No. 21A720

IN THE

Supreme Court of the United States

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

Applicants,

v.

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

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPLICANTS BY TECHFREEDOM

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TechFreedom respectfully moves for leave to file a brief *amicus curiae* in support of Applicants' Emergency Application for Immediate Administrative Relief and to Vacate Stay of Preliminary Injunction, without ten days' advance notice to the parties of *Amicus*'s intent to file as ordinarily required.

In light of the expedited briefing schedule set by the Court, it was not feasible to give ten days' notice, but *Amicus* was able to obtain a position on the motion from the parties. Applicants and Respondent consent to the filing of the *amicus* brief.

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom's experts have been deeply involved in the debate over state social media laws since before Florida's Senate Bill 7072 ("SB7072") or Texas's House Bill 20 ("HB20")—the first (and to date only) such laws—were even passed. *See, e.g.*, Corbin K. Barthold & Berin Szóka, *No, Florida Can't Regulate Online Speech,* Lawfare (Mar. 12, 2021), https://bit.ly/3iBFk0h (cited in Compl. at 19 n. 26, *NetChoice LLC v. Moody*, No. 4:21-cv-00220-RH-MAF (N.D. Fla. May 27, 2021) (challenging SB7072)). In the ensuing lawsuits against SB7072 and HB20, TechFreedom has filed an *amicus* brief at every stage of each litigation.

TechFreedom's earlier briefs, filed in the Northern District of Florida, the Western District of Texas, the Eleventh Circuit, and the Fifth Circuit, all focused on the topic of common carriage. *See, e.g.*, Brief of TechFreedom as Amicus Curiae Supporting Plaintiffs, *NetChoice LLC v. Moody*, No. 4:21-cv-00220-RH-MAF (N.D. Fla. June 11, 2021). They explain

"the history of common carriage, its core elements, the case law surrounding it, what it meant at common law, what it has meant in telecommunications law, and, above all, why it is not a useful concept in a discussion of social media and the First Amendment." Brief of TechFreedom as Amicus Curiae Supporting Petitioners at 2, *NetChoice LLC v. Paxton*, No. 21-51178 (5th Cir. Apr. 8, 2022).

Amicus offers this brief to situate the Application within the broader context of this Court's emergency docket. As we explain in the brief, far from being an unusual part of a federal court's activity, emergency proceedings are a standard judicial tool for vindicating core constitutional and civil rights. The *amicus* brief thus includes relevant material not fully brought to the attention of the Court by the parties. *See* Sup. Ct. R. 37.1.

For these reasons, *Amicus* respectfully requests that the Court grant this unopposed motion to file the attached proposed *amicus* brief and accept it in the format and at the time submitted.

Dated May 17, 2022

Respectfully submitted,
/s/ Mark W. Brennan

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BRIEF FOR *AMICUS CURIAE* TECHFREEDOM IN SUPPORT OF EMERGENCY APPLICATION FOR IMMEDIATE ADMINISTRATIVE RELIEF AND TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IDENTITY OF PARTIES AND RELATED PROCEEDINGS

The parties to the proceeding below are:

Applicants are NetChoice, LLC d/b/a NetChoice; and Computer & Communications Industry Association d/b/a CCIA.

Respondent is Ken Paxton, in his official capacity as Attorney General of Texas.

The related proceedings are:

NetChoice, LLC v. Paxton, No. 1:21-cv-00840 (W.D. Tex. Dec. 1, 2021) (order granting preliminary injunction)

NetChoice v. Paxton, No. 21-51178 (5th Cir. May 11, 2022) (order staying preliminary injunction pending appeal)

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INTERESTS OF AMICUS CURIAE[1]

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom's experts have been deeply involved in the debate over state social media laws since before Florida's Senate Bill 7072 ("SB7072") or Texas's House Bill 20 ("HB20")—the first (and to date only) such laws—were even passed. *See, e.g.*, Corbin K. Barthold & Berin Szóka, *No, Florida Can't Regulate Online Speech,* Lawfare (Mar. 12, 2021), https://bit.ly/3iBFk0h (cited in Compl. at 19 n. 26, *NetChoice LLC v. Moody*, No. 4:21-cv-00220-RH-MAF (N.D. Fla. May 27, 2021) (challenging SB7072)). In the ensuing lawsuits against SB7072 and HB20, TechFreedom has filed an *amicus* brief at every stage of each litigation.

TechFreedom's earlier briefs, filed in the Northern District of Florida, the Western District of Texas, the Eleventh Circuit, and the Fifth Circuit, all focused on the topic of common carriage. *See, e.g.*, Brief of TechFreedom as Amicus Curiae Supporting Plaintiffs, *NetChoice LLC v. Moody*, No. 4:21-cv-00220-RH-MAF (N.D. Fla. June 11, 2021). They explain "the history of common carriage, its core elements, the case law surrounding it, what it meant at common law, what it has meant in telecommunications law, and, above all, why it is not a useful concept in a discussion of social media and the First Amendment." Brief of

[1] No party's counsel authored any part of this brief. No person or entity, other than TechFreedom and its counsel, helped pay for the brief's preparation or submission. All parties have consented in writing to the brief being filed.

