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.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

APPELLANT'S REPLY IN SUPPORT OF MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

Plaintiffs—Internet platforms[1] generally—want it both ways. For decades, Internet platforms relying on Section 230 have insisted they are mere "conduits" for hosting the speech of others.[2] Here, Internet platforms claim that their hosting decisions are their "speech within the meaning of the First Amendment." Opp. 7. Both cannot be true.

After all, Plaintiffs do not dispute that "requiring someone to host another person's speech is often a perfectly legitimate thing for the Government to do." *Agency for Int'l Dev. v. Alliance for Open Soc'y*, 140 S. Ct. 2082, 2098 (2020) (three-Justice dissent, making undisputed point). Nor that "[t]he First Amendment . . . does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 657 (1994). Plaintiffs respond, in essence, that the Internet is different. That may be a distinction, but it is not a principled one. As even Plaintiffs do not dispute, they are the "modern public square" and "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). If Plaintiffs want an

[1] This reply uses "Plaintiffs" to include the three Internet platforms at issue here. Mot. 3 n.3.

[2] *See* Mot. 9; Twitter MTD, *Fields v. Twitter*, 2016 WL 2586923 n.5 (N.D. Cal. Apr. 6, 2016); *see also* MTD Reply, *Colon v. Twitter, Google, and Facebook*, 2019 WL 7835413 (M.D. Fla. Dec. 20, 2019) (Platforms asserting they use "neutral tools [to] filter or arrange third-party content" and they do not "creat[e]" or "develop[]" any third-party content).

exception from these generally applicable doctrines, that is an argument for the Supreme Court, not this one.

Plaintiffs' most conspicuous omission, however, is Section 230. 47 U.S.C. § 230. The Attorney General explained comprehensively why Section 230 is "highly relevant" here. Mot. 8, 9-10, 13-14. Section 230 makes Plaintiffs "liable . . . for the speech that is properly attributed to them." *Nemet Chevrolet v. Consumeraffairs.com*, 591 F.3d 250, 254 (4th Cir. 2009). Plaintiffs have said for years that Section 230 protects them because their users' speech is *not* attributable to them. Now, without so much as acknowledging their Section 230 advocacy, let alone attempting to reconcile it with their positions here, Plaintiffs are demanding a First Amendment right to control the same speech that they have consistently asserted is not their own. The First Amendment does not require this Court to indulge such gamesmanship.

ARGUMENT

I. HB20's Hosting Rule is Constitutional.

The Supreme Court has repeatedly held that no First Amendment problem arises when government requires platforms to merely host third-party speech. Mot. 12-17. That has long been incontrovertible for communications mediums, like Plaintiffs. *See, e.g.*, *Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 14 (1894) ("Telegraph companies . . . have doubtless a duty to the public to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms."). The Supreme Court has extended the rule to non-communications media. *See Rumsfeld v. FAIR*, 547 U.S. 47 (2006); *PruneYard*

Shopping Ctr. v. Robins, 447 U.S. 74 (1980). And even hosting regulations that affect a platform's own rights may still pass constitutional muster. *Turner Broad Sys. v. FCC*, 512 U.S. 622, 657 (1994). HB20's Hosting Rule fits well within these principles.

A. The Supreme Court's "hosting" precedent applies to the Internet.

Plaintiffs' primary response is to say that this hosting precedent "has no place in evaluating First Amendment rights on the Internet." Opp. 19, *see also id.* 7-8, 10 (citing *Reno v. ACLU*, 521 U.S. 844 (1997)). But "the basic principles of freedom of speech and the press . . . do not vary when a new and different medium for communication appears." *Brown v. EMA*, 564 U.S. 786, 790 (2011) (cleaned up). Government can require Internet platforms to host speech just like it has historically required telegraph, telephone, and cable companies to do so. *Reno*, by contrast, dealt with a law doing the *opposite* of the Hosting Rule—it "effectively suppresse[d] a large amount of speech" (and was content-based to boot). 541 U.S. at 874. And *Reno* did not even make the Internet off-limits for laws that suppress speech when it explained that a more narrowly tailored law could suffice. *Id.* at 879.

