Cahill

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Eleventh Circuit Strikes Down Florida Law Intended to Prohibit Social Media Platforms from Censoring Certain Speech on Grounds That Social Media Platforms Exercise First Amendment-Protected Editorial Judgment

On May 23, 2022, the United States Court of Appeals for the Eleventh Circuit decided *NetChoice, LLC* v. *Att'y Gen., Fla.*, 2022 WL 1613291 (11th Cir. May 23, 2022), in which the court held that most of the provisions in Florida S.B. 7072—a law intended to prohibit social media platforms, such as Twitter and Facebook, from censoring certain speech—were substantially likely to violate the platforms' First Amendment free speech rights. Although the law was intended to protect First Amendment rights—i.e., to protect certain speech from censorship by social media platforms—the Eleventh Circuit determined that the law itself violated the First Amendment by restricting the social media platforms' right to so censor and moderate as the platforms saw fit. That kind of content moderation, the court found, is constitutionally-protected "editorial judgment." The court also held that social media platforms are not "common carriers" with lessened First Amendment rights. In so holding, the Eleventh Circuit has created a circuit split, departing from the decision of the United States Court of Appeals for the Fifth Circuit (just twelve days earlier, on May 11, 2022) to permit enforcement of the substantially similar Texas H.B. 20.[1] It appears likely that the Supreme Court will ultimately weigh in and provide guidance regarding how the First Amendment should be applied to these statutes.

I. Factual and Procedural Background

On May 25, 2021, Florida Governor Ron DeSantis approved S.B. 7072, which prohibits certain social media platforms from "deplatforming" candidates (which the bill defines as deleting or banning from the platform for more than 14 days), from prioritizing or deprioritizing candidate-related posts and messages, and from censoring "journalistic enterprises" based on content. S.B. 7072's provisions may be broken down into three categories: (1) content-moderation restrictions, including prohibitions on deplatforming and content-prioritization algorithms; (2)

[1] *NetChoice, LLC.* v. *Paxton*, 2022 WL 1537249 (5th Cir. May 11, 2022).

disclosure obligations, including a requirement that any censorship be accompanied by a "thorough rationale" explaining why the platform took the action; and (3) a user-data requirement, under which a deplatformed user may access the user's data and content for at least 60 days following the removal.

On May 27, 2021, NetChoice and the Computer & Communications Industry Association ("CCIA")—trade associations representing internet and social media companies including Facebook, Twitter, Google, and TikTok—brought suit under 42 U.S.C. § 1983 in the United States District Court for the Northern District of Florida against the Florida officials charged with enforcing the law. NetChoice and CCIA sought to enjoin the law's enforcement on several grounds, including that it violated the social media companies' right to free speech under the First Amendment, and that the state law was preempted by Section 230 of the Communications Decency Act (47 U.S.C. § 230).[2]

On June 30, 2021, the district court granted plaintiffs' motion for a preliminary injunction, enjoining enforcement of S.B. 7072 in its entirety. The court found that (1) S.B. 7072 implicated the First Amendment because the platforms exercise "editorial judgment" in "moderating the content posted by users"[3]; (2) strict scrutiny was warranted because the entire bill was "motivat[ed]" by the Florida legislature's "hostility to the social media platforms' perceived liberal viewpoint"[4]; (3) S.B. 7072 could not withstand strict, or even intermediate, scrutiny; and (4) the content-moderation restrictions were preempted by 47 U.S.C. § 230. Defendants appealed to the Eleventh Circuit.

II. The Eleventh Circuit's Decision

On May 23, 2022, a three-judge Eleventh Circuit panel affirmed in part, finding that some, but not all, of S.B. 7072's provisions likely violated the First Amendment.[5] In so finding, the court held that (1) S.B. 7072 triggered First Amendment scrutiny by restricting social media platforms' exercise of editorial judgment and by requiring them to make certain disclosures;[6] (2) some of the content-moderation provisions triggered strict scrutiny, while others triggered intermediate scrutiny, neither of which had been satisfied; and (3) the disclosure provisions were properly assessed under the standard articulated in *Zauderer* v. *Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626 (1985), which they each survived, except for the "thorough rationale" provision.

First, the Eleventh Circuit held that each provision of S.B. 7072 at issue, except for the user-data requirement, triggered First Amendment scrutiny. The content-moderation provisions implicated the First Amendment because they restricted the platforms' ability to exercise editorial judgment. The disclosure provisions implicated the First Amendment because they indirectly burdened the platforms' editorial judgment by compelling them to disclose certain information. Significantly, the court also rejected defendants' arguments that the platforms were "common carriers" with diminished free speech rights.