TechFreedom as Amicus Curiae Supporting Petitioners at 2, *NetChoice LLC v. Paxton*, No. 21-51178 (5th Cir. Apr. 8, 2022).

During the appellate oral argument in this action, when a judge on the panel asked a question touching on common carriage, counsel for the social media platforms referred the judge "to the TechFreedom *amicus* brief" as authoritative on the subject. ("I've read the TechFreedom amicus brief several times," the judge responded.) We urge anyone interested in the issue of common carriage to consult that brief.

But the emergency posture of this case, as it reaches this Court, demands a shift of emphasis. In this brief, we turn to the potentially catastrophic consequences of the Fifth Circuit panel's decision, in a one-line order, to let HB20 take immediate effect.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

To hear its major proponents explain it, HB20 stops "Big Tech" from "silenc[ing] conservative speech and ideas." Greg Abbott (@GreggAbbott_TX), Twitter (Mar. 4, 2021, 11:52 PM), https://bit.ly/3jqSwWP. HB20's proponents admit—indeed, openly advertise—that if HB20 works as they intend, HB20 is a blatantly unconstitutional content-, viewpoint-, and speaker-discriminatory regulation of speech. But HB20 is not merely a pro-conservative speech law. No, HB20 is something else altogether.

HB20 is a "must-carry"—even a "must-promote"—law for social media posts that glorify terrorism, celebrate the Third Reich, encourage teen anorexia or cutting, depict children in sexually suggestive poses and settings, depict cruelty to animals, use racial slurs, and much more. Worse, it is a vague law that has been carefully designed to generate as much litigation as possible. Any social media user in Texas may sue to undo any act of content moderation, and the law attempts to limit rulings—including findings of

unconstitutionality—to the parties in a given case. As one expert put it, HB20 is "like a DDOS"—distributed denial-of-service—"attack. Platforms can be forced to litigate the same question repeatedly in different courts, even if they win in the 1st, 2nd, 3rd … nth cases." Daphne Keller (@daphnehk), Twitter (May 16, 2022, 9:27 AM), https://bit.ly/3wrBxZI.

With only very narrow exceptions, HB20 bans social media platforms from taking any action, including blocking, down-ranking, and even labeling—based on a user's "viewpoint." The law is thus as broad and ill-defined as the universe of human "viewpoints" itself. Almost all content expresses a "viewpoint" of some sort, and almost any act of content moderation can be rejiggered, by an enterprising plaintiff, into an act of viewpoint discrimination. Take, for instance, a ban on beheading videos. Is that a viewpoint-neutral policy against a certain type of content? Or is it "really" a viewpoint-based anti-terrorist-propaganda rule? Such questions are infinite, and, under HB20, they will be litigated.

HB20 flips the First Amendment on its head. Under the First Amendment, a social media platform is a "speaker"—akin, for instance, to a parade—with "the autonomy to choose the content of [its] own messages." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). Under HB20, the platforms are more like hostages. The most extreme users may put the platforms to the choice—thousands of times a day, no less—of either taking a heinous piece of content down, in violation of Texas law, or leaving it up, in defiance of the platform's own reputational and financial interests, in reckless disregard for the health and safety of the platform's other users and—because HB20 encourages users to ride the thin gray line of legality—at the risk of violating federal criminal law if they make even a single error.

This brief will discuss what HB20 *really* requires of social media platforms—and the immediate effect that the Fifth Circuit panel's decision to vacate the District Court's stay will have. This means that this brief includes some truly distasteful, vile material (including some references to actual social media posts that were taken down)—because that is what the law ultimately enables. We will examine, in particular, how HB20 opens the way for material harmful to children, posts promoting suicide or self-harm, depictions of animal cruelty, propaganda for terrorist groups, and hateful speech.

After discussing specific categories of content, we will turn to an important point about HB20's operative scope. Again, the law does not just set rules about what content platforms must allow. It also bars the platforms from "de-boost[ing]," "restrict[ing]," or "otherwise discriminat[ing]" against content. We will explore some of the terrible consequences that these limits will create. Above all, HB20 demands that platforms not only *allow* but actively *promote* harmful content.

Finally, we will explain why neither the four narrow exceptions to HB20's viewpoint-neutrality rule nor Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"), should deter this Court from granting immediate relief. The exceptions would not reliably shield the platforms from being sued for blocking the types of content discussed in this brief. And although Section 230 should offer such protection, Texas has designed HB20 to help it (and private plaintiffs) argue around that federal law.

ARGUMENT

I. The Fifth Circuit Panel Order Is Poised to Unleash a Torrent of Awful Content.

HB20's broad prohibition on viewpoint discrimination impermissibly puts social media platforms between a rock and a hard place. Every day, social media platforms remove

content that, while lawful, shocks the conscience. Under HB20, these platforms face an untenable choice: they can, on the one hand, permit the unfettered publication of content depicting minors in sexually suggestive positions (including images that may have been taken or posted without the minors' permission or knowledge); encouraging self-harm, such as mutilation or extreme dieting; depicting suicide; highlighting cruelty to animals; and hateful speech. Or they can continue to moderate content as they do today, consistent with what their users have come to expect—and expose themselves to the risk of liability should any Texas user sue while the constitutionality of HB20 is being litigated.

