No. 21-51178

In the United States Court of Appeals for the Fifth Circuit

NETCHOICE, LLC, et. al.,
Plaintiffs-Appellees,

– v. –

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

BRIEF OF CHRISTOPHER COX, FORMER MEMBER OF CONGRESS, CO-AUTHOR OF §230 OF THE COMMUNICATIONS DECENCY ACT, AS *AMICUS CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

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

1. Christopher Cox, *Amicus Curiae*;
2. Phelps Dunbar, LLP, Attorneys for *Amicus Curiae* Christopher Cox;
3. Mary Ellen Roy, Attorney for *Amicus Curiae* Christopher Cox; and
4. Dan Zimmerman, Attorney for *Amicus Curiae* Christopher Cox.

Respectfully submitted this 8th day of April, 2022.

/s/ Mary Ellen Roy

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Christopher Cox, *amicus curiae*, is a former United States Representative (R-CA), who, along with then-United States Representative (now Senator) Ron Wyden (D-OR), co-authored Section 230 of the Communications Decency Act, 47 U.S.C. §230. Since the law's enactment, Mr. Cox has been a leading observer of developments in the case law and, at the request of the House and Senate, a contributor to recent congressional deliberations about §230. As the statute's chief drafter, Mr. Cox is able to speak authoritatively to its history and Congress's intent in passing §230.

STATEMENT OF COMPLIANCE WITH RULE 29(a)

No party or party's counsel authored the brief in whole or in part or contributed money intended to fund preparing or submitting the brief. No person except *amicus curiae* or his counsel contributed money intended to fund preparing or submitting the brief. Both parties have consented to the brief's filing.

SUMMARY OF THE ARGUMENT

This is a First Amendment case. The First Amendment interests threatened by HB20 are paramount.

Texas believes that §230 "is also highly relevant" because internet platforms ("platforms") "deploy that legal shield as a matter of course," and "cannot at the same time claim the same rights as newspapers and parades." Appellant Brief ("Br.") 12, 33. But, to the contrary, the First Amendment protects all persons, not only "newspapers and parades." And *nothing* about §230 strips *anyone* of their First Amendment rights.

This brief will focus, first, on the relationship between the First Amendment and §230. It will expose Texas' mischaracterizations of the statute and the fallacious reasoning behind its conclusion that §230 is somehow incompatible with the First Amendment.

Second, this brief will address Texas' contention that Appellees cannot seek shelter in §230, focusing on the parts of HB20 that are in irreconcilable conflict with the federal statute and thus preempted by it.

Finally, this brief will address the other constitutional question in this case – the Supremacy Clause issue raised by §230's express preemption of inconsistent state laws such as HB20. The brief concludes with an explanation of why Congress

chose preemption, and the primacy of that statutory command under the Supremacy Clause.

ARGUMENT

1. THE LIABILITY SHIELD OF §230 DOES NOT ROB PLATFORMS OF THEIR FIRST AMENDMENT RIGHTS.

A. §230 Does Not Require Platforms to Be Mere Conduits.

Texas' main argument is that HB20 "does not implicate the First Amendment." Br. 17. Texas fails to see a connection between the First Amendment and a law requiring private parties to publish speech they find offensive.

To justify this extraordinary assertion, Texas advances the unfounded theory that §230 stripped platforms of their First Amendment rights: "Platforms enjoy §230 protection for their users' speech under the premise that the Platforms are mere conduits for that speech"; this protection "is irreconcilable with their claim that they should enjoy the separate privileges afforded to newspapers, who are legally responsible for the content they print." Br. 16.

But Texas' contention that platforms are mere conduits is not correct as a matter of fact or law. To the contrary, Congress enacted §230 for the express purpose of *overturning* a state court ruling that required a platform to be a mere conduit to avoid liability for user posts.

In 1995, a New York court held that only if a platform was a passive conduit could it avoid liability for tortious content authored by its users.[1] Prodigy, a leading internet platform at the time, was held liable for a user's posts because the platform was *not* a mere conduit, *e.g.*, it removed users' posts if they were "harmful to maintaining a harmonious online community." Its content guidelines stated that although "Prodigy is committed to open debate and discussion . . . this doesn't mean that 'anything goes.'"[2]

An earlier New York case had held that CompuServe, another leading platform, was protected from liability for user posts because it did not moderate content at all.[3] In contrast, the basis for subjecting Prodigy to liability for user-created content was that the platform did enforce content moderation standards.