Specifically, the court found that Supreme Court of the United States precedent—particularly *Turner Broadcasting Systems, Inc.* v. *FCC*, 512 U.S. 622 (1994), and *Hurley* v. *Irish-American Gay, Lesbian & Bisexual*

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[2] *NetChoice, LLC* v. *Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021). Plaintiffs challenged the law on several additional grounds irrelevant to the appellate decision, including that the law violated the Fourteenth Amendment's Equal Protection Clause and the Dormant Commerce Clause.

[3] *NetChoice, LLC*, 546 F. Supp. 3d at 1090.

[4] *Id.* at 1093.

[5] Because the court found that the provisions at issue in the preemption challenge were likely to violate the First Amendment, the court did not reach the merits of the preemption challenge. *NetChoice, LLC*, 2022 WL 1613291, at *6 & n.4.

[6] The court found that the user-data requirement did not "prevent or burden to any significant extent the exercise of editorial judgment or compel any disclosure," and therefore did not trigger First Amendment scrutiny. *Id.* at *18.

Group of Boston, 515 U.S. 557 (1995)—supported the conclusion that social media platforms, by making "decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public," engage in "editorial judgments protected by the First Amendment."[7] The Eleventh Circuit explained that just "as the parade organizer [*Hurley*] exercises editorial judgment when it refuses to include in its lineup groups with whose messages it disagrees, and just as a cable operator [*Turner*] might refuse to carry a channel that produces content it prefers not to disseminate, social media platforms regularly make choices 'not to propound a particular point of view.'"[8] The disclosure provisions also implicated the First Amendment because, although they did not "directly restrict editorial judgment or expressive conduct," they "indirectly burden[ed] platforms' editorial judgment by compelling them to disclose certain information."[9]

The court also rejected defendants' arguments that the platforms were "common carriers" akin to electricity providers, trucking companies, and railroads, which do not exercise any editorial discretion with respect to the services they provide. The court held that social media platforms were not common carriers for at least three reasons. First, social media platforms have never acted like common carriers; although they "generally hold themselves open to all members of the public," social media platforms "require users, as preconditions of access, to accept their terms of service and abide by their community standards."[10] Second, Supreme Court precedent suggested that social media platforms are not common carriers. Specifically, although *Turner* "applied less stringent First Amendment scrutiny to television and radio broadcasters," it "cabined that approach to 'broadcast' media because of its 'unique physical limitations'—chiefly, the scarcity of broadcast frequencies."[11] Third, Congress, by differentiating, in the Communications Act of 1934, "'interactive computer services'—like social media platforms—from 'common carriers or telecommunications services,'" already distinguishes internet companies from common carriers.[12]

Second, the Eleventh Circuit found that S.B. 7072's content-moderation provisions triggered either intermediate or strict scrutiny, neither of which could be satisfied in this case.[13] Certain of the content-moderation provisions were "self-evidently content-based and thus subject to strict scrutiny," such as the provisions regarding censoring journalistic enterprises and deprioritizing candidate-related posts.[14] The journalistic enterprises provision was clearly content-based because it prohibited platforms' "content-moderation decisions concerning any 'journalistic enterprise *based on the content of*' its posts."[15] The restriction therefore applied "'because of the . . . message' that the platform's decision expresse[d]."[16] The deprioritization of candidate posts provision was also clearly content-based because it "regulate[d] speech based on 'the topic discussed.'"[17] Conversely, the candidate-deplatforming and user-opt-out provisions were "pretty obviously content-neutral" because "[n]either a prohibition on banishing political

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[7] *NetChoice, LLC*, 2022 WL 1613291, at *9.

[8] *Id.* at *10 (quoting *Hurley*, 515 U.S. at 575).

[9] *Id.* at *17.

[10] *Id.* at *15.

[11] *Id.* at *16 (quoting *Turner Broadcasting Systems, Inc.*, 512 U.S. at 637-39).

[12] *Id.* at *16 (quoting 47 U.S.C. § 223(e)(6)).

[13] Unlike the district court—which reasoned that the *entire* bill was subject to strict scrutiny because of the state's viewpoint-based purpose—the Eleventh Circuit panel found that it could not "use the Act's chief proponents' statements as a basis to invalidate S.B. 7072 'root and branch,'" and therefore had to analyze each of the provisions separately. *Id.* at *20.

[14] *Id.* at *20.

[15] *Id.* at *20.

[16] *Id.* at *20 (quoting *Reed* v. *Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015)).

