of a wide spectrum of internet users in the United States and around the world who rely on online intermediaries, including social media, to communicate with each other and to access information online. Many internet users are concerned about the power these intermediaries exercise over online discourse. Some users think social media platforms allow too much speech they consider harmful, while others think social media companies "moderate" too much of their users' speech. But all benefit from having diverse options available to them.

Electronic Frontier Foundation (EFF) has worked for more than 30 years to protect the rights of users to transmit and receive information online. On behalf of its more than 38,000 dues-paying members, EFF ensures that users' interests are presented to courts considering crucial online free speech issues.

The National Coalition Against Censorship (NCAC) is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding, NCAC has worked to protect the First Amendment

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no one except for Amici or their counsel authored this brief in whole or in part, or contributed money towards its preparation. All parties consent to the filing of this brief.

rights of artists, authors, students, readers, and the general public. While it advocates for a broad and inclusive culture, NCAC has an interest in assuring the continuance of robust First Amendment protections for those who present work to the public, which includes their right to curate art, select plays to produce and books to publish or sell. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

The Woodhull Freedom Foundation is a non-profit organization that works to advance the recognition of sexual freedom, gender equality, and free expression. Woodhull is particularly concerned with the routine and pervasive suppression of sexual expression on the internet; how constitutionally protected sexual expression is frequently moderated or censored by online service providers; and how efforts to characterize online service providers as "non-selective" ignores this reality. Woodhull believes that if this Court upholds the constitutionality of the challenged law, other jurisdictions will be incentivized to pass similar statutes threatening the ability of its members to effectively advocate for sexual freedom and communicate about sexually oriented topics online.

SUMMARY OF ARGUMENT

Although some internet users are understandably frustrated and perplexed by how social media companies curate users' speech on their platforms, internet users nevertheless derive the most benefit when the First Amendment protects the

platforms' rights to make those decisions, and 47 U.S.C. § 230 (Section 230) bolsters those rights. These protections ensure that companies can curate their sites free from governmental mandates, resulting in a diverse array of forums for users, with unique editorial views and community norms.

Texas House Bill 20 (HB 20) takes those protections away and forces platforms to host speech inconsistent with their editorial vision. HB 20 prohibits popular online platforms from declining to publish others' speech, even when that speech violates the platform's rules, and even though such "content moderation" can be valuable to many internet users when it is carefully implemented.

Inconsistent and opaque private content moderation is a problem for users. But it is one best addressed through self-regulation and regulation that doesn't touch or retaliate against the editorial process.

This Court should affirm the district court's order.

ARGUMENT

I. INTERNET USERS ARE BEST SERVED BY THE AVAILABILITY OF BOTH UNMODERATED AND MODERATED PLATFORMS

Although Texas is purporting to act on behalf of internet users, HB 20 deprives users of the benefits of common content moderation practices. Indeed, internet users are best served under current law, where the First Amendment and Section 230, taken together, create legal space for the emergence of a continuum of

content moderation, from highly curated services to those not curated at all.

A. Moderated Platforms Serve the Interests of Users and the Public Generally

The social media platforms targeted by HB 20 are not the first online services to moderate—or edit, or curate—the user speech they publish on their sites. Online services, at least from their point of mass adoption, rarely published all legal speech submitted to their sites. For example, most platforms for user speech banned legal, non-obscene sexual content, speech that enjoys First Amendment protection. Large-scale, outsourced content moderation emerged in the early 2000s.[2]

Many internet users greatly benefit from moderated platforms. Users may want to find or create affinity and niche communities dedicated to certain subject matters or viewpoints and exclude others. Users may prefer environments that shield them from certain kinds of legal speech, including hateful rhetoric and harassment. Users may want a service that attempts to filter out misinformation by relying on sources the user trusts.

As a result of this exercise of editorial freedom by online services, users can choose from a variety of social media offerings, many of which reflect distinct

[2] Jillian C. York & David Greene, *How to Put COVID-19 Content Moderation Into Context*, Brooking's TechStream, May 21, 2020, https://www.brookings.edu/techstream/how-to-put-covid-19-content-moderation-into-context/.

editorial viewpoints, and exclude certain conflicting viewpoints.

Pinterest, a site with 86 million active monthly users in the U.S. designed to visually inspire creative projects, has "community guidelines" that "outline what we do and don't allow on Pinterest."[3] Under these guidelines, Pinterest reserves the right to remove several categories of speech: "Adult content," "Exploitation," "Hateful activities," "Misinformation," "Harassment and criticism," "Private information," "Self-injury and harmful behavior," "Graphic Violence and Threats," "Violent actors," "Dangerous goods and activities," "Harmful or Deceptive Products & Practices," and "Impersonation." Pinterest has special rules for comments users post on other users "Pins," including a ban on "Irrelevant or non-purposeful material."[4] Picsart, another site for creators with over 150 million monthly users, has a similar policy.[5]

Roblox, a rapidly growing social network through which its over 46 million active daily users worldwide play and build their own games, warns that its Community Standards "prohibit things that certain other online platforms allow."