Plaintiffs contend, however, (at 15-16) that websites "are inherently 'expressive' disseminators" of speech, and Plaintiffs' spaces are their own "expressive product." If anything, as Plaintiffs have maintained time and again,[3] the opposite is true: Internet platforms tend to be *hosts*. *See* 47 U.S.C. § 230(a)(3) (Internet should be "forum" for "true diversity of political discourse"). Plaintiffs'

[3] *See supra* n.2.

"expressive product" theory conflicts with their longstanding Section 230 advocacy, where they have consistently argued that they do not "develop[]"any third-party speech "in whole or in part." 47 U.S.C. 230(c)(1), (f)(3); Mot. 9. There is no way to reconcile, on the one hand, being a blameless "conduit" when a user defames someone or worse, with, on the other, creating an "inherently expressive" product by selectively restricting willing users' speech. Plaintiffs tellingly do not even try.

Then-Judge Kavanaugh's dicta (Opp. 4) from the net neutrality litigation is also inapposite. *U.S. Telecom v. FCC*, 855 F.3d 381 (D.C. Cir. 2017). That saga was about whether the FCC could require Internet service providers ("ISPs" like Comcast—*not* Plaintiffs) to neutrally transmit all Internet traffic. *U.S. Telecom v. FCC*, 825 F.3d 674, 697 (D.C. Cir. 2016). The FCC promulgated the (now void) net neutrality rules to "spur[] investment and development." *Id.* at 694. Censorship was an afterthought—unlike Plaintiffs, the ISPs had almost never behaved that way. *See id.* at 762 (Williams, J., concurring in part).

Plaintiffs' spaces are also not an end-product "inextricably intertwined" with underlying expressive components. Opp. 12. Plaintiffs seek refuge in the rule that the "process of creating a form of pure speech (such as writing or painting)" warrants as much protection as the "product" thereof "(the essay or the artwork)." *Turner v. Lt. Driver*, 848 F.3d 678, 689 (5th Cir. 2017). But the Hosting Rule requires Plaintiffs to host *others*' creative processes and products. Plaintiffs' reliance on Justice Thomas's concurrence in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), illustrates the flaw in their argument. Justice Thomas concluded that the First Amendment protects against compelled use of

one's "artistic talent[] to create" a product; but he recognized that this is different in kind from "being forced to provide a forum for a third party's speech," *id*. at 1743, 1744-45—exactly what the Hosting Rule requires.

B. Plaintiffs are nothing like newspapers or parades.

Plaintiffs fall back on the argument (Opp. 3-4, 12-14) that they are like newspapers and parades with an "editorial" censorship right. But their authorities here—*Miami Herald v. Tornillo*, 418 U.S. 241 (1974), and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995)[4]—are distinguishable in several ways, as the Attorney General explained. *See* Mot. 14-17. Plaintiffs suggest (at 13) that the "newspapers' limited space" should not be a dispositive distinction. But binding precedent says it is. *FAIR*, 547 U.S. at 64 ("compelled printing of a reply [in *Tornillo*] t[ook] up space that could be devoted to other material"); Mot. 14-15. Plaintiffs contend (at 13) that this means *digital* newspapers could be forced to host speech. Digital newspapers, however, differ from Plaintiffs in additional dispositive respects. "[U]nlike newspapers" (including online versions), Plaintiffs "hold themselves out as organizations that focus on distributing the speech of the broader public." *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1222, 1224 (2021) (Thomas, J., concurring); *see* Mot. 15; ROA.345-46. Plaintiffs neither acknowledge that distinction nor address

