No. 21-51178

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NetChoice, L.L.C., a 501(c)(6) District of Columbia Organization Doing Business as NetChoice; Computer & Communications Industry Association, a 501(c)(6) Non-Stock Virginia Corporation Doing Business as CCIA,
Plaintiffs-Appellees,

v.

Ken Paxton, in his Official Capacity as Attorney General of Texas,
Defendant-Appellant.

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

BRIEF OF AMICUS CURIAE iTEXASPOLITICS, LLC d/b/a THE TEXAN IN SUPPORT OF APPELLANT KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS

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CORPORATE DISCLOSURE STATEMENT

iTexasPolitics, LLC d/b/a The Texan is a Texas limited liability company.

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

No. 21-51178; *NetChoice, L.L.C., et al. v. Ken Paxton*

Pursuant to Local Rule 28.2.1, 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. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. iTexasPolitics, LLC d/b/a The Texan.

/s/Matthew Miller
MATTHEW MILLER
Attorney of Record for iTexasPolitics, LLC d/b/a The Texan

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT ii

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS....................... ii

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF *AMICUS* 1

I. H.B. 20 does not apply to entities like Amicus because they are publishing their own speech and not the speech of others 3

II. As a traditional publisher, The Texan is liable for common-law torts such as libel and defamation..4

III. The Court should not allow the Platforms to use Section 230 as both a shield and a sword..7

CERTIFICATE OF COMPLIANCE...10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Cases: **Page(s):**

Gonzalez v. Google, LLC,
2 F.4th 871 (9th Cir. 2021) 7

Kavanagh v. Zwilling,
997 F. Supp. 2d 241 (S.D. N.Y. 2014) 5

Main v. Royall,
348 S.W.3d 381 (Tex. App.—Dallas 2011) 5, 6

Other Authorities:

Edward Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*,
21 Santa Clara Computer & High Tech. L.J. 289, 293-94 5

IDENTITY AND INTEREST OF *AMICUS*[1]

Amicus curiae iTexasPolitics, LLC, is the publisher of an online news website called The Texan, which focuses on news and current events in the Lone Star State. As such, Amicus enjoys the full protection of the First Amendment to the United States Constitution, but does not enjoy protection under 47 U.S.C. § 230, a provision of the Communications Decency Act. Because the interplay between the First Amendment, Section 230, and Texas House Bill 20 (2021) ("H.B. 20," codified in relevant part at Tex. Bus. & Com. Code § 120.051) is central to this litigation, Amicus believes that its participation as an amicus party will provide valuable insight to the Court as it considers the merits of this case.

[1] All parties have consented to the filing of this *amicus* brief. This brief was not authored in whole or in part by counsel for any party. No party, party's counsel, or person—other than *amicus* or its counsel—contributed money that was intended to fund preparing or submitting this brief.

Amicus curiae iTexasPolitics, LLC d/b/a The Texan submits the following amicus brief, in support of Appellant, and would show the Court the following:

Before there was an internet, traditional publishers operated within a well-understood legal framework, with First Amendment protection from government censorship on one side of the landscape and potential legal liability—primarily from ancient causes of action like slander and libel—on the other. Which is to say that publishers were free to say whatever they wanted but were also responsible for the things they said. This landscape was upended by the advent of the internet, which brought platforms, like Appellees', that primarily make available not their *own* speech, but the speech of individuals who use their platforms.

The unique characteristics of large internet platforms have been discussed extensively throughout this litigation. However, Amicus believes that it is worth taking a step back and looking at everything that goes into traditional news gathering and publishing, with the goal of illuminating for the Court the difference between platforms and publishers, and why those differences are important when analyzing this case. As shown below, traditional publishers are *very* different from platforms in many important ways. The actions of traditional publishers, while being protected by the First Amendment, also subject them to significant legal liability from defamation (and alleged defamation), as illustrated by a famous case out of Texas. Accordingly, there may be good reasons why an entity may be allowed to claim

either the protection of the First Amendment or the protection of Section 230, but not both.