---

[3] *Community Guidelines*, Pinterest, https://policy.pinterest.com/en/community-guidelines (last visited Mar. 29, 2022). *Number of Monthly Active Pinterest Users*, Statista, (last visited Mar. 29, 2022).

[4] *Community Guidelines*, Pinterest, https://policy.pinterest.com/en/community-guidelines (last visited March 29, 2022).

[5] Picsart, https://picsart.com/about-us; *Community Guidelines,* Picsart, https://picsart.com/community-guidelines (last visited March 30, 2022).

For example, Roblox prohibits "Singling out a user or group for ridicule or abuse," "all sexual content or activity of any kind," "The depiction, support, or glorification of war crimes or human rights violations, including torture," and much political content, including any discussion of political parties or candidates for office.[6]

Strava, a social media platform for athletes with millions of active users, has Community Standards that prohibit the posting of content that is "harassing, abusive, or hateful or that advocates violence."[7] One of Strava's main features is for cyclists and runners to share their routes, called "segments," on Strava; but Strava's Community Standards allow only "good segments" created with "common sense."[8] The Community Standards also require all users to be "inclusive and anti-racist."[9]

Gettr, a "social media platform founded on the principles of free speech,

---

[6] *Roblox Community Standards*, Roblox, https://en.help.roblox.com/hc/en-us/articles/203313410-Roblox-Community-Standards (last visited October 8, 2021)); *Roblox Reports Fourth Quarter And Full Year 2021 Financial Results*, https://ir.roblox.com/news/news-details/2022/Roblox-Reports-Fourth-Quarter-and-Full-Year-2021-Financial-Results/default.aspx.

[7] *Strava Terms of Service*, Strava, https://www.strava.com/legal/terms#conduct (updated Dec. 15, 2020).

[8] *Strava Community Standards*, Strava, https://www.strava.com/community-standards (last visited March 30, 2022).

[9] *Id.*

independent thought and rejecting political censorship and 'cancel culture,'"[10] reserves the right to "address" content that attacks any religion or race, an inherently viewpoint-based criterion.[11]

Rumble, a video sharing alternative to YouTube that boasted 32 million monthly users in the first quarter of 2021, prohibits both videos and comments on a number of viewpoint-based criteria, including a bar on content that "Promotes, supports or incites individuals and/or groups which engage in violence or unlawful acts, including but not limited to Antifa groups and persons affiliated with Antifa, the KKK and white supremacist groups and or persons affiliated with these groups."[12]

The internet is full of specialized services with unique editorial viewpoints—from RallyPoint, a social media platform for members of the armed services,[13] to Ravelry, a social media site focused on knitting.[14]

HealthUnlocked, a social media site for the discussion of health information, notifies its users that "Negative and damaging references to identifiable

---

[10] *Gettr*, https://gettr.com/onboarding (last viewed April 1, 2022).

[11] *Terms of Use,* Gettr, https://gettr.com/terms (last visited April 1, 2022).

[12] *Website Terms and Conditions of Use and Agency Agreement*, Rumble, https://rumble.com/s/terms (last visited April 1, 2022).

[13] RallyPoint, https://www.rallypoint.com/ (last visited March 30, 2022).

[14] Ravelry, https://www.ravelry.com (last visited March 30, 2022).

individuals" may be edited or deleted either by HealthUnlocked or by a community administrator and requires users to agree "to share information that is true and correct to the best of your knowledge and . . . that is primarily drawn from your personal experience."[15]

Because their editorial choices are protected by the First Amendment, social media platforms commonly provide forums only for certain political ideologies. Thus, we can have both ProAmericaOnly, which promotes itself as "Social Media for Conservatives" and promises "No Censorship | No Shadow Bans | No BS | NO LIBERALS"[16] and The Democratic Hub, an "online community … for liberals, progressives, moderates, independent[s] and anyone who has a favorable opinion of Democrats and/or liberal political views or is critical of Republican ideology,"[17] and everything else on the political spectrum.

Sites routinely limit their users to expressing views of certain viewpoints, covering all types of belief systems. So, Vegan Forum does not require its users to be "vegan, vegetarian or even have immediate plans to give up animal products"; but since it is a site designed to promote a vegan lifestyle, "we will not tolerate

---

[15] *How Communities Are Safeguarded?*, HealthUnlocked, https://support.healthunlocked.com/article/11-community-guidelines#enforcing (last visited March 30, 2022).

