No. 21-51178

In the United States Court of Appeals for the Fifth Circuit

NetChoice, LLC d/b/a NetChoice, and Computer & Communications Industry Association d/b/a/ CCIA

Plaintiffs-Appellees,

v.

Kenneth Paxton, in his official capacity as Attorney General of Texas, *Defendant-Appellant.*

AMICUS Leonid Goldstein, pro se

BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

STATEMENT OF IDENTITY, INTEREST, AND DISCLOSURE

Amicus Leonid Goldstein is an individual, US citizen and resident of Texas. No party's counsel authored this brief, in whole or in part. No person other than Amicus contributed money to fund preparation or submission of this brief.

Amicus has a M.Sc. in Mathematics and 20+ years of technical and business experience in software development and in the Internet technology industry, including social media platforms. Considering his expertise, familiarity with the most important platforms, and knowledge of their business models and history, Amicus is qualified to provide professional opinion on subjects in this lawsuit. Of note, the Platforms collude and have became so powerful and accustomed to impunity, that most people with similar knowledge as Amicus depend on the Platforms for a living, either as employees, contractors, or employees of partners, and are therefore reluctant to testify for fear of retribution.

Amicus currently runs a non-profit, dedicated to the pure pursuit of science and knowledge, regardless of political viewpoint. Amicus submits this brief on behalf of self and the "silent majority" of Americans, who are being denied not only a voice, but also essential information, by the Platforms' conduct. Amicus has been de-platformed, banned, and subjected to other restrictions by Platforms, for reasons that have nothing to do with the pretexts alleged by the Platforms' witnesses. Further, Amicus witnesses how Platforms

suppress both criticism of the current administration's handling of the pandemic and any alternatives that differ from the administration's narrative , inclusive of alternative treatments with safe and effective repurposed medications.

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SUMMARY

Huge social media platforms claiming First Amendment rights and "editorial discretion" regarding users' content is an absurdity. Until very recently these Platforms maintained that any removal and restricting of users and content was only done under 47 U.S.C § 230 (CDA Sec.230) and 17 U.S.C § 512 (DMCA Sec.512).

The corporations that own just the Top Four Platforms (YouTube, Facebook/Instagram, Twitter, and LinkedIn) have a total market capitalization >$5 trillion.

In their description as "social media platforms," the word "media" is misappropriated. Some of the content that their users create can be described as "media", but the platforms themselves are not media companies, but telecommunications services providers. The Platforms have never marketed themselves as media, press, or publishers.

H.B.20 does not infringe the Platforms' First Amendment rights. H.B.20 regulates how the Platforms can "remove content posted by the user" (Sec.120.101) and "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression of" users and users-transmitted content (Sec.143A.002, 143A.001(A)(1)). Here, this is described as "regulated conduct". The Platforms' regulated conduct boils down to **removing** (including banning, blocking, deplatforming), **restricting** (including de-boosting, denying equal access or visibility), and **demonetizing** (not paying for

labor) users and users' content, except for conduct allowed or required by federal laws. "otherwise discriminate against expression" is interpreted here as "similar". H.B.20 does not impact Platforms' own speech.

Platforms are state actors and are prohibited from viewpoint discrimination. Platforms' regulated conduct lacks the communicative elements necessary to make it First Amendment speech. Platforms are telecommunications services providers, even when not strictly Title II common carriers.

On the other hand, the rights to free speech and access to information of 30 million Texas residents must be considered. Our rights exceed any corporate interests of the Platforms, especially during a pandemic.

ARGUMENT

I. Platforms are Telecommunication Service Providers, not Speakers

This case is very far from *Tornillo* and even *PruneYard*, where the question was citizens' First Amendment rights to speak vs corporate First Amendment rights to exclude speech from third parties. Platforms' users are not third parties but Platforms' consumers. Platforms are bound by their promises, implied contracts, and/or consumer protection laws to carry content to or from their users. Platforms cannot use the First Amendment to weasel out of their obligations to consumers. H.B.20 protects consumers rights.