The perverse incentive *Prodigy* established was clear: if platforms wanted to avoid ruinous liability for user-created content, they could not remove objectionable content from their sites.

Even twenty-five years ago, it was evident that platforms could not be expected to monitor all of the enormous quantities of material their users posted every minute of every day. Congress decided it was unreasonable for states to hold

[1] *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
[2] *Id.*, at *4-5.
[3] *Cubby, Inc. v. CompuServe Inc.*, 776 F.Supp. 135, 140, n.1 (S.D.N.Y. 1991).

platforms liable for user-created content. Doing so, lawmakers realized, would directly interfere with the internet's basic functioning.[4]

Congress therefore adopted §230 to protect platforms that display user-created content from being treated *as if* they were "the publisher or speaker of any information provided by another." §230(c)(1). For this protection to apply, the platform must not be "responsible, in whole or in part, for the creation or development" of the content at issue. §230(f)(3). When a platform does play that creative or developmental role, even if only partly, there is no protection from liability under §230.[5]

So says the statute. Texas mistakenly insists that a platform must be classified for all purposes as *either* a publisher *or* a mere conduit. But nothing in §230 requires classification of a platform as either a publisher or a conduit.

Most platforms share certain features in common with traditional print publishers. The two forms of media differ, however, in that platforms host millions of pieces of content posted online in real time. Still, almost all platforms perform content moderation – they are not just mere conduits. And §230 is premised on this

[4] For a thorough history of §230, *see* Christopher Cox, "The Origins and Original Intent of Section 230 of the Communications Decency Act," *Richmond Journal of Law & Technology* (August 27, 2020), https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act/.

[5] *See, e.g.*, *Fair Housing Council v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (when a platform is itself a content creator, it is ineligible for §230 protection).

multi-faceted reality. The statute provides that a platform *will* be treated as a publisher when it is involved in the creation or development of particular content, but it *will not* be treated as a publisher otherwise.

Content moderation, by its very nature, requires that platforms exercise editorial discretion when they remove objectionable content. The *Prodigy* decision would have subjected platforms to liability for this content moderation. To avoid *Prodigy's* unfortunate disincentive to remove objectionable content, Congress created a limited "Good Samaritan" exception to the general rule in §230 that participation in content creation or development gives rise to liability. This safe harbor prohibits holding platforms liable for restricting content the platform considers "objectionable," as defined in §230(c)(2)(A). Thus, §230 does not protect platforms only when they act as mere conduits. This misrepresentation of §230 is key to Texas' baseless argument.

Independently, because content moderation is a form of editorial speech, the First Amendment more fully protects it beyond the specific safeguards enumerated in §230(c)(2). Properly understood, §230 complements the First Amendment, and is entirely compatible with it. The broad reach of the First Amendment, which includes the editorial discretion inherent in content moderation, does not fall away because a platform that moderates user content is not a "mere conduit."

B. Platforms Do Not Lose Their First Amendment Rights Because They Are "Not Newspapers or Parades."

In enjoining the statute, the district court applied the fundamental First Amendment principle "that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group,* 515 U.S. 557, 573 (1995). Contrary to Texas' distortion of the district court's decision, the application of this bedrock principle is not dependent on the speaker being a newspaper (*Tornillo*),[6] a parade (*Hurley*), an electric utility (*PG&E*),[7] or even a registered sex offender (*McLendon v. Long*).[8] The First Amendment protects all persons from government-compelled speech.

This free speech principle does not represent a "carveout" from any general rule that the government can compel speech with which one disagrees, as Texas would have it. Br. 2. The prohibition against compelled speech is itself the prevailing general rule, and *Tornillo* and *Hurley* are not "outliers." As Chief Justice Roberts has observed, "some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the

[6] *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *see also Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) ("First Amendment interdicts judicial interference with the editorial decision" of newspaper to reject publication of ad, citing *Tornillo*).

[7] *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n,* 475 U.S. 1, 20-21 (1986).

[8] 22 F.4th 1330 (11th Cir. 2022).

government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 61 (2006).