[16] ProAmericaOnly, https://proamericaonly.org (last visited April 6, 2022).

[17] The Democratic Hub, https://www.democratichub.com (last visited April 6, 2022).

members who promote contrary agendas."[18] And SmokingMeatsForums.com, a "community of food lovers dedicated to smoking meat," more generally bans "fighting or excessive arguing" in its user discussion forums.[19]

Among the numerous content moderation practices is community moderation, with Reddit and Discord among its most popular adopters. Reddit users manage and create thousands of communities, called subreddits. Although Reddit has an overriding content policy, a moderator makes the decisions within each community as guided by Reddit's "Moderator Guidelines for Healthy Communities."[20] Discord employs a similar model.[21] Each site thereby empowers some users to remove and down-rank other users' speech if that speech is against that community's rules.[22] As a result, while a political candidate and their speech may be highlighted in one community, the candidate may be blocked or down-ranked in another.

---

[18] *Membership Rules*, Vegan Forum, https://www.veganforum.org/help/terms/ (last visited March 30, 2022).

[19] *The Rules*, SmokingMeatForums.com, https://www.smokingmeatforums.com/help/rules/ (last visited March 30, 2022).

[20] *Moderator Guidelines*, Reddit, https://www.redditinc.com/policies/moderator-guidelines (effective Apr. 17, 2017).

[21] *Moderating on Discord*, Discord, https://discord.com/moderation (last visited March 30, 2022).

[22] *See, e.g.*, *Reddiquette*, Reddit, https://reddit.zendesk.com/hc/en-us/articles/205926439-Reddiquette (last visited March 30, 2022).

B. HB 20 Will Destroy the Many Online Communities that Rely on Curation

Although HB 20 applies only to very large services, its prohibitions will affect the editorial polices of services of all sizes. Every service starts small, but many grow rapidly, and almost all hope to grow rapidly: TikTok needed only five years to surpass 1 billion active monthly users.[23] Every online service must account for such growth at its earliest stages. A radical revision of its editorial policy as it approached a state's size threshold would defeat the expectation of its users.

That the variety of editorial policies sampled above would all be required to adopt neutral viewpoint policies as they became popular is nonsensical and contrary to the interests of internet users. HB 20 forces platforms to defend their specialized moderation practices in court, and the prospect of costs of repeated litigation will chill their exercise of editorial discretion. That will ultimately harm users by limiting the availability of online services that cater to their particular interests, communities, or political viewpoints, and which seek to protect their users from abuse and harassment.[24] HB 20 appears to bar community moderation

---

[23] *See Digital 2021 October Global Statshot Report*, Datareportal, https://datareportal.com/reports/digital-2021-october-global-statshot (last visited March 30, 2022).

[24] *Amici* also have serious concerns with HB 20's creation of Bus. & Com. Code § 321.054, which may impose untenable restrictions on email providers' ability to protect users from annoying, abusive, and harassing spam. The new Sec. 321.054 would prohibit email providers from blocking emails unless they contain illegal

where users are empowered to down-rank other users' speech based on viewpoint.[25]

That HB 20 only prohibits viewpoint discrimination does not lessen its censorial effect on social media platforms. Even the non-niche platforms that publish diverse content and views will be hesitant to remove any unwanted legal speech from their sites, for fear that their decisions might be judged to be based on a viewpoint the user or *any other person* expressed *on or off the site*. *See* Bus. & Com. Code § 143A.002. This unwanted speech might include non-threatening violent content; false but non-harmful or non-defamatory content; or any content that is irrelevant to the platform's purpose or contrary to the platform host's or its community's values, but is nevertheless protected by the First Amendment.[26]

C. Moderation Means that Some User Content Will be Removed, Downranked, or Otherwise Moderated

In all of these sites, editing and curation occurs: some user speech is

---

content or malware, thus disabling email providers from merely blocking emails its users find objectionable and obnoxious.

[25] *See Reddiquette*, Reddit, https://reddit.zendesk.com/hc/en-us/articles/205926439-Reddiquette (last visited March 30, 2022).

[26] *See, e.g., Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (non-obscene but indecent sexual content is protected by First Amendment); *Elonis v. United States*, 575 U.S. 723, 740 (2015) (certain threatening speech is protected by First Amendment); *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (certain non-harmful false speech is protected by First Amendment).

rejected, downranked, hidden, labeled, or otherwise moderated.[27] And it is often frustrating, angering, or perplexing to users.

This may occur because the user speech clearly violated the site's rules, like those above.