A. Material Harmful to Children

HB20 would undo decades of efforts by private companies to reduce the volume and mitigate the effect of online content that harms children. While congressional efforts to broadly prohibit the distribution of harmful material have been largely struck down, *see Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656 (2004); *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844 (1997), many private companies have developed robust mechanisms to help limit the distribution of material that is legal but harmful to children.

While federal law contains prohibitions on the knowing receipt or distribution of child sexual abuse material (CSAM) (a/k/a "child pornography"), 18 U.S.C. § 2252A, and child sexual exploitation material (CSE), 18 U.S.C. § 2252, there are many disturbing forms of content that, while not necessarily illegal, pose a grave risk of harm to minors. For example, federal law criminalizes only some of the most extreme aspects of grooming, such as sending CSAM to children to "induc[e] or persuad[e]" them to "participate in any activity that is illegal, 18 U.S.C. § 2252A(a)(6), and "solicitation" of CSAM, 18 U.S.C. § 2252A(a)(3)(B). Fortunately, social media platforms help backstop federal law through content moderation.

For example, Twitter bans "sexualized commentaries about or directed at a known or unknown minor," "sharing fantasies about or promoting engagement in child sexual exploitation," and "promoting or normalizing sexual attraction to minors as a form of identity or sexual orientation." Child sexual exploitation policy, Twitter (Oct. 2020) ("*Twitter CSE Policy*"), https://bit.ly/39Ts7hU. None of these are specifically illegal under federal criminal law, and all of them are likely constitutionally protected speech. Meta bans not only CSAM and CSE but also "content or activity that . . . endangers children." Community guidelines, Child Sexual Exploitation, Abuse and Nudity, Meta, https://bit.ly/3FR5Xc8 (last visited May 16, 2022).

Under HB20, social media platforms would need to host these types of content and even *promote* such content, lest they fall afoul of HB20's prohibition on "de-boosting" material based on viewpoint. *See infra* Section II.B.

HB20 also stifles social media platforms' ability to moderate sexualized imagery of children. For example, Twitter bans "visual depictions of a child engaging in . . . sexually suggestive acts." *Twitter CSE Policy*. Such currently moderated content would include images of young girls wearing dresses, lying down, and spreading their legs to reveal their underwear to a camera placed roughly at their feet. Another example would be a video featuring a minor with her legs spread, her long hair dangling down to her waist, providing the appearance of covering up her bare thighs, so as to cause the viewer to think that she might be naked. Any effort by social media platforms to continue to enforce these policies could constitute "censorship" under HB20. By removing videos that a social media platform views as "sexually suggestive," the social media platform would arguably be implicitly distinguishing between speakers who are seeking to normalize or promote the sexualization

of children (itself a viewpoint) and those who might post similar content for other purposes (*e.g.*, to educate parents on how to identify harmful behavior by their children).

HB20 would also seem to prohibit platforms from limiting the receipt of certain pornography depicting children; so long as it is computer-generated and distinguishable from actual recordings, it would not qualify as CSAM. Existing case law upholding CSAM prohibitions rests on the presumption that the creation of CSAM is inherently harmful to the children involved. *New York v. Ferber*, 458 U.S. 747, 759 (1982) ("The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways."). The particular justifications for restricting authentic CSAM identified by the Court—the depicted child's participation in making the content (and its subsequent circulation) and the need to cut off distribution channels to stave production and consequently halt the exploitation of children—are tied to the production of such content.

