IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NETCHOICE, LLC d/b/a NETCHOICE, *a 501(c)(6) District of Columbia organization*, and COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION d/b/a CCIA, *a 501(c)(6) non-stock Virginia Corporation*,

Plaintiffs,

v.

KEN PAXTON, *in his official capacity as Attorney General of Texas*,

Defendant.

1:21-CV-840-RP

ORDER

Before the Court is Plaintiffs NetChoice, LLC d/b/a NetChoice ("NetChoice"), a 501(c)(6) District of Columbia organization, and Computer & Communications Industry Association d/b/a CCIA ("CCIA"), a 501(c)(6) non-stock Virginia corporation's ("Plaintiffs") Motion for Preliminary Injunction, (Dkt. 12), Defendant Texas Attorney General Ken Paxton's (the "State") response in opposition, (Dkt. 39), and Plaintiffs' reply, (Dkt. 48). The Court held the preliminary injunction hearing on November 29, 2021. (Dkt. 47). After considering the parties' briefs and arguments, the record, and the relevant law, the Court denies the motion to dismiss and grants the preliminary injunction.

I. BACKGROUND

A. The Challenged Legislation: HB 20

In the most recent legislative session, the State sought to pass a bill that would "allow Texans to participate on the virtual public square free from Silicon Valley censorship." Senator Bryan Hughes (@SenBryanHughes), TWITTER (Mar. 5, 2021, 10:48 PM), https://twitter.com/

SenBryanHughes/status/1368061021609463812. Governor Greg Abbott voiced his support, tweeting "[s]ilencing conservative views is un-American, it's un-Texan[,] and it's about to be illegal in Texas." Greg Abbott (@GregAbbott_TX), TWITTER (Mar. 5, 2021, 8:35 PM), https://t.co/JsPam2XyqD. After a bill failed to pass during the regular session or the first special session, Governor Abbott called a special second legislative session directing the Legislature to consider and act on legislation "protecting social-media and email users from being censored." (Proclamation by the Governor of the State of Texas (Aug. 5, 2021), https://gov.texas.gov/uploads/files/press/PROC_second_called_session_87th_legislature_IMAGE_08-05-21.pdf. The Legislature passed House Bill 20 ("HB 20"), and Governor Abbott signed it into law on September 9, 2021. (Prelim. Inj. Mot., Dkt. 12, at 16).

HB 20 prohibits large social media platforms from "censor[ing]" a user based on the user's "viewpoint." Tex. Civ. Prac. & Rem. Code § 143A.002 ("Section 7"). Specifically, Section 7 makes it unlawful for a "social media platform" to "censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression; or (3) a user's geographic location in this state or any part of this state." *Id.* § 143A.002(a)(1)-(3). The State defines social media platforms as any website or app (1) with more than 50 million active users in the United States in a calendar month, (2) that is open to the public, (3) allows users to create an account, and (4) enables users to communicate with each other "for the primary purpose of posting information, comments, messages, or images." Tex. Bus. & Com. Code §§ 120.001(1), 120.002(b); Tex. Civ. Prac. & Rem. Code § 143A.003(c). HB 20 applies to sites and apps like Facebook, Instagram, Pinterest, TikTok, Twitter, Vimeo, WhatsApp, and YouTube. (Prelim. Inj. Mot., Dkt. 12, at 11); (*see* CCIA Decl., Dkt. 12-1, at 3–4; NetChoice Decl., Dkt. 12-2, at 3–4). HB 20 excludes certain companies like Internet service providers, email providers, and sites and apps that "consist[] primarily of news, sports,

entertainment, or other information or content that is not user generated but is preselected by the provider" and user comments are "incidental to" the content. Tex. Bus. & Com. Code § 120.001(1)(A)–(C). HB 20 carves out two content-based exceptions to Section 7's broad prohibition: (1) platforms may moderate content that "is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment," and (2) platforms may moderate content that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge." Tex. Civ. Prac. & Rem. Code § 143A.006(a)(2)–(3).

HB 20 also requires social media platforms to meet disclosure and operational requirements. Tex. Bus. & Com. Code § 120.051, 120.101–.104 ("Section 2"). Section 2 requires platforms to publish "acceptable use policies," set up an "easily accessible" complaint system, produce a "biannual transparency report," and "publicly disclose accurate information regarding its content management, data management, and business practices, including specific information regarding how the social media platform: (i) curates and targets content to users; (ii) places and promotes content, services, and products, including its own content, services, and products; (iii) moderates content; (iv) uses search, ranking, or other algorithms or procedures that determine results on the platform; and (v) provides users' performance data on the use of the platform and its products and services." *Id.* § 120.051(a).