Texas contends otherwise. Newspapers, in its view, enjoy a rare freedom from government-coerced speech, a freedom that states may deny to platforms. Purporting to clinch this spurious argument, Texas then produces its rabbit from the hat: *by virtue of §230*, it claims, platforms cannot be treated like newspapers because the speech they host is not "their own." Br. 2.

But content moderation *is* a platform's own speech. And §230's protection for moderating user-created content does not depend on a platform being a mere conduit. How could it? Being a mere conduit means *not* moderating content. It is the "anything goes" model that §230 was designed to discourage. Indeed, content moderation – the enforcement of community standards unique to each platform – has been a feature of platforms since the internet's early days. It is not only consistent with §230; its protection is the very *raison d'etre* of §230.

Because moderating content inherently involves the platform's own speech, Texas is wrong to assume that newspapers exercise editorial discretion but platforms do not. This fallacious assumption is the premise to Texas' argument that §230 protection, which supposedly hinges on requiring platforms to function as mere conduits, is "irreconcilable with their claim that they should enjoy the

separate privileges afforded to newspapers, who are legally responsible for the content they print." Br. 16.

Platforms are responsible for the content *they* create or develop, even partially. §230(c)(1), (f)(3). Only if they fall within the safe harbor of §230(c)(2) are they protected from liability that would otherwise arise from their exercise of editorial discretion in moderating content. Beyond that, *all* of the editorial discretion inherent in content moderation, whether it falls within the safe harbor of §230 or not, retains its character as the platform's own speech. In this respect it is entitled to the same First Amendment rights enjoyed by newspapers, parades, electric utilities, and everyone else.

In short, Texas is wrong that platforms would not be eligible for §230 protection if they behaved like newspapers by exercising editorial discretion. Platforms *do* exercise editorial discretion when they moderate content, and it is *for that very reason* that §230 *does* protect them.

There is nothing about §230 or the First Amendment that requires abridging the free speech rights of platforms to exercise the editorial discretion inherent in content moderation.

C. Texas' Conflation of Speech and Conduct Is Sleight of Hand.

Because of the principle that freedom of speech prohibits the government from telling people what they must say, Texas is hard pressed to argue that HB20,

which it admits *requires* platforms "to host another person's speech," is consistent with the First Amendment. Br. 1. Texas is forced to advance the implausible claim that HB20 regulates only "conduct." Br. 18-19.

Once again Texas rests its argument on a misguided interpretation of §230. Texas' fallacious syllogism is as follows:

Major Premise: Because their speech is their own, newspapers enjoy a "carveout" from a supposed First Amendment rule that a state may force private persons to host speech they disagree with.

Minor Premise: Content moderation by platforms is *not* their own speech because §230 is based on platforms being mere conduits of others' speech.

Conclusion: Because content moderation cannot be the platforms' speech, it must be mere conduct; perforce, HB20 regulates mere content, not speech.[9]

In sorting through this illogic, the erroneous legal premises must be flagged. The First Amendment principle that "freedom of speech prohibits the government from telling people what they must say" is the rule, not an exception. *See* Part I.B., *supra*. And §230 liability protection does not require platforms to be mere conduits; their content moderation is their own speech. *See* Part I.A., *supra*.

[9] Br. 22-23, 33-34

In addition to these legal premises being wrong, the most egregious flaw in Texas' syllogism is the obvious fallacy embedded in its conclusion, which erases all meaningful distinction between speech and unexpressive conduct.

Recharacterizing the editorial discretion that is content moderation as unexpressive conduct is a breathtaking leap unsupported by law or evidence. Content moderation standards express a platform's brand identity. They define the online community that converges on the platform. They establish an editorial context that appeals to certain kinds of advertisers on which the platform and the community depend. The application of those standards gives concrete meaning to high-level principles.

The act of enforcing community guidelines is quintessentially expressive. Thus the district court concluded that platforms "have a First Amendment right to moderate content disseminated on their platforms." ROA.2582. Disallowing platforms from applying moderation policies requires platforms to "alter the expressive content of their [message]." ROA.2588, quoting *Hurley*, 515 U.S. at 572-73.

Platforms' decisions to remove certain content or suspend certain speakers is no less speech that is a parade organizer's decision to ban a particular marching group or a newspaper's decision to reject a particular op-ed. In each case, these editorial decisions go far beyond unexpressive "conduct."