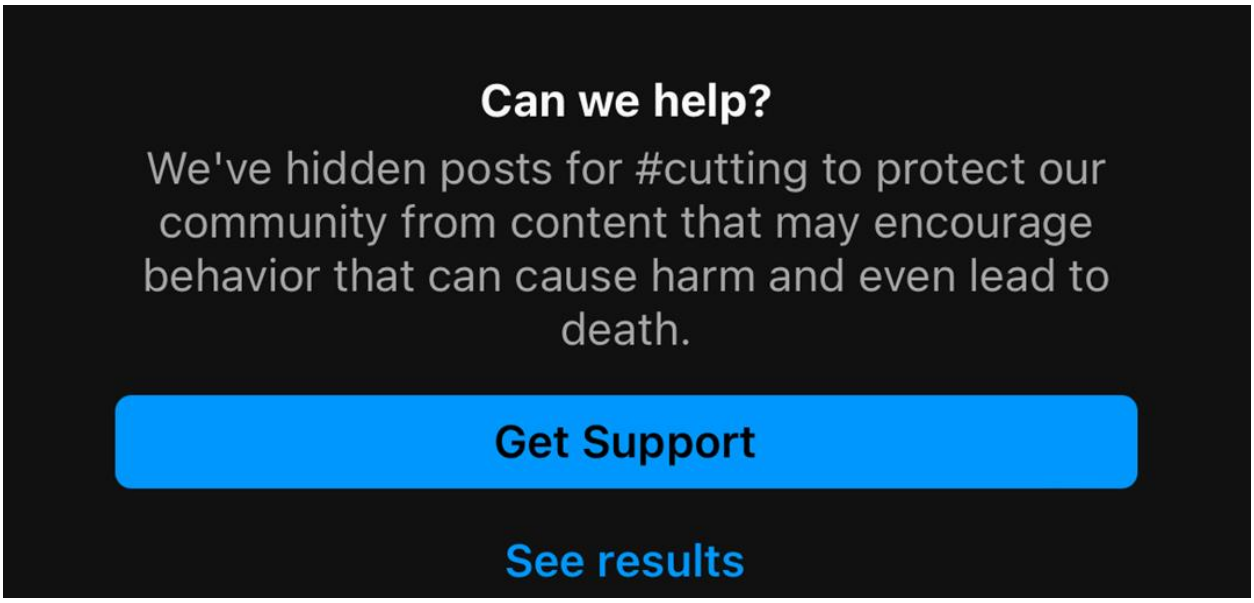
Yet modern technology allows for highly realistic images of virtual children engaged in sexually explicit contexts. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002) (Thomas, J., concurring) ("[T]echnology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children."). Today, social media platforms can prohibit these depictions on their platforms while still permitting simulated images that address important medical issues or are meant to educate. But it would be exceedingly difficult to develop a viewpoint-neutral rule to limit this type of synthetic but highly realistic content that social media platforms now must carry to comply with HB20. And any effort to do so would undoubtedly attract significant litigation. *Id.*

Neither would any of the examples listed above be subject to HB20's narrow exception for expression that "is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment." While social media platforms work closely with the National Center for Missing and Exploited Children and other organizations to identify harmful content, including illegal CSAM, any information-sharing with social media platforms would address only some of the harmful content that users seek to upload every single day. Unless and until one of these organizations were to make a referral or request for a given piece of material, particularly material not previously shared, the exception would not seem to apply.

B. Suicide and Self-Harm

Due to rises in the rates of teenage suicide and self-harm, some social media platforms implemented additional restrictions to limit the spread of content that could result in user harm. *See, e.g.*, Taylor Hatmaker, *Instagram and Facebook will start censoring 'graphic images' of self-harm*, TechCrunch (Feb. 7, 2019), https://tcrn.ch/3MhrfSt. Some also have sought to avoid even promoting content with viewpoints encouraging self-harm. TikTok "will not show self-harm related content when searching related terms." *See* Suicide & self-harm, TikTok, https://bit.ly/3le42Fd (last visited May 16, 2022). Twitter states that "[y]ou may not promote or encourage suicide or self-harm," including "sharing information, strategies, methods or instructions that would assist people to engage in self-harm and suicide. *See* Suicide and Self-harm policy, Twitter, https://bit.ly/3FQ9g38 (last visited May 16, 2022). Some social media platforms de-list "hashtags" used to find this content, which would almost certainly deny "equal access or visibility to" content with those hashtags.

Figure 1: Instagram Notification When Searching for Posts Using Search Query "#cutting"



These policies arguably discriminate against the viewpoint that self-harm can be a productive, effective response to conditions such as obesity or depression. Under HB20, blocking, deprioritizing, or even age-gating this content would constitute prohibited viewpoint-based "censorship" of a user. Social media platforms would be unable to take even minimal steps to help protect American children or teenagers from content promoting suicide and self-harm. In fact, HB20 would *require* social media platforms to help users find relevant content—no matter how harmful.

As one stark example of HB20's impact, in August 2020, Ronnie McNutt, a 33-year-old Army veteran, committed suicide. He did so as part of a live-stream, which was recorded and broadcast to the world. A screenshot from the video is included below:

Figure 2: Screenshot of Mr. McNutt Shortly Before Committing Suicide on a Live-Stream

Since Mr. McNutt's death, users have sought to upload this video to social media platforms on a regular basis. Some undoubtedly do so to express a viewpoint: to highlight the struggles that Mr. McNutt faced and the factors that drove him to choose suicide. Or to discourage others from following a similar path. Under HB20, covered social media platforms could essentially be forced to: (1) allow the video to be posted and shared, including for purposes of encouraging suicide; or (2) remove or block all suicide-related content (including prevention and life-affirming videos) to avoid the litigation and enforcement risks of engaging in "viewpoint" discrimination.