But frequently it was just a mistake. As is often said, content moderation at scale is impossible to do perfectly, and nearly impossible to do well.[28] Even when using a set of precise rules or carefully articulated "community standards," moderated platforms often struggle to draw workable lines between speech that is and is not permitted. Every online forum for user speech, not just the dominant social media platforms, struggles with this problem.

This is neither a new problem, dating to at least 2007, [29] nor one limited to U.S. conservative politics. Thousands of puzzling decisions continue to be made. In 2017, users discovered that Twitter had marked tweets containing the word "queer" as offensive.[30] In January 2021, Facebook's updated policy to remove

---

[27] Eric Goldman, *Content Moderation Remedies*, 28 Mich. Tech. L. Rev. 1 (2021).

[28] *See*, *e.g.*, Mike 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.

[29] Jillian C. York, Silicon Values: The Future of Free Speech Under Surveillance Capitalism 25-27 (Verso 2021).

[30] Taylor Wofford, *Twitter Was Flagging Tweets Including the Word "Queer" as Potentially "Offensive Content*, Mic, June 22, 2017,

"harmful conspiracy theories" resulted in it disabling a punk rock band's page because its name, Adrenochrome, is a chemical that has become a central part of the QAnon conspiracy theory.[31] Also in 2021, Instagram removed posts about one of Islam's holiest mosques, Al Aqsa, because its name is contained within the name of a designated terrorist organization.[32] YouTube has removed videos documenting atrocities in Syria and elsewhere under its graphic violence policy,[33] and has been accused of restricting and demonetizing LGBTQ+ content.[34] Sex worker advocates have documented how they are routinely shadow banned across

---

https://www.mic.com/articles/180601/twitter-was-flagging-tweets-including-the-word-queer-as-potentially-offensive-content.

[31] *Facebook Treats Punk Rockers Like Crazy Conspiracy Theorists, Kicks Them Offline*, EFF, https://www.eff.org/takedowns/facebook-treats-punk-rockers-crazy-conspiracy-theorists-kicks-them-offline (last visited Oct. 7, 2021).

[32] Ryan Mac, *Instagram Censored Posts About One of Islam's Holiest Mosques, Drawing Employee Ire*, BuzzFeed News, May 12, 2021, https://www.buzzfeednews.com/article/ryanmac/instagram-facebook-censored-al-aqsa-mosque.

[33] Malachy Browne, *YouTube Removes Videos Showing Atrocities in Syria,* N.Y. Times, Aug. 22, 2017, https://www.nytimes.com/2017/08/22/world/middleeast/syria-youtube-videos-isis.html; Kevin Anderson, *YouTube Suspends Egyptian Blog Activist's Account*, The Guardian, Nov. 28, 2007, https://www.theguardian.com/news/blog/2007/nov/28/youtubesuspendsegyptianblog.

[34] Megan Farokhmanesh, *YouTube Is Still Restricting and Demonetizing LGBT Videos—and Adding Anti-LGBT Ads to Some*, The Verge, June 4, 2018, https://www.theverge.com/2018/6/4/17424472/youtube-lgbt-domentization-ads-alogrithm.

a variety of social media platforms.[35]

D. In Praise of the (Hypothetical) Unmoderated Platform

Any regulatory system must also leave open the possibility of unmoderated platforms, where the operator plays no role in selecting protected content or ordering its presentation. Although unmoderated forums are at present highly rare, they conceivably benefit internet users and the public generally by eliminating corporate editors, inhibiting the creation of silos, and allowing users to engage in free-form discussions and debates of their choosing, and find unexpected sources of ideas and information. Users do not need to fear that their communications are actively screened, nor that they may accidentally run afoul of content rules. Unmoderated platforms can be of special value to political dissidents and others who may be targeted for censorship by governments and private actors. They would provide an accessible forum for speech that is unpopular, disfavored, or inadvertently suppressed.

Unfortunately, there are not any large-scale positive models of unmoderated forums. 8kun,[36] formerly 8chan, is probably the most well-known example and it is notoriously rife with hateful speech.

---

[35] *See* Danielle Blunt et al., *Posting Into The Void*, Hacking//Hustling, Oct. 2020, https://hackinghustling.org/wp-content/uploads/2020/09/Posting-Into-the-Void.pdf.

[36] 8chan, https://en.wikipedia.org/wiki/8chan (last visited April 5, 2022).

Nevertheless, regulatory regimes must provide for the possibility of positive models.

II. CURRENT CONSTITUTIONAL AND STATUTORY LAW SUPPORT THE CO-EXISTENCE OF UNMODERATED AND MODERATED PLATFORMS

The law in its current state, without jettisoning decades of binding precedent that HB 20 demands, supports the existence of online platforms all along the moderation continuum.