Texas argues that the *PruneYard* case permitting political expression by patrons of a shopping complex eliminates all First Amendment issues because, "like the mall," platforms "are open to all comers."[10] But platforms are not and never have been "open to all comers." From the beginning, platforms have maintained community standards governing user-created content. Texas dismissively belittles the "terms of service" that potential users must agree to before they can gain access to a platform. These terms of service, however, include each platform's legally binding community standards.

Texas makes its false assertion that platforms are "open to all comers" because *PruneYard* involved a large commercial complex "open to the public to come and go as they please." 447 U.S. at 83. Thus, the public's views would not likely be identified with the owner's. *Id.* at 86-87.

In contrast to the *PruneYard* mall, platforms *do* exclude users *and* a wide variety of user-created content for violating their community standards. Texas must concede this point, or the entire rationale of HB20 collapses. This is the inherent contradiction in its argument: on the one hand, Texas asserts that platforms take all comers; and on the other hand, the very essence of its complaint is that the platforms "de-platform" speakers and censor their speech.

[10] Br. 18-19, citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

In further contrast to *PruneYard*, there is no doubt that the public does associate platforms with the kinds of speech and speakers they allow or forbid. Advertisers do so – they sponsor only platforms with which they are willing to associate their brands. Users do so – they patronize platforms that provide a congenial online community suited to their tastes. None of the platforms covered by HB20 follows an "anything goes" model; if one did, it would certainly attract a very different user demographic than at present.

That platforms are identified with the character of their content moderation is further evidenced by the fact that whenever a platform suspends a particular speaker or deletes a particular type of content, users who agree with the decision hail the platform, and those who disagree criticize it. While platforms differ from newspapers in important respects, in applying their community standards they exercise editorial discretion in much the way that a newspaper manages its opinion section, agreeing to publish certain viewpoints and rejecting others. And just as with newspapers, the public notices.

Furthermore, readers and advertisers do not just notice when a platform allows content they find offensive. They "vote with their feet," abandoning certain platforms and patronizing others, just as newspaper readers and advertisers do. Texas is not content to allow the marketplace of ideas to sort out these matters, as the First Amendment envisages. Instead, HB20 uses the heavy hand of the State to

require platforms to "take all comers" and follow the discredited policy of "anything goes."

A brief comparison to *Rumsfeld*, the other main case Texas relies on, illustrates the point.[11] Because *Rumsfeld* addressed the government's power to require federally-funded universities to give campus access to military recruiters, and not what the schools might say to those recruiters, *Rumsfeld* was about conduct rather than speech. Unlike what Texas has done in HB20, *Rumsfeld* did not strip universities of their right to maintain community standards related to speech. If a campus recruiter violated school polices by flinging F-bombs or racial epithets at students, the courts would not dismiss these policies as mere "conduct" beyond the protection of the First Amendment.

D. Under §230 Platforms, Like Others, Are Liable for Their Own Speech.

Texas concedes that "a platform 'remains liable for its own speech,'" and that §230(f)(3) ensures this liability exposure when a platform "has any role in the formation of another's speech." Br. 14. Yet Texas' argument proceeds as if platforms are *not* legally liable for their own speech. Because §230 absolves platforms of liability for the speech of *others*, Texas argues, it must follow that

[11] *Rumsfeld v. FAIR*, 547 U.S. 47 (2006).

content moderation is not the platforms' *own* speech. This reflects Texas' serious misunderstanding of the architecture of §230.

Section 230 provides that if a platform does not create or develop content, even in part, then it receives protection from liability for that content. Congress constructed §230 this way because, in light of the huge volume of content crossing most platforms in real time, it would be unreasonable for the law to presume that a platform could possibly screen it all. Congress also understood that if a platform *did* review and edit specific content, then it *would* be fair to hold it liable for that content. As a general rule, therefore, §230 makes a platform liable in these circumstances. §230(c)(1), (f)(3).

But Congress, not wanting to expose platforms to liability for good faith content moderation, included a Good Samaritan exception to the general rule of liability exposure when review and removal occurs. This safe harbor protects a platform from liability for "any action voluntarily taken in good faith to restrict access to or availability of material" that it considers "objectionable" as defined in §230(c)(2)(A). Falling within the safe harbor protection of §230 does not magically convert the speech a platform expresses through content moderation into speech that is not its own. Though immunized, the editorial discretion involved in

content moderation remains the platform's speech.[12] At the same time, adding commentary to a user's post falls outside the protection of §230. In such exercises of editorial discretion, a platform is liable, like any other person, for its own speech.