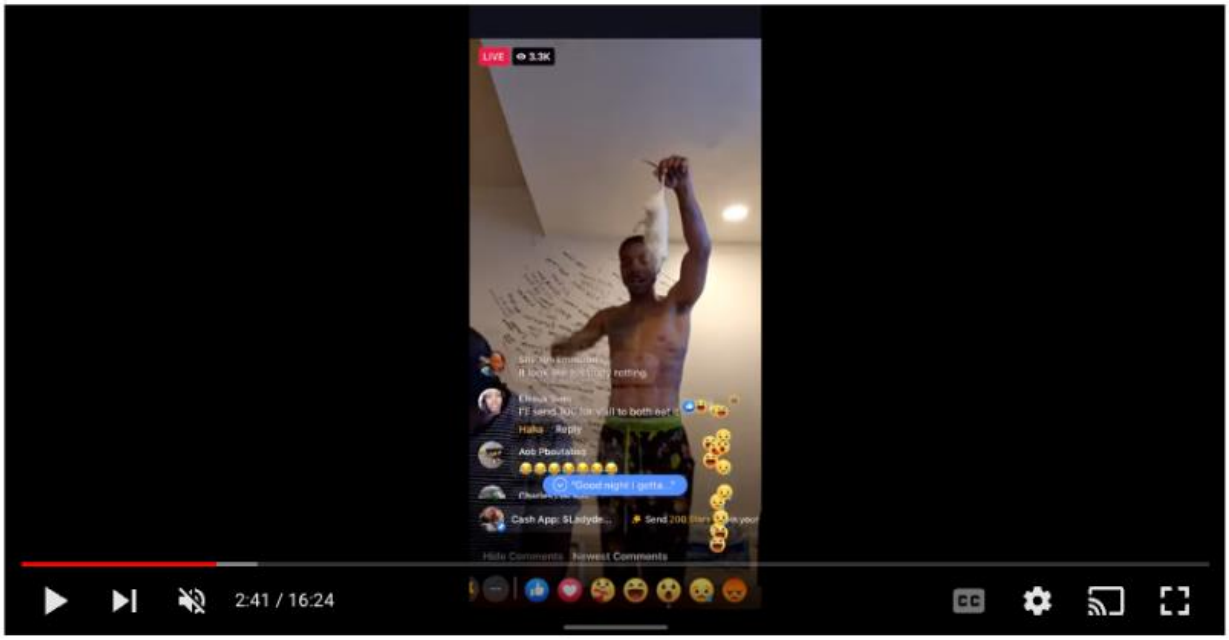
C. Animal Cruelty

Social media platforms maintain policies against posting animal torture or killing, aside from exceptions such as for posts "made for religious sacrifice, food preparation or processing, and hunting." Sensitive media policy, Twitter (Jan. 2022), https://bit.ly/3legBQB. Content depicting animal cruelty displays criminal conduct—but the legality of the depictions themselves is less than clear. *United States v. Stevens*, 559 U.S. 460,

495-99 (2010) (Alito, J., dissenting) (describing the extreme physical torture and pain endured by animals used in videos at issue and recordings of such conduct perpetuate those acts).

Figure 3 depicts a screenshot from a live-streamed video of a man consuming a live mouse.

Figure 3: Man Live-Streaming Consumption of a Live Mouse



While this video would likely be prohibited by most or all social media platforms' acceptable use policies, HB20 essentially forces social media platforms to make split-second judgment calls on potentially complex questions: Does it matter whether he toys with the mouse before eating it? Whether he torments it? Prolongs the process? Whether he explicitly states that he is engaged in a religious sacrifice or preparing a meal? And if the social media platform gets it wrong on any question, they face the risk of litigation and an enforcement action.

D. Organized Hate

Blocking terrorist videos often raises religious and political viewpoint issues and thus also the risk that a social media platform will be alleged to have engaged in viewpoint discrimination. Consequently, HB20 would prohibit platforms from de-listing, de-boosting, removing, redirecting from, or even de-monetizing content supporting terrorist organizations. *See, e.g.*, Mike Snider, *YouTube redirects ISIS recruits to anti-terrorist videos*, USA Today (July 20, 2017), https://bit.ly/3lfh1WW; Violent criminal organizations policy, YouTube, https://bit.ly/3lctjzr (last visited May 16, 2022) ("Don't post content on YouTube if it fits any of the descriptions noted below. . . . Content aimed at recruiting new members to violent criminal or terrorist organizations.").

Distinguishing between content that provides meaningful discourse versus gratuitous or harmful violence typically involves some viewpoint discrimination. For example, when ISIS began regularly posting gruesome videos of beheadings and executions, social media platforms moved quickly to prohibit the distribution of these videos on their platforms, which not only glorified violence but also served to promote the heinous viewpoints that ISIS sought to promote.

Figure 4: Screenshot of ISIS Execution of James Foley

In 2013, though, Facebook updated its content moderation policies to permit the sharing of these videos in some cases. A spokesperson explained, "People are sharing this video on Facebook to condemn it. If the video were being celebrated, or the actions in it encouraged, our approach would be different." Leo Kelion, *Facebook lets beheading clips return to social network*, BBC (Oct. 21, 2013), https://bbc.in/3wxAYxl. HB20 would strip social media platforms from making these sorts of nuanced content moderation decisions. In fact, because the video itself is not illegal or otherwise subject to any of the exceptions in HB20, the law will force social media platforms not only to host but, in some cases, also *recommend* (*e.g.*, refrain from "de-boosting") that users view such content. Other content that has been removed by platforms in the past, including posts of decapitated servicemembers, would similarly need to be left on the platform under HB20.

