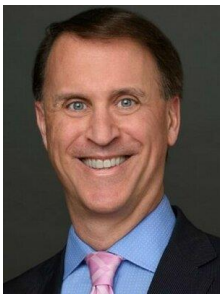
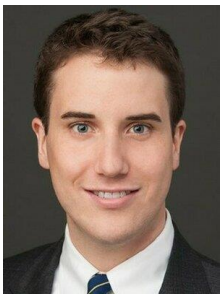
High Court Likely To Review Social Media Speech Censorship

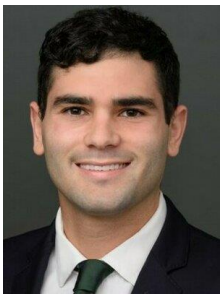
By **Joel Kurtzberg, John MacGregor and Jason Rozbruch** (September 29, 2022)



Joel Kurtzberg



John MacGregor



Jason Rozbruch

The constitutionality of two state laws intended to prohibit social media platforms like Twitter and Facebook from censoring speech based on its viewpoint is likely headed for U.S. Supreme Court review. The laws at issue are Florida S.B. 7072 and Texas H.B. 20.

Against which a group of trade associations led by NetChoice LLC and the Computer & Communications Industry Association — collectively referred to as NetChoice — have filed preliminary injunctions in the U.S. District Courts for the Northern District of Florida and the Western District of Texas, respectively, alleging that the laws violate the platforms' First Amendment free speech rights.[1]

The U.S. Courts of Appeals for the Eleventh and Fifth Circuits are split on whether these laws violate the First Amendment.

While the U.S. Court of Appeals for the Eleventh Circuit held that at least some of the Florida statute's provisions violate the social media platforms' free speech rights,[2] the U.S. Court of Appeals for the Fifth Circuit held otherwise, deeming the Texas statute constitutional and rejecting the notion that the platforms had a First Amendment right to moderate the content of speech on their platforms as they see fit.[3]

In light of that circuit split, the significance of the issues raised, and Justice Samuel Alito's recent dissenting opinion on a motion for a stay of the Texas law stating that the issues raised by such laws are "of great importance [and] will plainly merit this Court's review,"[4] it appears highly likely that the Supreme Court will take up at least one of these cases.

The question at the center of these two cases is whether the two statutes, although intended to protect the First Amendment rights of individuals who use social media platforms by protecting their speech from censorship by the social media platforms, themselves violate the First Amendment by restricting the social media platforms' right to moderate content on those platforms as the platforms see fit.

The laws allegedly infringe the social media platforms' First Amendment rights by:

- In the case of Florida's S.B. 7072, prohibiting certain social media platforms from deplatforming — deleting or banning from the platform for over 14 days — candidates for political office, from prioritizing or deprioritizing candidate-related posts and messages, and from censoring journalistic enterprises based on content; and

- In the case of Texas's H.B. 20, censoring — blocking, banning, removing, deplatforming or restricting — expression based on viewpoint.

Florida's S.B. 7072

On June 30, 2021, Judge Robert Hinkle, in the U.S. District Court for the Northern District of Florida, ruled for NetChoice and enjoined enforcement of Florida's S.B. 7072 in its entirety.

The court found in NetChoice LLC v. Moody that S.B. 7072 implicated the First Amendment because the platforms exercise editorial judgment in "moderating the content posted by users" and that, because the entire bill was motivated by the Florida Legislature's "hostility to the social media platforms' perceived liberal viewpoint," it could not withstand strict, or even intermediate, scrutiny.[5]

On May 23, 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 in NetChoice LLC v. Attorney General, State of Florida.[6]

First, the panel held that S.B. 7072 triggered First Amendment scrutiny by restricting social media platforms' exercise of editorial judgment and by requiring them to make certain disclosures.

The court rejected defendants' arguments that the platforms were common carriers, akin to electricity providers, trucking companies and railroads, which exercise no editorial discretion with respect to the services they provide.

The court held that social media platforms were not common carriers because they 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."[7]

On the common carrier analysis, the court also explained that Supreme Court precedent — particularly the 1994 Turner Broadcasting Systems Inc. v. FCC decision and the 1995 Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston decision — 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."[8]

Specifically, although Turner "applied less stringent First Amendment scrutiny to television and radio broadcasters," the panel reasoned, it "cabined that approach to 'broadcast' media because of its 'unique physical limitations' — chiefly, the scarcity of broadcast frequencies."[9]

Second, the court held that some of the so-called content-moderation provisions of S.B. 7072, including those regarding censoring journalistic enterprises, triggered strict scrutiny.[10]

The journalistic-enterprises provision, for example, prohibited platforms from making "content-moderation decisions concerning any 'journalistic enterprise based on the content of' its posts."[11]

Other content-moderation provisions in the statute, including those regarding candidate deplatforming, triggered intermediate scrutiny.[12]

For instance, the court concluded that the candidate-deplatforming provision was "pretty

obviously content-neutral" because "a prohibition on banishing political candidates" did not "depend[] in any way on the substance of platforms' content-moderation decisions."[13] The court held that the law failed to satisfy both strict and intermediate scrutiny.