With this understanding of how §230 operates, it becomes clear that nothing about it robs platforms of their First Amendment rights. Content moderation is assuredly the platform's "own speech," whether or not it is immunized. The State's injection of §230 into its discussion of the First Amendment, based on a grossly inaccurate depiction of the statute, ultimately is a red herring. Platforms' First Amendment rights include all of their speech, whether it is protected from liability by §230 or not.

E. Platforms Are Not Common Carriers.

Texas' declaration that platforms are common carriers is circular: because platforms take all comers, the State may force them to take all comers. But, as covered in Part I.C. *supra*, most platforms featuring user-created content exercise content moderation, and assuredly do *not* take all comers. This includes the platforms represented by Appellees. Section 230, which Congress enacted for the

[12] Nor does every act of content moderation fall within the ambit of the Good Samaritan provision. Editorial discretion falling outside the scope of permissible content moderation identified in §230(c)(2)(A), and which constitutes content creation or development "in whole or in part" within the meaning of §230(f)(3), is not immunized by §230.

very purpose of ensuring that platforms could enforce community guidelines to prevent an "anything goes" atmosphere, underscores this point.

Common carriers such as telephone utilities or telegraph operators are fundamentally different from platforms because they facilitate private communications, while platforms exist for the purpose of *publishing* users' speech.[13] There is no reason for telephone or telegraph users to believe that telecommunications companies endorse, or are even aware of, the opinions expressed in their users' private conversations. Speech that is published on a platform is by definition widely known, so that the platform hosting it cannot avoid being linked to it.

Moreover, platforms promote speech within voluntary online *communities*. Unlike telecommunications companies, which facilitate private point-to-point connections typically between two or a few people, social media platforms enforce rules of the road for the benefit of their particular online communities. Treating platforms as common carriers would effectively force the "anything goes" model on them.

Far from the "variety" of services that was envisioned in §230(a) as the best route to a "true diversity of political discourse, unique opportunities for cultural

[13] Other common carriers such as trucking and rail freight companies are easily distinguished from platforms because regulating them does not regulate speech.

development, and myriad avenues for intellectual activity," online communities would no longer be able to set their own standards. §230(a)(3). Moderation of content that is offensive to entire communities would be a thing of the past. All of this would stand §230 on its head, since removing the disincentives for content moderation was the impetus for Congress' enactment of §230.

2. HB20 IS INCONSISTENT WITH §230.

A. HB20 Prohibits Platforms from Enforcing Community Standards.

HB20 flatly prohibits platforms from using ordinary forms of content moderation. *See* Tex. Civ. Prac. & Rem. Code §§143A.001-0002. Using the pejorative term "censor" to lump together a variety of actions, the law prohibits a platform from revoking a user's privileges even when the user flagrantly violates reasonable community standards. All that matters is that the content violating the platform's policies expresses a "viewpoint." §143A.002(a)(1).

Under HB20, denying service even to repeat bad actors, or merely removing offending content, makes the platform liable for penalties, attorneys' fees, and the State's investigation costs. §§143A.007-008. These harsh penalties for content moderation conflict with §230, which protects a website taking "any action" in good faith to restrict access to objectionable material. §230(c)(2).

If a platform bans vile racist viewpoints, for example, it is subject to liability and penalties. In a weak gesture acknowledging that a problem lurks here, HB20

allows a platform to "censor" user content that invidiously targets "race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge" – but *only if* such hate speech "directly incites criminal activity or consists of specific threats of violence." That narrow exception protects the full cornucopia of lawful-but-awful speech, and robs platforms of their First Amendment right to exclude such repugnant material from their sites.

Under HB20, not only is a platform prohibited from taking down objectionable content, but it must give it the same prominence it gives to all other content on the platform, no matter how laudable or popular. In §143A.001(1), HB20 defines "censor" to include denying "equal access or visibility." How this provision could feasibly be enforced is anyone's guess, but with billions of posts without any kind of curation, a platform would quickly become a chaotic mess.