I. H.B. 20 does not apply to entities like Amicus because they are publishing their own speech and not the speech of others.

H.B. 20 is careful to differentiate between "platforms," which purport to be neutral carriers of the speech of their users, and traditional news sources, which publish their own speech. The Texan is a paradigmatic example of a traditional news source and, as such, it provides a useful contrast with the activities engaged in by platforms. Amicus publishes its news at www.TheTexan.news. It is strictly an online publisher; it publishes no physical copies of the stories it produces. However, in every other way, The Texan is a traditional news source. The Texan started publishing on April 29, 2019, after having identified the need for a trustworthy, straightforward news site serving the state of Texas. It has a stated goal of providing unbiased and objective news to its readers and, as such, does not carry any editorial content. It does not allow readers to comment on the articles it publishes. The Texan strives to "show" and not "tell" its readers what is going on in Texas from as many objective angles as possible.

To produce the content on its website, The Texan relies on both staff reporters and contract journalists. At any given time, it has a full-time staff of about 10. As newspapers have done for decades, The Texan assigns "beats" to its reporters, who are expected to develop subject-matter expertise in their assigned beats. Some beats

involve a particular topic, like the Texas-Mexico border or the Texas legislature. Others involve a geographic region, like the Houston metropolitan area. Most stories involve original reporting on current topics of public interest; some involve reporting on a press release that the public might be interested in; and still others involve research-oriented "look backs" at topics of historical interest.

No matter the story, reporters are expected to talk to sources, gather original information, and present written copy that will illuminate topics of public concern for the site's readers. Submitted stories are scrutinized, edited, and copy edited by The Texan's editorial staff before they are approved for publication. They will often be accompanied by original photography from the site's staff photographers. The Texan publishes approximately six stories on a normal news day, although this can climb as high as 23 stories during a busy cycle. The average story is 700 words long, but sometimes The Texan will publish "long-form" stories that can run as long as 2,500 words. The topics that the site covers can vary greatly.

II. As a traditional publisher, The Texan is liable for common-law torts such as libel and defamation.

The articles published by The Texan are, of course, protected by the First Amendment to the U.S. Constitution. And it is black-letter law that the government may take no action to censor or silence The Texan over its speech. However, as speakers have traditionally understood for centuries, Amicus is also responsible for what it publishes, and is subject to potential liability under the laws of slander and

libel. These torts pre-date the First Amendment, dating back to English common law that began developing around 1275. Edward Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 Santa Clara Computer & High Tech. L.J. 289, 293-94. Crucially, the First Amendment is no defense to libel. *See Kavanagh v. Zwilling*, 997 F. Supp. 2d 241 (S.D. N.Y. 2014). If one speaks or publishes falsehoods that damage the reputation of another, one can be subject to civil damages.

This is no chimerical threat. For instance, consider the Texas libel case of *Main v. Royall*, 348 S.W.3d 381 (Tex. App.—Dallas 2011). There, author Carla Main, her publisher Encounter Books, and Professor Richard Epstein (who had reviewed the book) were sued for defamation by H. Walker Royall, a Texas developer. Main had written a book about eminent domain abuse called *Bulldozed: "*Kelo*," Eminent Domain, and the American Lust for Land*, which told “the story of the City [of Freeport’s] plan to use eminent domain to condemn waterfront property along the Old Brazos River to build a private yacht marina,” which Royall would then own and operate. *Id*. at 384. Royall, who took offense to Main’s characterization of his attempt to collaborate with the City to abuse eminent domain, sued Main, Encounter, and Epstein, “contending that the book and publicity for the book defamed and injured him in his occupation and profession. He alleged claims

for libel, aiding and abetting libel, and ratifying libel, and he sought nominal, general, actual, and exemplary damages." *Id*.

Royall identified 79 passages that contained allegedly defamatory material. *Id*. at 391. These included such standard journalistic tropes as the deal being a "sweetheart deal," that Royall had a "lust for land," and that he was "in cahoots" with the City to take the land through eminent domain. *Id*. He also objected to Main's characterization of certain facts, such as that "the proposed marina would have endangered navigation" in the marina. *Id*. While Main, Encounter, and Epstein were ultimately successful in defending the lawsuit, doing so took more than two years and—had they not been represented pro bono by a public-interest law firm—would have cost hundreds of thousands of dollars in legal fees.