As appellees correctly argue, the First Amendment shields platforms from being forced to publish any content that they would otherwise choose not to publish.

Section 230 bolsters these constitutional rights with important procedural benefits that allow for quick dismissal and discourage frivolous lawsuits, thus decreasing platforms' incentives to censor user speech. Section 230 provides online platforms with immunity from liability both for publishing and deciding not to publish user speech. HB 20, which requires social media companies to publish certain user content, upsets this careful balance.

A. The First Amendment Protects a Service's Right to Curate Users' Speech That It Publishes on Its Site

The First Amendment protects the rights of social media services to publish both user speech and their own speech, regardless of whether they curate it a lot, a little, or not at all (and everything in between).

Every court that has considered the issue has rightfully found that private entities that operate online platforms for user speech enjoy a First Amendment right to curate that speech.

The Supreme Court has long held that private publishers have a First Amendment right to control the content of their publications. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-55 (1974*); Cf. Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (reaffirming that "when a private entity provides a forum for speech," "[t]he private entity may . . . exercise editorial discretion over the speech and speakers in the forum")*; See also Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (recognizing cable television providers' First Amendment right to "exercis[e] editorial discretion over which stations or programs to include in its repertoire"). This intrusion into the functions of editors is per se unconstitutional even if the compelled publication of undesired content would not add costs or force the omission of desired content. *Tornillo*, 418 U.S. at 258.

The parallels between *Tornillo* and the present case are strong.

Both concern state laws that require private companies to publish viewpoints they otherwise would not publish. In *Tornillo*, the law required newspapers that endorsed a candidate for elected office to publish a response from the endorsed candidate's opponents. *Id*. at 243-45. HB 20 is even broader, flatly prohibiting

social media companies from making editorial decisions based on *anybody's* viewpoint, no matter where it was expressed, and regardless of whether it was a viewpoint expressed by one of its users.

And the policy concerns behind the laws are similar. In *Tornillo*, the Supreme Court rejected "vigorous" arguments that "the government has an obligation to ensure that a wide variety of views reach the public." 418 U.S at 247-48. The state of Florida argued in *Tornillo* that the print news media both dominated public discourse, were biased, and manipulated public discourse. The state cited a "concentration of control of outlets to inform the public," that had "become big business," "noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events," *Id*. at 248-49.

> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. . . . The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires.
>
> *Id*. at 250-51.

The *Tornillo* Court did not dispute the validity of these concerns, but nevertheless found that governmental interference with editorial discretion was so anathema to the First Amendment and the broader principles of freedom of speech and the press that the remedy for these concerns must be found through

"consensual . . . mechanisms" and not governmental compulsion. *Id*. at 254. *See also Assocs. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 134 (9th Cir. 1971) (rejecting argument that the Los Angeles Times' "semimonopoly and quasi-public position" justified order compelling the newspaper to publish certain advertisements).

Tornillo is not limited to only newspapers or publishers that actively select the content they publish. It applies to any entity that speaks by curating the speech of others, and, though phrased in terms of traditional print newspaper publishers, has been applied in a variety of speech contexts, including thrice in the 2018 Supreme Court term. *See Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring). The Supreme Court applied *Tornillo*, among other authorities, in holding that the organizers of a parade had a First Amendment right to curate its participants, and thus could not be required to include a certain message, even if the parade was perceived as generally open for public participation. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569–70 (1995). As the *Hurley* Court explained, "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by

failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication." *Id.*

Nor does it matter whether a site predominantly publishes its own content or content written by others. Numerous courts have applied *Tornillo* to social media platforms that primarily, if not exclusively, publish user-generated content.[37] A separate, but related line of cases has rejected the argument that social media platforms are state actors that are limited by the First Amendment in their ability to select the speech of others.[38]

Attorney General Paxton has in other cases recognized the importance of

---

[37] *See, e.g., Davison v. Facebook, Inc.*, 370 F. Supp. 3d 621, 628-29 (E.D. Va. 2019), *aff'd*, 774 F. App'x 162 (4th Cir. 2019); *DJ Lincoln Enters., Inc. v. Google, LLC*, No. 2:20-CV-14159, 2021 WL 184527, at *8 (S.D. Fla. Jan. 19, 2021); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 436-37 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007); *Dreamstime.com, LLC v. Google, LLC*, No. C 18-01910 WHA, 2019 WL 2372280, at *2 (N.D. Cal. June 5, 2019); *e-ventures Worldwide, LLC v. Google, Inc.*, No. 214CV646FTMPAMCM, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017).