Or consider ideologically motivated mass-shooting events. On May 14, 2022, a man shot 13 people, 10 fatally, in a supermarket in Buffalo, New York. The shooter live-streamed his attack on Twitch. While Twitch was able to remove the video within two minutes of the

violence beginning, the video was recorded and distributed through other sites. Kellen Browning & Ryan Mac, *After Buffalo Shooting Video Spreads, Social Platforms Face Questions*, N.Y. Times (May 15, 2022), https://nyti.ms/38q1uRzs. HB20 would arguably require covered social media platforms offering live-streaming services to continue broadcasting the stream as the shooting continued. At the very least, content moderators may be delayed in de-listing offending content as they consider the potential liabilities for doing so (recognizing as well that the context of a particular post can evolve, and quickly). The Buffalo shooter published the live-stream as an expression of his viewpoint, stating that "livestreaming this attack gives me some motivation in the way that I know that some people will be cheering for me." *Id.* The shooter's video is not subject to any of the narrow exceptions under HB20, such as the exception for "unlawful expression," as the expression (the stream) itself is not illegal, even if the shooter's underlying acts were.

Platforms would also be prohibited from removing posts that glorify previous acts of mass violence, including, for example: "The shooters did a glorious thing—perhaps it's time for more of us to follow their example." HB20 would also prohibit them from removing statements that recruit or solicit support for violent extremist groups, violent organizations, and terrorist groups.

E. Hateful Speech

This Court's First Amendment decisions suggest that an acceptable use policy banning hateful speech would constitute viewpoint discrimination that runs afoul of HB20. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019) (stating that the Lanham Act's "'disparag[ing]' trademark[]" registration bar "violated the First Amendment because it discriminated on the basis of viewpoint") (quoting *Matal v. Tam*, 137 S. Ct. 1744 (2017)); *see*

also R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (striking down as impermissible viewpoint discrimination an ordinance prohibiting private property symbols that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender"). As a result, a social media platform that removed the following type of content, which does not constitute a direct incitement or specific threat of violence, would risk both private litigation and an enforcement action by the Attorney General of Texas:

Figure 5: Facebook Post Containing Hateful Speech

If HB20 is not stayed while the merits case is litigated, there are likely to be millions of expressions of hateful speech that social media platforms will be essentially forced to host, promote, and distribute. For example, Facebook's most recent Community Standards Enforcement Report stated that, in the fourth quarter of 2021 alone, Facebook removed 1.6 million pieces of "organized hate content," and 17.4 million pieces of "hate speech content." Community Standards Enforcement Report, Facebook, https://bit.ly/3FTO3W7 (last visited May 16, 2022). Over that same three-month period, YouTube removed more than 34,000 channels and nearly 90,000 videos due to "[h]ateful or abusive content." YouTube Community Guidelines enforcement, Google, https://bit.ly/3wiYQGk (last visited May 17, 2022).

II. HB20 Would Require Social Media Platforms to Not Only Host but Also Promote Hateful and Harmful Content to Users of All Ages, Including Children.

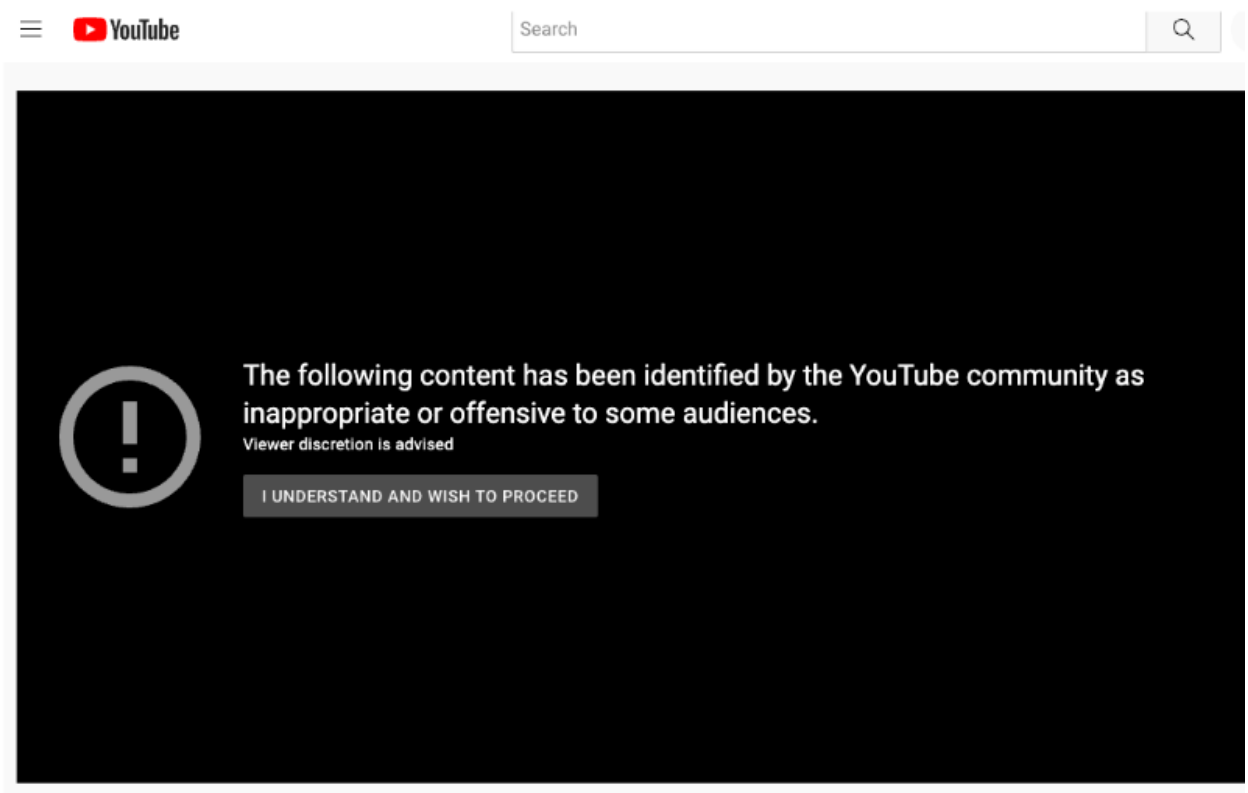
While the material that platforms will have to leave up to comply with HB20 is atrocious enough, that HB20 requires such content to be carried is only the beginning of the problem with this law. HB20 also forces the *promotion* of such content and *thwarts* parents and others from protecting children.