It is inherent in organizing large quantities of material that some content must come before other content, even when the content is randomly sorted. Content that is shown first and content that is shown last do not have "equal . . . visibility," especially in the long line of content that constitutes any user's feed. Sorting is literally impossible to avoid. Because HB20 gives the State the power to enforce this hopelessly unworkable yardstick of "equal visibility," the proprietary work of platforms to arrange the vast volumes of user-created content they host in an orderly fashion would be second-guessed by Texas officials, whose

discretionary authority easily could be abused in attempts to influence the platforms' content moderation policies.

In an oblique nod to §230's express preemption of inconsistent state laws, HB20 provides that its prohibition on content moderation does not forbid censorship of expression that a platform "is specifically authorized to censor by federal law." §143A.006(1). But §230 does not by its terms "authorize" any type of content moderation, much less "censorship"; §230 is a protection from liability, not a grant of power. The First Amendment, not a federal statute, is the source of platforms' authority to exercise editorial discretion over the user-created content they host.

If Texas intended HB20 to defer to the preemptive force of §230, then §143A.006(1) was not well drafted. But this flaw is of no moment because a generously broad interpretation of §143A.006(1) would lead to the same result as a strict interpretation. Under a broad construction, §230 would continue to protect platforms from liability for content moderation by operation of HB20's own terms, which expressly bow to §230. Under a strict construction, HB20's ban on content moderation would directly conflict with §230, and so be preempted by it.

Under either interpretation of this provision of HB20, both §230 and, more broadly, the First Amendment would remain protective of platforms' editorial discretion to engage in content moderation. *See* Part I, *supra*.

B. HB20 Prohibits Platforms from Relying on Their Own Judgment to Restrict Objectionable Content.

There is further conflict between HB20 and §230. Under HB20, the State's subjective determination of whether particular user content is objectionable, whether it should be removed, or how the speaker should be restricted is controlling. Under §230, it is the subjective determination of each platform that controls these decisions.

Under HB20, platforms are not free to make their own good faith judgments about what content is objectionable or in breach of their community standards. Instead, the law's enforcers – the State and private litigants – are empowered to challenge those judgments, on the ground that certain content expresses a "viewpoint" or has not enjoyed "equal access or visibility." §§143A.001-002. Most troubling from a First Amendment perspective, in the hands of the State, this all-purpose device to second-guess a platform's good-faith judgments becomes a weapon to control the editorial decisions of the platform.

No court would uphold as consistent with the First Amendment a law that requires newspapers to yield to the State's judgment on what letters to publish, parade organizers to defer to the State with regard to how they pick marching groups, movie studios to give up their discretion to choose screenplays by their own criteria, or book publishers to submit their guidelines for selecting novelists to the State for approval.

In this respect, consumer disclosure laws governing the sale of goods and services are easily distinguishable because commercial speech is protected by less strict First Amendment standards. Commercial speech doctrine allows the government to mandate the publication of information such as calorie counts, warning labels, and SEC disclosures.

Mandating the disclosure by platforms of their editorial decision-making processes, however, infringes expressive and often political speech. State laws that would override the content moderation judgments of platforms are plainly inconsistent with both the First Amendment and §230. In particular, the statute expressly provides that a platform is protected in using its *own* judgment in restricting access to "objectionable" material as defined in §230(c)(2)(A).

The policy basis for Congress's decision that platforms, not the government, should be entitled to use their own judgment in determining standards for their online communities is expressly stated in §230(b)(2), and aligns with the values of the First Amendment: "It is the policy of the United States" that the internet shall be "unfettered by Federal or State regulation." HB20's imposition of extensive state regulation on platforms contradicts this federal policy, most egregiously by prohibiting them from using their own judgment to restrict objectionable content.

C. HB20 Imposes a Duty to Constantly Monitor That Is Inconsistent with §230.

A platform subject to HB20 is given a mere 48 hours to "make a good faith effort" to determine the legality of every piece of content on its site that is the subject of a complaint. Tex. Bus. & Com. Code §120.102. Given the billions of pieces of content involved, this is a remarkably short deadline that will undoubtedly prove impossible to meet in every instance, no matter the resources devoted. Failing to accomplish this hyper-ambitious goal will open platforms to suit by the State for failing to make a "good faith effort" to meet the deadline. §120.151.