[38] *See, e.g., Prager Univ. v. Google LLC*, 951 F.3d 991, 995 (9th Cir. 2020); *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30, 40 (D.D.C. 2019), *aff'd*, 816 F. App'x 497 (D.C. Cir. 2020). *See generally* Eric Goldman and Jess Miers, *Online Account/Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 Journal of Free Speech Law (August 2021) (collecting cases).

prohibitions of compelled speech by association. Paxton submitted three separate amicus briefs in *McDonald v. Longley* in support of three lawyer-plaintiffs who claimed that the State Bar of Texas' mandatory membership dues violated their First Amendment rights by forcing them to associate with political and ideological activities they opposed. *See McDonald v. Longley*, 4 F.4th 229, 237 (5th Cir. 2021), *cert. denied* (April 4, 2022). Paxton argued that "[c]ompelling individuals to mouth support for views they find objectionable violate[d] [the] cardinal constitutional command against compelled speech[]" and that the State Bar had no compelling interest to "forc[e] lawyers to support its divisive ideological agenda."[39]

B. Social Media Sites Are Similar to Newspapers' Opinion Pages That Were Subject to the Right-of-Reply Law in Tornillo

Although *Tornillo* is not limited to newspapers and applies to any exercise of editorial or curatorial discretion, it is helpful to understand the similarities between social media platforms and the opinion pages of a newspaper, the specific forum targeted by the Florida right of reply law struck down in *Tornillo*.

Like social media sites, opinion pages typically publish content created by others: opinion pieces, letters to the editor, syndicated editorial cartoons, as well as the syndicated and wire service articles and advertisements also found elsewhere

[39] Brief for the State of Texas as Amicus Curiae in Support of Appellants at 1-2, *McDonald v. Longley*, 4 F.4th 229, 237 (5th Cir. 2021) (quotations omitted).

throughout the typical newspaper.[40] Indeed, much of the typical newspaper is a mix of original writing and content created by others including also wedding, engagement, and birth announcements, and comics.

Indeed, perhaps the most powerful pronouncement of freedom of the press in Supreme Court jurisprudence, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), centered on *The Times* publishing someone else's unsolicited content, a paid advertisement.

The Times' role as an intermediary for the speech of others was critical to the Court's decision: as the Court explained, newspapers are "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press." *Id*. at 266.[41] More recently, the

---

[40] *See* Jack Shafer, *The Op-Ed Page's Back Pages: A Press Scholar Explains How the New York Times Op-Ed Page Got Started*, Slate, Sept. 27, 2010, https://slate.com/news-and-politics/2010/09/a-press-scholar-explains-how-the-new-york-times-op-ed-page-got-started.html (describing how the pages opposite newspapers' editorial pages became a forum for outside contributors to express views different from those expressed by the paper's editorial board); Michael J. Socolow, *A Profitable Public Sphere: The Creation of the New York Times Op-Ed Pag*e, Commc'n & Journalism Fac. Scholarship (2010), https://digitalcommons.library.umaine.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1001&context=cmj_facpub; *Op-Ed*, Wikipedia, https://en.wikipedia.org/wiki/Op-ed (last visited Oct. 7, 2021).

[41] The *Sullivan* Court also bolstered its actual malice rule by reference to earlier cases dealing with another type of intermediary, booksellers. *Id.* at 278-79 (citing

Court recognized that social media sites now play that very role by providing "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

It would also be a mistake to draw a constitutional line based on a service's perceived selectivity, and thus hold that *Tornillo* applies only after a certain degree of curation is achieved.[42] There is no dichotomy of selective and non-selective services. For both online and offline media, there exists a continuum of selectivity. News media is historically replete with examples of publications the primary purpose of which was the non-selective transmission of user speech. Pennysavers, for example, local newspapers either entirely or primarily composed of classified advertisements, coupons, life milestone announcements, congratulatory messages, recipes, public notices, and the like, have a long and storied history.[43] The curators, theater directors and booksellers whose artistic freedom amicus curiae National Coalition Against Censorship defends curate art, select plays to produce and books to publish or sell along a similar continuum and do not want to see their First

---

Smith v. California, 361 U.S. 147 (1959); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)).

[42] As discussed above, the major social media sites have actively curated the user content on their sites since at least 2007. The Internet users represented by amicus curiae Woodhull Freedom Foundation understand that the perception of such services as "unmoderated" typically disregards the very active removal and moderation of constitutionally protected sexual expression.

[43] https://en.wikipedia.org/wiki/Pennysaver (last visited March 30, 2022)

Amendment rights depend upon their falling on the proper side of some selectivity line.

In *Tornillo*, the Supreme Court did not hesitate to recognize the First Amendment right of the opinion page editors to endorse candidates and exclude replies from opponents even though the press in 1974 was much different than that of our nation's Founders. This Court should likewise apply the same rule even if social media sites are not exactly the opinion pages of 1974.