Most users, presumably, do not want to see the graphic, sexualized, violent, or hateful content that HB20 all but requires social media platforms to spread. And HB20 might *seem* to assist such users, by letting platforms help them opt-in to blocking content they don't want to see. Tex. Civ. Prac. & Rem. Code Ann. § 143A.006(b). But there are many good reasons why platforms make content moderation the default. Most importantly, perhaps, making users opt-in, user-by-user, to content moderation essentially guarantees that the worst content will reach the youngest and most vulnerable users. Consider YouTube's Restricted Mode, which parents can activate for their children's YouTube accounts; school and library administrators can do likewise. Turn Restricted Mode on or off, YouTube, https://bit.ly/3lfyL4G (last visited May 17, 2022). Videos containing potentially adult content—including not only the types of lawful but awful material discussed above but also "mature subjects," such as discussions of drugs or alcohol—will not be shown to viewers who have Restricted Mode turned on. YouTube would have to take this feature away from parents and probably bar institutional administrators from activating it on their computers for other users. Even more absurdly, YouTube would also have to ensure that any child using their parents' account on restricted mode had consented to it.

A. HB20 Would Prevent Social Media Platforms from Restricting Age-Inappropriate Content from Younger Audiences.

Some social media platforms also restrict certain sensitive content through age restrictions and login requirements. Under HB20, such gating requirements could be construed as "restrict[ions]" and thus "censorship." Thus, even taking the moderate step of requiring a user to confirm that they are old enough to view the content raises a liability risk. Rather than accept that risk, some social media platforms may deprecate their content gating functionality, allowing users of any age to access any content. While HB20 permits moderation "on the user's platform or page at the request of that user," this exception would only allow individuals to proactively request that their experience be moderated. Today, social media platforms can flag sensitive content to a user before they see it, but HB20 would hinder those efforts.

Figure 6: Age Restriction Notice on YouTube



B. HB20 Will Force Social Media Platforms to Recommend Offensive and Misleading Content.

HB20 prohibits "de-boosting" or removal of content based on viewpoint. Those viewpoints are not limited to routine policy issues such as whether taxes should be raised or cut. They include the viewpoint that the Holocaust did not happen, that the 9/11 attacks were carried out by the U.S. or Israeli governments, that the Sandy Hook shooting was a hoax, or that the earth is flat. *See, e.g.*, Continuing our work to improve recommendations on YouTube, YouTube (Jan. 25, 2019), https://bit.ly/3wjp0Zt (listing misleading content such as "a phony miracle cure for a serious illness, claiming the earth is flat, or making blatantly false claims about historic events like 9/11."). While American citizens undoubtedly have the right to hold these views and to promote them, HB20 will require that social media platforms amplify them.

Social media platforms rely on algorithms to drive their recommendations—from what video to watch next, to which post to load in a user's feed. These algorithms consider thousands of signals, including concepts such as "authoritativeness." Under HB20, social media platforms would be prohibited from considering "authoritativeness" in making these recommendations, as any finding that a viewpoint is less authoritative would have the effect of de-boosting it.

To give an example, a user watching a video with a Holocaust survivor's testimony might be recommended, as the next video, to watch a video arguing that the Holocaust never actually happened. Children increasingly conduct research online, including through social media platforms, and Americans increasingly consume news and learn by browsing social media platforms. HB20 would require private companies to help others poison the minds of the populace with false, even if well-produced content.