Third, the court held that the so-called disclosure provisions — requiring that any censorship be accompanied by a thorough rationale explaining why the platform took the action, and requiring platforms to inform users of any changes to their content-moderation rules — were properly assessed under the less speech-protective standard articulated in the 1985 Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio case, which the disclosure provisions each survived, except for the "thorough rationale" provision.[14]

On June 17, the parties in NetChoice v. Attorney General, State of Florida, moved jointly 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."[15]

On June 22, the Eleventh Circuit granted the stay,[16] and on Sept. 21, the Florida defendants filed their petition for certiorari.

Texas's H.B. 20

On Dec. 1, 2021, NetChoice received a similar victory at the district court level with respect to Texas's H.B. 20, when Judge Robert Pitman in the U.S. District Court for the Western District of Texas enjoined the law on the basis that it was likely to violate the social media platforms' First Amendment free speech rights in NetChoice, LLC v. Paxton.[17]

The court similarly found that social media platforms are not common carriers with diminished First Amendment rights; rather, they exercise editorial discretion that is protected by the First Amendment and H.B. 20 could not withstand strict or intermediate scrutiny.[18]

The Texas state defendants appealed and moved to stay the preliminary injunction of H.B. 20 pending appeal, which NetChoice opposed.[19] The Fifth Circuit heard oral argument on May 9, and, just two days later, issued a one-sentence opinion granting the stay.[20]

On May 13, NetChoice applied to the Supreme Court for immediate administrative relief and to vacate the Fifth Circuit's stay of the preliminary injunction.[21]

The Supreme Court, in a 5-4 decision, granted NetChoice's application and vacated the Fifth Circuit's stay of the preliminary injunction pending appeal.[22]

While the majority did not issue a written opinion, Justice Samuel Alito — who wrote for the dissent on behalf of Justices Clarence Thomas and Neil Gorsuch — explained that he had "not formed a definitive view on the novel legal questions" presented and therefore was "not comfortable intervening at this point in the proceedings."[23]

Justice Alito also noted that the application "concerns issues of great importance that will plainly merit this Court's review."[24] Justice Elena Kagan dissented separately, also without a written opinion.

On Sept.16, a divided panel of the Fifth Circuit reversed, vacating the district court's preliminary injunction and remanding for further proceedings consistent with its opinion.[25]

The Fifth Circuit's analysis departed from the Eleventh Circuit's on just about every issue pertinent to the two cases.

First, unlike the Eleventh Circuit, which found that S.B. 7072 triggered First Amendment scrutiny, the Fifth Circuit held that H.B. 20 "does not regulate the Platforms' speech at all"; instead, it "protects other people's speech and regulated the Platforms' conduct."[26]

In so holding, the Fifth Circuit concluded that the platforms are "common carriers subject to nondiscrimination regulation"[27]; and by providing that the platforms "'shall [not] be treated as the publisher or speaker' of content developed by others," demonstrates that the laws do not regulate speech.[28]

The Fifth Circuit also held that even if H.B. 20 triggered First Amendment scrutiny, the level of scrutiny would be intermediate, which the law would satisfy.

According to the Fifth Circuit, H.B. 20 would trigger only intermediate scrutiny because, to the extent it "burdens the Platforms' First Amendment rights, it does so in a content-neutral way."[29]

In other words, inasmuch as H.B. 20 regulates the platforms' speech, it does so "equally regardless of the censored user's viewpoint, and regardless of the motives (stated or unstated) animating the Platform's viewpoint-based or geography-based censorship."[30]

The Fifth Circuit rejected NetChoice's arguments that H.B 20 is content-based because it excludes certain platforms from regulation — news, sports and entertainment websites, as well as social media platforms with less than 50 million users — and permits certain censorship of expression directly inciting criminal activity and expressing true threats of violence.[31]

The Fifth Circuit concluded that H.B. 20 satisfied intermediate scrutiny because:

- Texas has an important, fundamental interest in protecting the free exchange of ideas and information in the state;
- H.B. 20 is unrelated to the suppression of free speech — it, in fact, aims to protect individual speaker' ability to speak; and
- H.B. 20 does not burden substantially more speech than necessary to further Texas's interest in protecting free speech.[32]

Judge Southwick wrote a separate opinion, concurring in part and dissenting in part. Unlike the majority, Judge Southwick concluded that the social media platforms engage in First Amendment-protected expression when they moderate their users' content. [33]

Following the Fifth Circuit's decision, NetChoice general counsel Carl Szabo stated in a press release on Sept. 16 that NetChoice, while disappointed by the Fifth Circuit's decision, "remain[s] convinced that when the U.S. Supreme Court hears one of [the] cases, it will uphold the First Amendment rights of websites, platforms, and apps."[34]

Conclusion

Supreme Court review of this issue is highly likely, and a decision by the Supreme Court

holding that social media platforms do not have a First Amendment right to moderate content could fundamentally change the way social media operates.