C. HB 20'S Reliance on the Size of a Platform's User Base Does Not Cure Its Constitutional Defects

Rather than making it more constitutionally palatable, HB 20's limited application to platforms with large user bases only exacerbates its defects. As the appellees correctly argue, to prevent insidious viewpoint discrimination, the Supreme Court applies strict scrutiny to laws that restrict the speech of speakers based on size. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (striking down a law that applied only after $100,000 of ink and paper were consumed in a year). "Where important First Amendment interests are at stake, the mass scope of disclosure is not an acceptable surrogate for injury." *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (striking down a law that prohibited publication by an "instrument of mass communication").

D. HB 20'S Publication Mandate Undermines Section 230

HB 20's ban on editorial discretion violates and undermines the protections

of Section 230, the legal bedrock of the internet.[44] Congress enacted Section 230 to make it clear that the privately operated internet intermediaries that comprise the internet have the right to do exactly what Texas seeks to prevent them from doing—moderate content unencumbered by the threat of legal liability for doing so.[45]

Section 230 bolsters the First Amendment right of social media companies to have their sites reflect their curatorial perspective. Subsection 230 (c)(1) provides internet intermediaries with limited immunity from liability based on the harm plaintiffs suffered from the intermediary acting as a publisher of user-generated content. 47 U.S.C. § 230 (c)(1). This includes "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). *Accord Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014); *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003). Subsection 230 (c)(2) provides additional protection

---

[44] *See* David Post, *Opinion: A Bit of Internet History, or How Two Members of Congress Helped Create a Trillion or so Dollars of Value*, Washington Post, Aug. 27, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value/ ("[I]t is impossible to imagine what the Internet ecosystem would look like today without [Section 230].").

[45] *See A Brief History of NSF and the Internet*, National Science Foundation, Aug. 13, 2003, https://www.nsf.gov/news/news_summ.jsp?cntn_id=103050.

against claims brought by content creators based on the intermediaries having blocked the plaintiffs' content or enabled others to do so. See 47 U.S.C. § 230 (c)(2).

Prior to Section 230, online platforms had two strong disincentives to moderate or otherwise engage with user-generated content. First, online platforms faced traditional publisher liability for content posted by their users: the liability could be based on notice if the platforms acted as mere passive conduits; but the liability did not require notice if the platforms engaged with user content in any way. *See Barnes*, 570 F.3d at 1101. Second, online platforms faced tort liability if a user was harmed by their content being taken down, blocked, or otherwise moderated. *See Barnes*, 570 F.3d at 1105.

Congress passed Section 230 to remove these disincentives and encourage platforms to develop and apply their own editorial standards, in ways that benefit users, or subsets of users, and reflect the values of the company, rather than acting out of fear of liability. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

HB 20 cannot be reconciled with Section 230's protections or policy goals.

III. INTERNET USERS ARE BEST SERVED BY VOLUNTARY MEASURES FOR CONTENT MODERATION RATHER THAN HB 20'S EDITORIAL MANDATES

Internet users are better when content moderation is governed by

"consensual . . . mechanisms," in the words of the Supreme Court in *Tornillo*, 418 U.S. at 254, however imperfect they may be. Both companies and users can look to several models for self-regulation. EFF and NCAC are among a broad range of civil society groups that has endorsed the Santa Clara Principles.[46] UNESCO has published principles focusing on transparency around content moderation decisions that are purposefully high-level, rather than prescriptive, in recognition of the "[v]ast differences in types, sizes, business models and engineering of internet platform companies" that make government mandates inappropriate.[47] The Internet Commission's annual Accountability Report aims to identify best practices scaled to an online service's maturity.[48]

A. HB 20's Mandated Complaint and Disclosure Procedures Are an Inseparable Part of The Law's Retaliatory Attack on Editorial Freedom

With respect to HB 20's mandated transparency and complaint procedures, requirements such as these may be appropriate as an alternative to government restrictions on editorial practices only if they are carefully crafted to accommodate competing constitutional and practical concerns.

But HB 20 is not such a carefully crafted regulatory scheme and should not

---

[46] Santa Clara Principles, https://www.santaclaraprinciples.org/.

[47] *Letting the Sun Shine In: Transparency and Accountability in the Digital Age* at 1, UNESCO (2021), https://unesdoc.unesco.org/ark:/48223/pf0000377231.