Even more concerning, HB20 imposes the same 48-hour deadline on internally-generated alerts as it does on outside complaints. The deadline in §120.102 applies to *every* notice of potentially illegal content, no matter where the notice comes from. Similarly, §§120.053(a)(1) and (b)(2) list user complaints, employee-generated notices, and internal alerts from automated detection tools as sources of information about possible illegal content. Because a platform's own surveillance systems will (or at least from a policy standpoint should be encouraged to) cover most user-created content, the volume subject to the 48-hour rule thus grows exceedingly large. Rather than encouraging platforms to weed out harmful content, as Congress intended by enacting §230, HB20 discourages platforms from generating internal flags, because doing so exposes them to liability

under the onerous 48-hour rule that can be avoided by eschewing diligent monitoring.

The 48-hour rule amounts to a legal duty to feverishly and continuously scrutinize every bit of user-generated content. While Congress wanted to encourage robust content moderation, §230 is premised on the fact that it would be unreasonable to demand that platforms flawlessly examine the vast amount of content posted around the clock each day – let alone to investigate the accuracy or acceptability of each bit of content, and having done so, then to deal on an individualized basis with the millions of users who post content.[14]

As the Ninth Circuit has held, §230's protection may not be vitiated based on requirements to "monitor, or remove user generated content." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016).[15] Congress understood that liability-driven content monitoring and removal would slow internet communications, discourage development of new platforms featuring user content, and chill opportunities for users to publish online. HB20 rejects this cornerstone

[14] As Rep. White observed during debate on §230, referring to platforms: "There is no way that any of those entities, like Prodigy, can take the responsibility [for all of the] information that is going to be coming into them from all manner of sources." 141 CONG. REC. H8471; *see also id.* (statement of Rep. Goodlatte) (emphasizing importance of not requiring platforms to review users' content, calling that imposition "wrong"); *id.* at H8469 (statement of Rep. Cox) ("There is just too much going on [over platforms] for that to be effective.").

[15] *See also Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (under §230, "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process").

policy choice of §230. As such, it is an inconsistent state law, which §230(e)(3) expressly preempts.[16]

Many states are eager to join Texas in this game of challenging the federal policy embodied in §230 with their own approaches to internet platform regulation. Congress early recognized the inevitable problems that would arise if each state could regulate the internet as it chose. Notwithstanding HB20's conceit that it applies only within Texas, platforms cannot feasibly limit the reach of their sites to particular states. The necessity of complying not only with HB20, but the multiplying parade of additional state laws that will follow HB20 if it is upheld, would make the internet as we know it unworkable.

An important reason §230 protects platforms from liability is that it is unreasonable for the government to require ceaseless monitoring of all the content that millions of people post to platforms every day. A state law that requires platforms to constantly monitor users' content is fundamentally inconsistent with §230.

[16] *See Doe*, 528 F.3d at 418 ("[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section," quoting §230(e)(3)) (citation omitted).

D. HB20's Mandated Individualized Attention to User Posts Is Inconsistent with §230.

A further inconsistency with §230 is HB20's requirement that platforms provide, to each user whose content is removed, an individualized explanation of the reason it found the content to be objectionable. §120.102. Immediately upon a user's complaint about a content moderation decision, the platform must provide the user the ability to "track the status of the complaint." §120.101. The platform is required to once again review the material at issue, reevaluate its original decision that the content violated the platform's community guidelines, take whatever follow-up actions the reevaluation calls for, and provide notification of each step to the user – all within 14 business days. §120.104.

Like the 48-hour rule, the Texas Attorney General enforces the complaint provisions of HB20, thereby exposing platforms to substantial monetary liability for the State's attorneys' fees and investigation costs. Given the enormous volume of user content on the platforms covered by HB20, these regulations impose an extraordinary burden that threatens the viability of content moderation. Each time a platform enforces its community guidelines regarding objectionable content, these chilling regulatory requirements kick in, complete with attendant legal liability. The net result is a powerful incentive *not* to remove user posts, no matter how objectionable.

Given the legislative history of HB20, this disincentive to content moderation is likely the intended result of the law (*i.e.*, a feature rather than a bug). But such a purpose flies in the face of §230, which Congress enacted to encourage platforms to monitor content by protecting them from liability when they do so.