Examples of Platforms' obligations are Twitter's promise to function as a utility communication network[1] and Facebook's promise of being "a platform for people of all viewpoints."[2]

II. Platforms are State Actors

Today, Platforms have become akin to the Stationers' Company in medieval England, granted privileges equivalent to a monopoly on printing press and expected and demanded by the government to censor dissent. The multiplicity of Platforms results in a collusive monopoly (*Press Briefing by Press Secretary Jen Psaki*, July 16, 2021[3]: "You shouldn't be banned from one platform and not others if you — for providing misinformation out there"). Needless to say, when the government labels dissenting views as 'misinformation' and demands their suppression, the people should be suspicious of both the government and those who act upon such guidance.

"The freedom of the press" in the First Amendment was motivated by the Stationer's company example (*Rossignol v. Voorhaar*, 316 F.3d 516, 526-27 (4th Cir. 2003)). Now we are faced with the same problem except that Platforms' power is not limited to the printing

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[1] Jack Dorsey, CEO: "Twitter ... is used as a utility. Like electricity." https://archive.is/SoeEO
"Biz Stone, Twitter's co-founder: I think of Twitter first as a communication network" https://archive.is/HFoHx

[2] Facebook promises to be "a platform for people of all viewpoints" https://archive.is/wwe30

[3] https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/16/press-briefing-by-press-secretary-jen-psaki-july-16-2021/

press or media, but reaches everywhere, from private conversations to scientific research to individual healthcare[4].

Here are a few of the many privileges and advantages that the government has bestowed upon these top Platforms, effectively making them state actors.

A. Privileges, subsidies and eliminating competition

Redefined net neutrality ("Obamanet") forced ISPs to carry Platform traffic without charging the Platforms themselves[5]. The costs are being passed to all ISP' subscribers, regardless of the subscribers' Platforms usage, subsidizing these Platforms and eliminating any competition. *FCC Order 15-24* ("Obamanet-2015")[6] mentioned many benefitting Platforms by name, including Google, YouTube, Twitter, Instagram, Reddit, Facebook, LinkedIn. When the FCC rescinded Obamanet, multiple states passed similar laws, like Californian *TITLE 15. Internet Neutrality, 3101*. These laws infringe upon Texas citizens' rights to speak or to provide competing social media platforms to audiences in California or in other Obamanet states[7].

The current administration explicitly delegated to Platforms government censorship, in an attempt to bypass the First Amendment. It did that revoking *E.O.13925 Preventing Online*

[4] https://archive.is/cNOEb
[5] https://archive.is/qFPXg
[6] https://docs.fcc.gov/public/attachments/FCC-15-24A1.pdf
[7] https://perma.cc/33NH-XED5

Censorship (May 28, 2020), in *E.O.14029 Revocation of Certain Presidential Actions and Technical Amendment* (May 2021).

B. Government communications, business, and endorsements

Innumerate government agencies (including the Texas government) have created and maintain tens of thousands of accounts on these Platforms and use these accounts for government business, from information dissemination to emergency assistance. This is exclusive government endorsement of the Platforms, and in effect contributes to coercing citizens into to accepting Platforms' onerous Terms of Services (ToS) as a condition for receiving government services, including essential services.

Typically, each of the used Platforms is granted exclusivity on at least some information or interaction mode which is not duplicated on other platforms and/or government websites. In 2019, Forbes wrote: "Twitter has truly become the realtime emergency alert platform of government".[8] YouTube frequently gets exclusivity on videos. Twitter and other Platforms decide unilaterally on who can use government services furnished through these Platforms.[9] This qualifies Platforms as state actors under *McKeesport Hosp. v. Accreditation Council*, 24 F.3d 519, 525 (3d Cir. 1994) ("a state and an ostensibly private entity are so interdependent that state action will be found").

[8] https://archive.is/3oT17, https://archive.is/iUexk
[9] https://archive.is/piGo7

Governmental communications are, by definition, an exclusive public function of government. Since 2009, the government has been incrementally transferring this function to Platforms, especially Twitter, Facebook, YouTube, and LinkedIn. For example, FEMA's site has no RSS or independent video. Its communication, preparedness, and emergency alerts are delegated to Twitter and YouTube. The same applies to various activities of the CDC, FDA, and DHS. The government has transferred "a traditionally and exclusively public function to a private actor" making these Platforms state actors (*Debauche v. Trani*, 191 F.3d 499, 507 (4th Cir. 1999)).

Platforms' ToS purport to bind all visitors, including those referred by a government website, who have no accounts on the Platforms. These ToS prominently feature the law and forum selection most favorable to Platforms, usually Northern California,[10] and multiple clauses of dubious validity and even legality.