Proponents of the statutes argue that they facilitate a truly free-flowing marketplace of ideas, while opponents would prioritize the First Amendment freedoms of private corporations.

Under the latter view, laws like Florida's S.B. 7072 and Texas's H.B. 20 directly interfere with those freedoms, ultimately harming the free marketplace of ideas in the process — a marketplace that the laws were intended to support.

Proponents and opponents alike will eagerly await the Supreme Court's decision on whether to grant certiorari, and if so, whether the court will side with Florida and/or Texas, or with NetChoice.

Joel Kurtzberg is a partner, and John MacGregor and Jason Rozbruch are associates, at Cahill Gordon & Reindel LLP.

[1] NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082 (N.D. Fla. 2021); NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092 (W.D. Tex. 2021).

[2] NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022).

[3] NetChoice, L.L.C. v. Paxton, 2022 WL 4285917 (5th Cir. Sept. 16, 2022).

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

[5] NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1090, 1093 (N.D. Fla. 2021).

[6] NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022).

[7] NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1220 (11th Cir. 2022).

[8] NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1212 (11th Cir. 2022).

[9] NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1220 (11th Cir. 2022).

[10] NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1226 (11th Cir. 2022).

[11] NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1226 (11th Cir. 2022) (emphasis in original).

[12] NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1226 (11th Cir. 2022).

[13] NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1226 (11th Cir. 2022).

[14] NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1227, 1230-31 (11th Cir. 2022).

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

[16] 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).

[17] NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092 (W.D. Tex. 2021).

[18] NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1105-16 (W.D. Tex. 2021).

[19] Appellant's Motion to Stay Preliminary Injunction Pending Appeal, NetChoice, LLC v. Paxton, No. 21-51178 (5th Cir. Dec. 15, 2021).

[20] Order Granting Motion to Stay Preliminary Injunction Pending Appeal, NetChoice, LLC v. Paxton, No. 21-51178 (5th Cir. May 11, 2022).

[21] Emergency Application for Immediate Administrative Relief and to Vacate Stay of Preliminary Injunction Issued by the United States Court of Appeals for the Fifth Circuit, NetChoice, LLC v. Paxton, No. 21A720 (U.S. May 13, 2022).

[22] Order on Application to Vacate Stay, NetChoice, LLC v. Paxton, No. 21A720 (U.S. May 31, 2022).

[23] Id. at *5 (Alito, J., dissenting).

[24] Id. at *5-6.

[25] NetChoice, L.L.C. v. Paxton, 2022 WL 4285917 (5th Cir. Sept. 16, 2022).

[26] NetChoice, L.L.C. v. Paxton, 2022 WL 4285917, at *4 (5th Cir. Sept. 16, 2022).

[27] NetChoice, L.L.C. v. Paxton, 2022 WL 4285917, at *25 (5th Cir. Sept. 16, 2022).

[28] NetChoice, L.L.C. v. Paxton, 2022 WL 4285917, at *18 (5th Cir. Sept. 16, 2022) (quoting 47 U.S.C. § 230).

[29] NetChoice, L.L.C. v. Paxton, 2022 WL 4285917, at *30 (5th Cir. Sept. 16, 2022).

[30] NetChoice, L.L.C. v. Paxton, 2022 WL 4285917, at *30 (5th Cir. Sept. 16, 2022).

[31] NetChoice, L.L.C. v. Paxton, 2022 WL 4285917, at *30-31 (5th Cir. Sept. 16, 2022).

[32] NetChoice, L.L.C. v. Paxton, 2022 WL 4285917, at *32-33 (5th Cir. Sept. 16, 2022).

[33] NetChoice, L.L.C. v. Paxton, 2022 WL 4285917, at *43 (5th Cir. Sept. 16, 2022) (Southwick, J., concurring in part and dissenting in part).

[34] Press Release, NetChoice Disappointed on Fifth Circuit Ruling in NetChoice & CCIA v.

Paxton, NetChoice (Sept. 16, 2022), available at https://netchoice.org/netchoice-disappointed-on-fifth-circuit-ruling-in-netchoice-ccia-v-paxton/.