[48] *Accountability Report 2.0*, Internet Comm'n (2022), https://inetco.org/report.

be upheld. Its user-focused provisions, such as requiring annual notice to users on the use of algorithms, are part and parcel of the law's restrictions on editorial discretion. They are likewise motivated by misconceptions about disproportionate partisan censorship and thus raise the specter of selective punitive enforcement.[49]

HB 20's Disclosure Requirements and Complaint Procedures will also stifle innovation that would best serve internet users. Indeed, they will likely further entrench the market dominance of the very social media companies the law targets because compliance will require a significant investment of both money and time. Although the companies that currently meet HB 20's 50-million-monthly-US-users criteria may be profit-driven, users would be best served by wide adoption of non-profit and decentralized social media services that did not rely on advertising or exploiting their users' private data. Because HB 20's mandates functionally require that popular social media sites be highly capitalized, those alternatives may never develop. Separately, the law's technical mandates will inevitably become obsolete.

While some of the self-regulatory models mentioned above do urge online publishers to adopt robust transparency and complaint procedures, those models are not templates for regulation.[50] The Santa Clara Principles specifically states

[49] The Attorney General's use of civil investigative demands against Twitter has already raised such concerns. *See Twitter v. Paxton*, 26 F.4th 1119 (9th Cir. 2022).

[50] The Santa Clara Principles, https://www.santaclaraprinciples.org/ (emphasis in original).

"This second iteration of the Santa Clara Principles has been developed to support companies to comply with their responsibilities to respect human rights and enhance their accountability, and to assist human rights advocates in their work. **They are not designed to provide a template for regulation."** In a Note to Regulators,[51] the Principles explain that its transparency and reporting standards do not readily scale or account for the variations among online services:

> The Santa Clara Principles seeks to set standards. Some services will appropriately meet these standards. Some will appropriately meet only some of them, while others will and should exceed them. Where any particular service falls will depend on many factors—number of users, capitalization, age, focus of service, editorial priorities, user priorities—that will vary from service to service. While companies should design their services with due process in mind from the beginning, companies must have some flexibility as to how they implement the Santa Clara Principles, from their inception, and then evolving over time as the service matures. The Santa Clara Principles are thus best seen as touchstones against which any company's practices can be evaluated and compared, not as dictates.
>
> To maintain this necessary flexibility, governments should resist legal mandates that would be prohibitively expensive or practically impossible to meet. Such mandates discourage new entrants into the field and thus discourage innovation and competition. Even among well-established services, there are no metrics that readily correspond to a required level of compliance.

The Principles also discuss other obstacles to employing them as governmental mandates: the potential for political exploitation, the variation among regional and national legal systems that govern these inherently

[51] A Note to Regulators, https://www.santaclaraprinciples.org/regulators/.

international services, and the constantly evolving landscape of available services.[52]

B. Governments May Use Non-Retaliatory Measures to Promote Competition Online

This is not to say that governments have no regulatory authority over online services. Regulatory measures that do not target the editorial process or are not enacted in retaliation against disfavored editorial policies and decisions may be acceptable.

Amicus EFF supports regulations that benefit users, promotes user choice and control by encouraging competition,[53] and platform interoperability.[54]

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the Court affirm the District Court.

Dated: April 8, 2022

Respectfully submitted,

/s/ David Greene
David Greene

---

[52] *Id.*

[53] *Comment on Evaluating the Competitive Effects of Corporate Acquisitions and Mergers*, EFF (August 20, 2018), https://www.eff.org/document/eff-comments-ftc-competition-0.

[54] Bennett Cyphers, Cory Doctorow, *The New ACCESS Act Is a Good Start. Here's How to Make Sure It Delivers.*, EFF (June 21, 2021), https://www.eff.org/deeplinks/2021/06/new-access-act-good-start-heres-how-make-sure-it-delivers.

Mukund Rathi
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Tel.: (415) 436-9333
Email: davidg@eff.org, mukund@eff.org

Thomas S. Leatherbury
VINSON & ELKINS L.L.P.
2001 Ross Avenue
Suite 3900
Dallas, Texas 75201-2975
Tel.: (214) 220-7700
Fax: (214) 999-7792
Email: tleatherbury@velaw.com

Counsel for Amici Curiae Electronic Frontier Foundation, National Coalition Against Censorship, and Woodhull Freedom Foundation

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit on April 8, 2022 and will, therefore, be served electronically upon all counsel.

Dated: April 8, 2022

/s/ David Greene
David Greene

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because:

[X] this brief contains 6,392 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f), or

[ ] this brief uses a monospaced typeface and contains [less than 650] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f)

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this brief has been prepared in a proportionally spaced typeface using [Microsoft Word 2018] in [14 point Times New Roman font], or

[ ] this brief has been prepared in a monospaced typeface using [name and version of word processing program] with [number of characters per inch and name of type style].

Dated: April 8 2022

/s/ David Greene
David Greene