[17] *Id.* at *20 (quoting *Reed*, 576 U.S. at 163).

candidates nor a requirement that platforms allow users to decline content curation depends in any way on the substance of platforms' content-moderation decisions."[18]

The court concluded that the content-moderation provisions were substantially likely not to "survive even intermediate scrutiny," because they did "not further any substantial governmental interest—much less any compelling one."[19] The court noted that the defendants did not even argue that the provisions could survive heightened scrutiny, but rather "wagered pretty much every-thing on the argument that S.B. 7072's provisions don't trigger First Amendment scrutiny at all."[20] Even assuming the defendants were able to establish that the content-moderation provisions "serve[d] a substantial governmental interest," defendants could not demonstrate that the burdens imposed by the provisions were "no greater than is essential to the furtherance of that interest."[21]

Third, the Eleventh Circuit found that the disclosure provisions of S.B. 7072 warranted assessment under the less speech-protective *Zauderer* standard because they were "content-neutral regulations requiring social media platforms to disclose 'purely factual and uncontroversial information' about their conduct toward their users and the 'terms under which [their] services will be available.'"[22]

The court found that each of the disclosure provisions, except for the thorough rationale provision, satisfied the *Zauderer* standard because defendants' interest in "ensuring that users" are "fully informed about the terms of that transaction and aren't misled about platforms' content-moderation policies" was "likely legitimate." Moreover, the requirements imposed by the provisions were not "unduly burdensome or likely to chill platforms' speech."[23] This was not the case for the thorough rationale provision, because providing a "detailed justification for every content-moderation action" is "practically impossible to satisfy," and therefore the provision was "unduly burdensome and likely to chill platforms' protected speech."[24]

III. Implications

By affirming the preliminary injunction against enforcement of Florida's S.B. 7072, the Eleventh Circuit has created a circuit split, departing from the decision of the United States Court of Appeals for the Fifth Circuit (just twelve days earlier, on May 11, 2022) to permit enforcement of the substantially similar Texas H.B. 20.[25] NetChoice and CCIA similarly sought to enjoin Texas H.B. 20 on First Amendment grounds, and Judge Robert Pitman of the United States District Court for the Western District of Texas granted their motion for preliminary injunction on December 1, 2021.[26] The Texas state defendants appealed, and just two days after hearing oral arguments from the parties, the Fifth Circuit granted defendants' motion to stay the preliminary injunction pending appeal. On May 13,

[18] *Id.* at *20.

[19] *Id.* at *22.

[20] *Id.* at *22.

[21] *Id.* at *23 (quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)).

[22] *Id.* at *21 (quoting *Zauderer*, 471 U.S. at 651). Under *Zauderer*, a "commercial disclosure requirement must be 'reasonably related to the State's interest in preventing deception of consumers' and must not be '[u]njustified or unduly burdensome' such that it would 'chill[ ] protected speech.'" *Id.* at *23 (quoting *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 250 (2010)).

[23] *Id.* at *23.

[24] *Id.* at *24.

[25] *NetChoice, LLC.* v. *Paxton*, 2022 WL 1537249 (5th Cir. May 11, 2022).

[26] *NetChoice, LLC* v. *Paxton*, 2021 WL 5755120 (W.D. Tex. Dec. 1, 2021).

2022, NetChoice and CCIA applied to the Supreme Court for immediate administrative relief and to vacate the Fifth Circuit's stay of the preliminary injunction.

On May 31, 2022, the Supreme Court (in a 5-4 decision) granted NetChoice and CCIA's application and vacated the Fifth Circuit's stay of the preliminary injunction pending appeal. While the majority did not issue a written opinion, Justice Samuel Alito—who wrote on behalf of Justices Clarence Thomas and Neil Gorsuch (Justice Elena Kagan dissented separately, also without a written opinion)—explained that he has "not formed a definitive view on the novel legal questions" presented, and therefore was "not comfortable intervening at this point in the proceedings."[27] Justice Alito also noted that the application "concerns issues of great importance that will plainly merit this Court's review."[28]

On June 17, 2022, the parties in *NetChoice, LLC* v. *Att'y Gen., Fla.* filed a joint motion to stay the issuance of the Eleventh Circuit's mandate, explaining that they "share the view that further review in the Supreme Court is warranted and have asked the District Court to stay proceedings pending disposition of forthcoming petition(s) for a writ of certiorari."[29] On June 22, 2022, the Eleventh Circuit granted the application,[30] further setting the stage for the Supreme Court to weigh in and provide guidance regarding how the First Amendment should be applied to these statutes.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or jkurtzberg@cahill.com; John MacGregor (Associate) at 212.701.3445 or jmacgregor@cahill.com; or Jason Rozbruch (Associate) at 212.701.3750 or jrozbruch@cahill.com; or email publications@cahill.com.

[27] Order on Application to Vacate Stay, *NetChoice, LLC* v. *Paxton*, at *5 (Alito, J., dissenting), No. 21A720 (U.S. May 31, 2022).

[28] *Id.* at *5-6.

[29] Joint Motion to Stay the Issuance of the Mandate, *NetChoice, LLC* v. *Att'y Gen., Fla.*, No. 21-12355 (11th Cir. June 17, 2022).

[30] Order Granting Joint Motion to Stay the Issuance of the Mandate, *NetChoice, LLC* v. *Att'y Gen., Fla.*, No. 21-12355 (11th Cir. June 22, 2022).