[4] Plaintiffs also cite (at 11) cases holding that government generally may not restrict the speech a host can disseminate. No one disputes that. And *Manhattan Community Access Corp. v. Halleck* (Opp. 8, 14) is about whether the First Amendment may operate to require hosting of its own force. 139 S. Ct. 1921 (2019). This case is about the "distinct question" of whether government may require hosting. *Id.* at 1931, n.2.

the fact that, unlike newspapers, Plaintiffs do not pre-screen content before disseminating it. *See* Mot. 15. They cite (at 14) a report claiming Plaintiffs sometimes quickly *take down* offensive content—not that they prohibit it from circulating in the first place. And Plaintiffs' slippery slope hypotheticals (at 3-4) about bookstores, theaters, and comedy clubs all fail.[5]

Plaintiffs' parade analogy also fails. The key with parades is the probability of "speech misattribution." *See Agency for Int'l Dev.*, 140 S. Ct. at 2095 (describing *Hurley*). Viewers would have no way of knowing that a rogue marcher's message lacks the organizers' blessing. Plaintiffs say (at 4) that this is their problem too, because as hosts they essentially "express the message that the disseminated speech is worthy of presentation." But Plaintiffs host *terrorist content*. *See* Mot. 9-10. And "[s]omething well north of 99%" of speech they host "never gets reviewed." *NetChoice, LLC v. Moody*, 2021 WL 2690876, *8 (N.D. Fla. June 30, 2021). They operate nothing like the *Hurley* parade, which screened marchers and had "no customary practice" of "disavow[ing]" specific ones. 515 U.S. at 576. Granted, some *unreasonable* observers might attribute third-party speech to Plaintiffs. But that argument was made and rejected in *FAIR*. *See* Br. *Amici Curiae* of Nat'l Lesbian & Gay Law Ass'n, *Rumsfeld v. FAIR*, 2005 WL 2347167, at *7 (U.S. Sept. 21, 2005) (students asserting they would "perceive their schools as endorsing the military's discriminatory policies").

[5] Such a slippery-slope argument is surprising considering that Section 230 immunity is premised on the notion that bookstores and internet platforms should be treated *differently*. *See Zeran v. America Online*, 129 F.3d 327, 331-32 (4th Cir. 1997). Again, plaintiffs make no effort to explain their inconsistent positions.

C. The Platforms are also analogous to, and may be regulated like, common carriers.

In all events, the Hosting Rule is a constitutionally permissible common-carrier regulation. Mot. 17-19. Plaintiffs contend (at 18) they are not true common carriers. The common carriage touchstone, however, is whether one "hold[s] oneself out indiscriminately to the clientele one is suited to serve" and does not "make individualized decisions" about "whether and on what terms to deal." *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("*NARUC*"). That is precisely how Plaintiffs have held themselves out to the public. ROA345.46; Mot. 13. At a bare minimum, Plaintiffs are analogous to common carriers and may be regulated similarly. *See Biden*, 141. S. Ct. at 1223 n.2 (Thomas, J., concurring). Contrary to Plaintiffs' view (at 19-20), "nothing approaching monopoly" is required to justify common carriage regulation. *NARUC*, 525 F.2d at 641.

D. The Hosting Rule satisfies any appropriate level of scrutiny.

Plaintiffs' plea for strict scrutiny also fails. *PruneYard* and *FAIR* foreclose Plaintiffs' argument (at 26) that HB20 discriminates on the basis of viewpoint because it prevents *them* from discriminating against viewpoints; if that were true, every hosting requirement would be viewpoint-based. Plaintiffs' argument (at 26) that HB20 is content-based because it applies to the Platforms and not dissimilar websites also fails: "[T]he fact that a law singles out a certain medium" or even "a subset thereof" is "insufficient to raise First Amendment concerns." *Turner*, 512 U.S. at 660. And HB20's exceptions are likewise constitutional. *Compare* Opp. 27, *with* Mot. 19-20.