Main describes the kind of liability that traditional publishers, like Amicus, potentially face with every article they publish. Furthermore, the case demonstrates that even standard (if perhaps colorful) journalistic descriptions of current events can result in vexatious libel lawsuits that can take years to resolve, at great expense. Traditional publishers accept this risk as a cost of doing business, and no matter how much care they take or how many rounds of edits they perform, that risk cannot be eliminated.

Unless, of course, the entity doing the publishing happens to be an "interactive computer service" that is protected under Section 230. As Appellant has explained

in its briefing to the Court, Congress has carved out a special, legislatively created exemption for certain internet companies that act as platforms hosting the speech of others. Br. of Appellant at 13-14. Amicus takes no position on whether this is desirable from a policy standpoint, although it is easy enough to understand why Section 230's protections serve to encourage and expand online speech. However, Amicus encourages the Court to reject the platforms' position that they should be allowed to use Section 230 as both a shield and a sword, as explained below.

III. The Court should not allow the Platforms to use Section 230 as both a shield and a sword.

Platforms, like Appellants, argue that they are protected by *both* Section 230 (which grants them sweeping liability protection) and the First Amendment (which, under their theory, would prevent application of H.B. 20 to internet platforms). *See, e.g, Gonzalez v. Google LLC*, 2 F.4th 871, 882 (9th Cir. 2021); ROA.2582. While it is understandable that a company would seek maximum freedom and minimum responsibility, Amicus asks the Court to reject such an arrangement. As shown above, traditional publishers may be protected by the First Amendment, but they are also responsible for their words and actions. And this potential liability, as was the case in *Main*, can even mean that they will be subject to baseless lawsuits over non-libelous and non-slanderous things they publish. That is unfortunate, but it is part of a well-established legal tradition that balances First Amendment protection with ancient remedies for defamatory speech.

Section 230 is not a part of that tradition. It is a legislatively created liability shield that was meant to foster the growth of a robust and open internet. But unlike constitutional rights, no individual or entity has an absolute right to claim a legislatively created privilege in perpetuity. There is no natural right to Section 230 protection. Instead, it is something that is there for platforms to claim *if they choose to operate like platforms*. Which is to say that Section 230 induces internet companies to behave in certain ways in exchange for certain legislatively created legal protections.

Amicus chooses not to operate as a platform. That means it cannot claim Section 230 protection, but it likewise is not subject to the modest requirements of H.B. 20. By forgoing Section 230 protection—and publishing its own speech, rather than hosting the speech of others—Amicus relies on the integrity of its reporters and editors to shield it from liability. As shown in the *Main* case, this protection is imperfect no matter how scrupulous a traditional publisher has been. But such is life, which often involves imperfect trade-offs.

Appellees are not willing to accept such a trade-off. They seek Section 230 protection *and* First Amendment protection *and* zero additional legislatively imposed burdens. The Court should decline to build them this legal Eden. And in doing so, it is worth remembering the two alleged "burdens" that H.B. 20 places on Appellees. First, it requires them to host speakers and not engage in viewpoint

discrimination. H.B. 20. Second, it requires them to post their content-enforcement policies. *Id*. These are modest requirements. If Congress had written them directly into Section 230, there would be no question about their constitutionality. Appellees only object here because the State of Texas is imposing these additional requirements, and not Congress. But if Congress could impose the viewpoint and policy requirements via Section 230, then there is no constitutional bar to Texas doing so via H.B. 20. Appellees have accepted a legal benefit. The legal burdens that Texas asks them to accept as a condition of that benefit are modest and should be upheld by the Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 2,038 words, excluding the parts exempted by Fed. R. App. P. 32(f).

/s/Matthew Miller
MATTHEW MILLER

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2022, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

/s/Matthew Miller
MATTHEW MILLER