According to an October 2016 article on the website of the prominent legal scholar Jonathan Turley,[11] Platforms carrying government accounts were expected to be viewpoint neutral. Until recently, Platforms tried to create the impression that they are viewpoint neutral.

[10] YouTube example: https://archive.is/6rVeE

[11] https://jonathanturley.org/2016/10/15/government-agencies-should-reconsider-using-facebook-and-twitter/

C. Platforms Coerced to Censor by Government

In July 2021, Jonathan Turley called Platforms "surrogates for government action."[12]

Before that, congresspersons Eshoo and McNerney sent a threatening letter to Alphabet/Google[13], mentioning YouTube, and demanding the deplatforming of conservative channels, including Fox News. They praised YouTube for deplatforming of OANN, which indicates that YouTube was responsive to such demands. Congressperson Doyle[14] made more veiled threats to social media platforms in general, and YouTube, Facebook, and Twitter specifically. An entire Congressional hearing was devoted to bullying Platforms into censorship[15]. Senators backed their threats by introducing legislatures that would create unlimited liability for Platforms.

Jen Psaki acknowledged that the White House has been instructing Platforms to remove specific content critical of the current administration (*Press Briefing by Press Secretary Jen Psaki*). Before each election, Democrat government officials have coerced or colluded with Platforms to censor Republicans.[16]

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[12] https://jonathanturley.org/2021/07/19/the-shadow-state-embracing-corporations-as-surrogates-for-government-action/

[13] https://eshoo.house.gov/sites/eshoo.house.gov/files/Eshoo-McNerney-TV-Misinfo%20Letters-2.22.21.pdf , p.31

[14] https://doyle.house.gov/media/press-releases/doyle-statement-energy-commerce-committee-hearing-social-medias-role-promoting

[15] https://archive.is/onxGe

[16] Example: "CA State Officials Coordinated with Big Tech to Censor Americans' Election Posts" https://archive.is/Hd2eb

Thus, the federal administration has been (1) coercing Platforms to censor users who are criticizing its policies and (2) evading the First Amendment by delegating censorship to Platforms. These actions make the Platforms state actors (*Debauche v. Trani*, 191 F.3d 499, 507 (4th Cir. 1999)).

D. Collusive Monopoly under the Control of Foreign Governments

The Top Platforms (Google YouTube, Facebook, Twitter, and Microsoft's LinkedIn) collude in their viewpoint discrimination. In 2018, these Platforms and advertising agencies signed a multilateral agreement[17] and roadmaps to do that under control of foreign governments.

III. Platforms Help Operate Designated Public Forums

"A designated public forum is property the government has opened for expressive activity"; *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019), *Robinson v. Hunt Cty.*, Texas, 921 F.3d 440, 447 (5th Cir. 2019).

A single government account on a social media platform creates a designated public forum around it(*Summum v. Callaghan*, 130 F.3d 906, 914 (10th Cir. 1997)). When the government opens thousands of accounts on one Platform, it invites citizens to comment on, discuss, and debate information from multiple government accounts all over the

[17] https://archive.fo/TTH9S, https://archive.is/DcnXP, https://archive.is/dDJ5w, https://archive.is/5gGwS, https://archive.is/052t6

Platform. Thus, the government creates a designated public forum, covering the whole Platform.

In this situation, viewpoint censorship by the Platform is a state action, because this ostensibly private party is a willful participant in joint activity with the government (*United States v. Price*, 383 U.S. 787, 794 (1966)).

IV. Regulated Conduct is not First Amendment Speech

Platforms' conduct, regulated by H.B.20 – banning, removing, restricting, demonetizing etc. – "[does not take the form of] printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication" (*Spence v. Washington*, 418 U.S. 405, 409 (1974)). Even its visibility is in question, unlike *Spence v. Washington* (Id., "The flag ... was plainly visible to passersby"). Per *Texas v. Johnson*, 491 U.S. 397, 404 (1989) "To determine whether an actor's conduct possesses sufficient communicative elements to bring the First Amendment into play, the Supreme Court has asked whether [a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood" (internal quotation marks omitted).

The Platforms' regulated conduct fails both of these requirements and frequently, even lacks visibility.