Regardless, Texas's interest in "protecting the free exchange of ideas and information" is—far from inadequate (Opp. 27-28)[6]—one "of the highest order, for it promotes values central to the First Amendment." *Turner*, 512 U.S. at 663. And Texas is not (Opp. 28) attempting to "restrict the speech of some elements of our society in order to enhance the relative voice of others." *See Turner*, 512 U.S. at 657 (rejecting identical argument). HB20 is also not flawed for failing to regulate smaller/dissimilar entities (Opp. 29)—such regulation might have *caused* constitutional problems. *See PruneYard*, 447 U.S. at 96-97 (Powell, J., concurring) (expressing doubt whether hosting rules could be applied to small establishments). Plaintiffs' argument (at 29-30) that Texas could have created its own social media platform also fails. *See* Mot. 20-21.

II. HB20's Disclosure Requirements Are Constitutional.

HB20's disclosure requirements are also constitutional. The core dispute here is whether *Zauderer*'s standard applies, which permits compelled disclosure of "purely factual and uncontroversial information" that is not "unduly burdensome." *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985); Opp. 24 (recognizing this test). *Zauderer* applies not just to "commercial advertising," as Plaintiffs would have it (Opp. 24), but to a range of other disclosures such as "health and safety warnings" and "disclosures about commercial products." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018); *CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 844 (9th Cir.

[6] Plaintiffs wrongly assert (at 27) that the Attorney General forfeited this interest. It appears in HB20's text, ROA.66, and it was raised below, ROA.1074.

2019). HB20 comfortably fits within this genre of disclosure laws. Mot. 23-25. Plaintiffs' authorities (at 22-23) for a more rigorous standard are inapposite. *Herbert v. Lando*, 441 U.S. 153 (1979), addressed whether a defamation plaintiff could obtain discovery into the editorial processes that defamed him. It held yes—and Plaintiffs are in no way "editors" anyways. *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019), addressed disclosures only in the *sui generis* political campaign setting. *See id.* at 513 (law "single[d] out one particular topic of speech—campaign related speech").

Under *Zauderer*, Plaintiffs' arguments all fail. The complaint-and-appeal process, Tex. Bus. & Com. Code §§ 120.101-104, is not (Opp. 24) unduly burdensome. It is standard-fare economic regulation essentially requiring certain minimum standards for how businesses treat their clients—this is not even subject to the low *Zauderer* bar for compelled speech. Mot. 25. It is also no answer (Opp. 25-26) that the biannual transparency report, Tex. Bus & Com. Code § 120.053 would require "voluminous data collection and calculation." The SEC's reporting requirements—and countless other similar financial and other rules—require comparable voluminous collection. *See* Mot. 24-25. Plaintiffs are not bold enough to argue against all of these laws—which would give away how untenable their position is. And the disclosure requirements are not "vague" (Opp. 25), as even the district court agreed. ROA.2596.

Finally, Plaintiffs argue (at 25) that some of these disclosures "may" result in release of "trade secrets" or information that could "enable[] predators to evade detection." Their only support for these implausible assertions is self-serving

deposition testimony asserting that disclosure of "*any* kind of information about the inner workings" of platforms could have these effects. ROA.1437 40:12-18. That is wrong, and Plaintiffs could tailor their disclosures to omit information that would compromise trade secrets or benefit predators.

III. The Equities Favor the Attorney General.

Plaintiffs' asserted harms that will flow if HB20 takes effect are implausible because the Hosting Rule requires Plaintiffs to operate in materially the same way they used to operate. Mot. 25-26. And the disclosure requirements require publication of information that Plaintiffs in large measure already compile. *Id.* By contrast, the preliminary injunction is injuring Texas and inflicting significant harm on Texans' ability to freely speak and receive information. *Id.* at 26.

CONCLUSION

The Court should stay the district court's preliminary injunction pending appeal.

Respectfully submitted.

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This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,583 words, excluding the parts of the motion exempted by rule. This motion 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 Equity) using Microsoft Word (the same program used to calculate the word count).

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