3. THE SUPREMACY CLAUSE REQUIRES THAT HB20 YIELD TO FEDERAL LAW.

Throughout the history of the internet, Congress has sought to strike the right balance between opportunity and responsibility. Section 230 is such a balance. It holds content creators liable for their own unlawful activity while protecting platforms from liability only when they are not responsible, even in part, for the creation or development of unlawful content. §§230(c)(1), (f)(3).

Section 230 expressly preempts state law that is inconsistent with it. §230(e)(3). Congress chose this course because a significant purpose of §230 was to establish a uniform federal policy, applicable across the internet, that would avoid a patchwork of state laws exposing websites to liability for content moderation.

If every state were free to adopt its own policy concerning when a platform will be liable for content created by others, not only would compliance become oppressive, but the federal policy itself could quickly be undone, and §230 would become a nullity.

Section 230 thus establishes a uniform national policy and enforces it with the full authority of the Supremacy Clause, in the broadest possible terms: *No* liability may be imposed under *any* State or local law that is inconsistent with §230. §230(e)(3). This is express, not implied, preemption. And "inconsistency" is the broadest basis for expressly asserting federal priority. Section 230's plain language establishes that Congress intended to preempt not only state laws in direct conflict, but also all state laws that are inconsistent. §230(e)(3) unambiguously preempts "any State or local law that is inconsistent with this section." The Supremacy Clause, U.S. CONST., art. VI, §2, provides that federal law in such cases reigns supreme, "the Laws of any State to the Contrary notwithstanding."

In *Arizona v. United States*, 567 U.S. 387 (2012), the Supreme Court surveyed the jurisprudence governing federal preemption and held that federal law preempted multiple sections of the Arizona law at issue. Justice Kennedy laid out the fundamental principles:

> The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. Under this principle, Congress has the power to preempt state law. [citations omitted] There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.

Id. at 398. Congress' constitutional preemption power includes instances where challenged state law "stands as an obstacle to the accomplishment and execution of the full *purposes and objectives* of Congress." *Id.* at 399 (emphasis added).

Texas cannot controvert this well-established law and the plain language of §230, and so it instead attempts to turn the tables by meekly suggesting (in one paragraph near the end of its brief) that §230 preemption might *itself* be unconstitutional. To make this fanciful argument, Texas puts forward *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), in support of its position. Br. 35. It is an odd case to choose, however, as it *upheld* federal preemption.

In *Hanson*, nonunion railroad employees sued to enjoin enforcement of a union shop agreement. The federal Railway Labor Act expressly authorized union shop agreements "notwithstanding any state law," and thereby invalidated the laws of 17 states. The Supreme Court upheld this exercise of Congress's preemption power. Because the union shop agreement was made pursuant to federal law, "by force of the Supremacy Clause of Article VI of the Constitution," it could not be vitiated by state law. 351 U.S. at 232.

There is no question that §230 represents Congress' express decision to preempt inconsistent state laws. Moreover, the First Amendment, not §230, guarantees platforms' rights to exercise editorial control to moderate content. The exercise by private platforms of their own First Amendment rights does not entail

state action, which would be necessary for there to be constitutional concerns with their moderation of user content. Section 230's express preemption of HB20 buttresses the platforms' well-established free speech rights and helps prevent their abridgement by state action such as that of Texas in this instance.

Accordingly, there is no reason to avoid, and every reason to enforce, the command of the Supremacy Clause that HB20 yield to federal law. Enforcement of the Supremacy Clause and the preemptive intent of Congress expressed in §230 is necessary to ensure that the uniform national "policy of the United States" is not undermined by a multiplicity of alternative state policies attempting to govern the quintessential vehicle of interstate commerce that is the internet.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume requirements in Fed.R.App.P. 32(a)(5), (6), (7)(b) and 32(f). The foregoing brief was prepared on a computer using Microsoft Word. A proportionately spaced typeface was used as follows: Name of Typeface: Times New Roman; Point Size: 14 (text), 12 (footnotes); Line Spacing: Double.

The total number of words in the brief, inclusive of point headings and footnotes but exclusive of pages containing the cover page, certificate of interested persons, table of contents, table of citations, signature block, counsel's certificate of compliance, and certificate of service is 6491. This is less than one-half the maximum length authorized for a party's principal brief.

Dated: April 8, 2022 */s/ Mary Ellen Roy*

CERTIFICATE OF SERVICE

I certify that, on April 8, 2022, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Mary Ellen Roy