A. Regulated Conduct is Invisible

Platforms' regulated conduct is typically invisible to the targeted users. When a Platform removes or restricts someone's message, oftentimes, neither the speaker nor the expecting audience is made aware of this action. This leads to tragic results.[18]

B. Platforms' Conduct does not convey an Understandable Message

The regulated conduct does not convey and, usually, does not intend to convey a particularized message. On the contrary, Platforms often intend to hide their conduct from the victims and from the public.

Platforms are protected by Sec.512(g) and Sec.230(c)(2), which allow them broad discretion to remove content without editorial decision, expressive intent, and/or liability. Platforms have been publicly claiming this protection for more than a decade. Even if users see that a message was banned, they think it was done under Sec.512(g) or Sec.230(c)(2).

Thus, Platforms' regulated conduct does not convey an understandable message, and does not bring into play the First Amendment.

[18] https://archive.is/cNOEb describes how in March 2020, Google and Twitter coordinately removed a video presentation by a prominent French physician and other documents showing that Hydroxychloroquine + Azithromycin cure COVID-19. That led to politicization of Hydroxychloroquine and discontinuance of its use, which could stop pandemic by summer 2020.

C. Platforms' Conduct does not intend to convey a Particularized Message

In the rare cases when a Platform does explain its actions, it denies any expressive intent or editorial discretion. A typical message is "Account suspended. Twitter suspends accounts that violate Twitter rules."[19] No particularized message is conveyed by the suspension.

Platforms lack even the intent to convey any particularized message when engaging in the conduct regulated by H.B.20.

Regular media outlets have editors, writers, movie directors and producers, whose names are proudly displayed, almost without exception. Platforms that exercise editorial discretion would also have editors. Such an editor would be the logical choice for a witness in this case. Yet, the actual witnesses for YouTube and Facebook are PR and Safety & Trust managers, respectively. These witnesses have failed to name even one editor or position responsible for the "intent to convey a particularized message" This is because Platforms' activities regulated by H.B.20 have no such intent. They are acts of subverting messages and suppressing speakers.

[19] https://archive.is/MSbxW

V. Regulated Conduct cannot be First Amendment Speech

When a platform, which creates little or no content of its own, has 50 million monthly US users, the users talk to each other. Very few Platforms' users would agree to subject their conversations to the "editorial decisions" of the Platforms.

A. CDA Sec.230

Sec.230(c)(1) clearly states that Platforms are not to be treated as speakers or publishers. The law does not say "protected from liability" but specifies that service under the Sec.230 is conduct having neither the liability nor the protections of a "speaker" or of "publisher" (which would include editorial decisions). A publisher, speaker, or editor is already protected by the First Amendment and does not need special permission, granted by Sec.230(c)(2), to remove certain content on certain conditions.

Further, creating a new type of publisher, with protections that traditional publishers and other speakers do not have, would be a violation of the First Amendment of ordinary speakers and publishers, much worse than a 4% tax on ink and paper (stricken in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983)).

B. DMCA Sec.512

Sec.512 protects Platforms from liability for copyright violations, which may be caused by their users posting third party content. Third party materials are essential for the Platforms. The condition for this protection is to not make editorial decisions in respect to third party materials: no selection of material, no selection of recipients, no modification of content (Sec.512(a)). Platforms do not differentiate (for purposes of H.B.20) between posts with and without third party content.

Thus, Platforms cannot exercise editorial discretion regarding users' content, and therefore, H.B.20 does not violate their First Amendment rights.

VI. H.B.20 Hardly Burdens Platforms

The Platforms are distinguished and distanced from the speech of their users by Sec.230 – "not treated as speakers or publishers". Platforms can further distance themselves from posts and speakers by adding labels of their choice to third-party content. They already do this, and H.B.20 does not prohibit it.

H.B.20 has no effect on Platforms' privileges under the Sec.230(c)(2) to take any action " to restrict access to or availability of material that the provider or user considers to be obscene ... excessively violent, harassing, or otherwise objectionable", even if these actions are not viewpoint neutral.

The collection of information to satisfy reporting requirements of H.B.20 consists of running a computer query on a database. The required notifications can also be implemented by slight changes in the computer code.

H.B.20 reporting requirements create almost no burden on Platforms.