If a user believes a platform has improperly "censored" their viewpoint under Section 7, the user can sue the platform, which may be enjoined, and obtain attorney's fees. Tex. Civ. Prac. & Rem. Code § 143A.007(a), (b). Lawsuits can be brought by any Texan and anyone doing business in the state or who "shares or receives expression in this state." *Id.* §§ 143A.002(a), 143A.004(a), 143A.007. In addition, the Attorney General of Texas may "bring an action to enjoin a violation or a potential

violation" of HB 20 and recover their attorney's fees. *Id.* § 143A.008. Failure to comply with Section 2's requirement also subjects social media platforms to suit. The Texas Attorney General may seek injunctive relief and collect attorney's fees and "reasonable investigative costs" if successful in obtaining injunctive relief. Tex. Bus. & Com. Code § 120.151.

Finally, HB 20 contains a severability clause. Tex. Civ. Prac. & Rem. Code § 143A.008(a). "If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected." *Id.* § 143A.008(b).

HB 20 goes into effect on December 2, 2021. *Id.* § 143A.003–143A.008 (noting that the effective date is December 2, 2021).

Plaintiffs recently challenged a similar Florida law in the Northern District of Florida in *NetChoice v. Moody*, successfully obtaining a preliminary injunction to halt the enforcement of that law. The district court in that case described the Florida legislation as "an effort to rein in social-media providers deemed too large and too liberal." No. 4:21CV220-RH-MAF, 2021 WL 2690876, at *12 (N.D. Fla. June 30, 2021). The Florida court concluded that

> Balancing the exchange of ideas among private speakers is not a legitimate governmental interest. And even aside from the actual motivation for this legislation, it is plainly content-based and subject to strict scrutiny. It is also subject to strict scrutiny because it discriminates on its face among otherwise-identical speakers: between social-media providers that do or do not meet the legislation's size requirements and are or are not under common ownership with a theme park. The legislation does not survive strict scrutiny. Parts also are expressly preempted by federal law.

Id. The court's preliminary injunction has been appealed to the Eleventh Circuit.

B. Procedural Background

Plaintiffs are two trade associations with members that operate social media platforms that would be affected by HB 20. (Compl., Dkt. 1, at 1–2); (Prelim. Inj. Mot., Dkt. 12, at 11). Plaintiffs filed their lawsuit on September 22, 2021, challenging HB 20 because it violates the First

Amendment; is void for vagueness; violates the commerce clause, full faith and credit clause, and the Fourteenth Amendment's due process clause; is preempted under the supremacy clause by the Communications Decency Act, 47 U.S.C. § 230; and violates the equal protection clause of the Fourteenth Amendment. (Compl., Dkt. 1, at 31, 35, 38, 41, 44). In their motion for preliminary injunction, Plaintiffs request that this Court preliminarily enjoin the Texas Attorney General from enforcing Sections 2 and 7 of HB 20 against Plaintiffs and their members. (Dkt. 12, at 54).

In response to the motion for preliminary injunction, the State requested expedited discovery, (Mot. Discovery, Dkt. 20), which Plaintiffs opposed, (Dkt. 22). The Court granted the State's request, in part, permitting "narrowly-tailored, expedited discovery" before the State would be required to respond to the preliminary injunction motion. (Order, Dkt. 25, at 3). The Court expressed its confidence in the State to "significantly tailor its discovery requests . . . to obtain precise information without burdening Plaintiffs' members." (*Id.* at 4). Several days later, Plaintiffs filed a motion for protective order, (Dkt. 29), which the Court granted, (Order, Dkt. 36). In that Order, the Court allowed the State to depose Plaintiffs' declarants, request documents relied on by those declarants, and serve interrogatories directed to Plaintiffs. (*Id.* at 2).

Additionally, the State filed a motion to dismiss about to two weeks after Plaintiffs filed their motion for preliminary injunction. (Mot. Dismiss, Dkt. 23). The State argues that Plaintiffs lack associational or organizational standing. (*Id.*). Plaintiffs respond that they have associational standing to represent their members covered by HB 20 and also have organizational standing. (Resp. Mot. Dismiss, Dkt. 28).

Finally, Plaintiffs filed a motion to strike the expert report of Adam Candeub, which was attached to the State's opposition to the preliminary injunction motion. (Mot. Strike, Dkt. 43). Plaintiffs challenge the report by Candeub, who is a law professor at Michigan State University, for being a "second legal brief" that offers "nothing more than (incorrect) legal conclusions." (*Id.* at 2).

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