De-boosting is a particularly effective practice to counter misinformation and conspiracy theories. Social media platforms are flooded with text, images, and videos seeking to share alternate viewpoints, including, for example, that September 11th was committed by U.S. and Israeli agents. Like the various types of expressions discussed above, HB20 would effectively preclude efforts to block or remove these viewpoints from private social media platforms. And it would also prohibit "de-boosting" or "restricting" this content.

Social media platforms include search functionality and recommendation engines, which help surface the content most relevant to a user at any given time. When a user searches for "how the Holocaust happened," social media platforms parse the query to understand the user's intent. One of many signals that social media platforms consider is whether a post is reputable or authoritative. HB20's prohibition on de-boosting or restricting would seem to preclude social media platforms from marking Holocaust denial content as less authoritative (or from removing it entirely, as some do today). Accordingly, a user might find posts questioning whether the crematoria at Auschwitz were even crematoria, alongside posts recounting the testimony of Auschwitz survivors.

III. The Exceptions to HB20's Ban on Content Moderation Are Far Too Limited to Save HB20 from Being Unconstitutional.

HB20's exceptions do not provide social media platforms with the latitude to sufficiently prohibit content that they find objectionable. The exceptions are limited to content for which moderation is authorized by federal law; where the request for moderation comes from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment; direct incitement of criminal activity or certain threats; or unlawful expression, which is

unlawful under the U.S. Constitution, federal law, the Texas constitution, or Texas law, including torts. Tex. Civ. Prac. & Rem. Code Ann. § 143A.001(5) (West 2021).

But these exceptions do not permit online services to moderate most decidedly harmful content. The First Amendment provides broad protection from governmental interference with content such as text, images, and videos—even when the content relates to illegal activity. *See Stevens*, 559 U.S. at 469 ("As the Government notes, the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. . . . But we are unaware of any similar tradition excluding depictions of animal cruelty from 'the freedom of speech' codified in the First Amendment, and the Government points us to none."). But it imposes no such requirement on private companies.

HB20 prohibits social media platforms from moderating content based on "viewpoint." Tex. Civ. Prac. & Rem. Code Ann. §§ 143A.001(1), 143A.002 (West 2021). No lawyer, no judge, no expert in the field—not even the sponsors of the law—really knows what compliance with HB20 would look like. The line between viewpoint- and content-based rules is clear as mud. For example, the Court split 5-4 in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), on whether a public university's refusal to fund religious student publications was a viewpoint-based regulation of speech. That decision had the benefit of years of litigation, briefing, and oral argument before the Court ultimately concluded that the University of Virginia was engaging in viewpoint discrimination. By contrast, HB20 will force social media platforms to make at least tens of thousands of content moderation decisions daily that raise viewpoint discrimination issues. Any time spent delaying and deliberating will be time spent with objectionable content being hosted, distributed, and promoted to thousands or millions of users.

Some—including the House sponsor of HB20, *see* Briscoe Cain (@BriscoeCain), Twitter (May 16, 2022, 2:05 PM), https://bit.ly/3NfChrJ—have suggested that much of what Texas takes away with one hand, by barring content moderation based on "viewpoint," it gives back with the other hand, by allowing a platform to moderate content "as authorized" by "federal law." This is plainly a nod to Section 230.

It is indeed the case that Section 230(c)(1), properly construed, grants all websites, including social media, broad protection from liability for publishing, or exercising editorial discretion over, content created by others. *See, e.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). But this is cold comfort to the platforms, and the statute appears to "specifically authorize," Tex. Civ. Prac. & Rem. Code Ann. § 143A.006(1), no forms of moderation. That Texas passed a viewpoint-neutrality requirement that is completely swallowed by Section 230(c)(1), properly construed, suggests that Texas rejects the proper construction of Section 230(c)(1). And sure enough, at oral argument below, Texas's counsel speculated—based largely on the erroneous notion that only the largest platforms, rather than all sites that host content created entirely by others, enjoy Section 230 protection—that Section 230 might be unconstitutional. If this Court fails to act, Texas will likely try to evade Section 230 at every turn, as it presses enforcement of HB20. Some of the private plaintiffs empowered to enforce the law will *certainly* give it a shot.

Under HB20, moreover, "a user may bring an action . . . regardless whether another court has . . . declared any provision of this chapter unconstitutional unless that court decision is binding on the court in which the action is brought." Tex. Civ. Prac. & Rem. Code Ann. § 143A.007(d). A state law "preempted" by federal law is "unconstitutional," of course, "under the Supremacy Clause." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388

(2000). So even if one judge—and another, and another—properly declares that Section 230 preempts HB20's viewpoint-neutrality rule, plaintiffs may continue raising the issue until they find a judge who agrees with them.

The Court thus needs to vacate the Fifth Circuit's order *now*, before the platforms face a hail of lawsuits, all pressuring them—and potentially some eventually forcing them—to publish the sorts of material discussed in this brief. By the time the platforms are able to vindicate their rights in merits arguments in the courts below—even if that's only a few months from now—the damage will have already been done.

CONCLUSION

The Emergency Application should be granted without delay.

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Respectfully submitted,
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