VIII. Facial Challenge

Probably not every argument above is applicable to every platform, but each one is applicable to the top four platforms and many others. In a facial challenge like the one by Platforms' front groups, the challenger must show that the law always operates unconstitutionally (*Whole Woman's Health v. Cole*, 790 F.3d 563, 591 (5th Cir. 2015), *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The front groups have failed to show H.B.20 ever operates unconstitutionally.

IX. Platforms' Testimonies are Untruthful

The Amicus is especially appalled by the Plaintiff's cynical abuse of the Holocaust. Contrary to the original allegations and YouTube witness testimony, Platforms are quite tolerant to Holocaust denial and even of incitement to genocide. For examples, Reddit's subreddit r/Holocaust is used to feature mostly Holocaust denial content.[20] Also, it had a subreddit

[20] https://perma.cc/6GPC-D4E8, screenshots: https://archive.fo/Ont1Q, https://archive.fo/cosKT

r/Holohoax (sic!)[21]. This was in late 2017, when Reddit was also banning Trump supporters. Other Platforms were doing business with Reddit without any remorse.

Twitter allowed an account @HolohoaxExposed[22] with the content matching its name from 2013 to March 2021 or later. Twitter displayed and widely disseminated Louis Farrakhan's tweet(s) comparing Jews to termites,[23] and confirmed this content is allowed by its policy.[24]

Twitter also used the phrase "Kill all Jews" as a trending topic[25] in New York on November 2, 2018. Due to my experience in software development and familiarity with Twitter operations[26], I can say with certainty that Twitter employee(s) intentionally changed its software code to make this phrase trending. Twitter continuously hosts and displays tweets[27] praising Hitler for murdering Jews[28], hashtag #NeedAnotherHolocaust[29] and similar content.

Since 2015, Google has a partnership with Twitter, pays it for real time access to its content,[30] and prominently displays selected tweets in its search. Google has not publicly

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[21] https://archive.fo/vLO55
[22] https://archive.fo/xsb5a
[23] https://archive.fo/rZVUL
[24] https://archive.fo/HZgf0
[25] https://archive.is/yjr5D, https://archive.is/TvuEZ
[26] https://archive.is/Vlnph
[27] https://archive.is/FAVix, https://archive.is/gCzX5, https://archive.is/0xrVH, https://archive.is/OkeRJ, https://archive.is/OCXV5, https://archive.is/eJgGw
[28] https://archive.is/atkes
[29] https://archive.is/2gvWx, https://archive.is/UyrsN
[30] https://archive.is/fgs3v

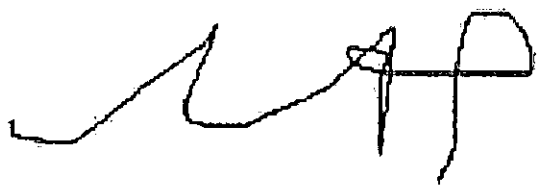
criticized Twitter for their policies regarding the Holocaust. Google also directs or used to direct users not looking for Holocaust denial to Holocaust denying materials[31].

CONCLUSION

H.B.20 is proper and even necessary to ensure that Platforms respect their users' First Amendment and other rights. The Court should grant Defendant-Appellant's Motion in full and as soon as possible, due to the urgent need for the free flow of communication and information during a pandemic.

March 9, 2021

Respectfully submitted,



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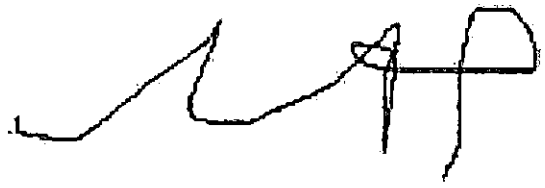
[31] https://perma.cc/S6NZ-KKER

CERTIFICATE OF COMPLIANCE

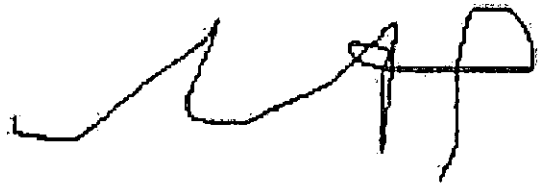
This *Amicus* filing supporting Appellant's motion contains 2876 words, excluding the parts of the motion exempted by rule. This filing complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word.



Leonid Goldstein

CERTIFICATE OF SERVICE

I certify that I served all participants in this case by email on March 9, 2021. Additionally, all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.



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