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Legal Sidebar

Free Speech Challenges to Florida and Texas Social Media Laws

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Two U.S. Courts of Appeals recently took different positions on the validity of state laws that restrict internet services' ability to moderate user content, although the Supreme Court has vacated the ruling of one of those courts. Almost a year after Florida enacted Senate Bill 7072, the Eleventh Circuit largely upheld a preliminary injunction ruling the law likely unconstitutional, preventing Florida's law from taking effect. This ruling contrasts with a Fifth Circuit order staying a preliminary injunction against a somewhat similar Texas law, H.B. 20, and allowing that Texas law to take effect. As explained in more detail in this Legal Sidebar, these two courts' actions appeared to be based on different views of whether these laws likely violate the constitutional free speech rights of online platforms. The Supreme Court vacated the Fifth Circuit's stay, but the Fifth Circuit could still reach the same outcome in a future ruling on the merits. This Legal Sidebar begins by reviewing the relevant constitutional background, then explains both states' laws and the First Amendment aspects of the legal challenges to those laws.

First Amendment and Editorial Discretion

As explored in this CRS Report, the Supreme Court has recognized that private entities may exercise constitutionally protected "editorial control" when they choose what speech to publish or how to present it. For example, in one case, the Court held that a state violated the First Amendment's Free Speech Clause when it sought to force newspapers to publish political candidates' responses to editorials criticizing their character. Newspapers and cable operators are classic examples of companies that exercise editorial discretion, and the Court has recognized that other private businesses, including public utilities and parade organizers, may also have constitutionally protected rights to exclude speech in certain circumstances. In one case, the Court stated the principle as follows: "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."

In other decisions, however, the Supreme Court has held that private entities may not assert a constitutional right to exclude third parties if the hosting decision is not "inherently expressive." The Supreme Court has suggested one factor in determining whether the hosting decision is expressive is whether anyone would attribute the speech of those third parties to the host. One federal court of appeals concluded that the First Amendment did not bar net neutrality regulations requiring broadband providers

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to host lawful content. This ruling was based on the premise that these providers did not exercise protected editorial discretion but instead neutrally transmitted all third-party speech in the same way a common carrier would. (Historically, common carriers were companies such as railroads or telecommunications services who held themselves out to the public as carrying passengers, goods, or communications for a fee.) The appeals court cautioned, however, that it might have resolved the case differently if the providers instead "engage[d] in editorial discretion" by "selecting which speech to transmit."

Accordingly, one critical question for lower courts evaluating laws or lawsuits that would require a website to host unwanted speech has been whether a site's hosting decision is expressive. A related question is whether the website in fact exercises editorial discretion.

A number of trial courts facing this issue have concluded that the First Amendment barred lawsuits seeking to hold websites, search engines, and social media companies liable for their decisions to not host certain content. For example, one trial court concluded that the First Amendment barred a lawsuit brought under federal and state civil rights laws when the plaintiffs tried to hold a search engine liable for designing "its search-engine algorithms to favor certain expression on core political subjects." The court ruled that the plaintiffs' theory of liability depended on the premise that the search engine "exercise[d] editorial control" protected by the First Amendment. The court believed that allowing the lawsuits to proceed would violate the principle, stated by the Supreme Court, "that a speaker has the autonomy to choose the content of his own message."

Florida

Senate Bill 7072

Florida's social media law, signed into law on May 24, 2021, restricts internet services' ability to moderate content and imposes certain disclosure obligations on those services. The law primarily applies to "social media platforms," defined broadly to include any service that "[p]rovides or enables computer access by multiple users to a computer server," operates as a "legal entity," and does business in the state. Partially tracking the federal definition of "interactive computer service," this term could therefore include services such as search engines or internet service providers. The state law originally excluded services owned by companies that also operate theme parks or entertainment complexes, although that exclusion was repealed in April 2022. Further, the definition includes only larger companies that meet certain revenue or user thresholds.

The content moderation provisions of the law limit platforms' ability to engage in deplatforming, censorship, shadow-banning, or post prioritization—all terms defined in the law. The law requires platforms to apply their moderation standards "in a consistent manner" and provides that platforms can change their "user rules, terms, and agreements" only once every 30 days. It also requires platforms to allow users to opt out of certain content-moderation practices. There are additional restrictions prohibiting platforms from deplatforming or restricting the content of political candidates or "journalistic enterprises."

The law also contains several disclosure provisions, including requirements to publish standards for moderating content, inform users about changes to terms of service, and provide data about how many people viewed a user's posts. The law also requires platforms to give users notice and explanations before the platform may censor, deplatform, or shadow ban users' content.

NetChoice v. Moody

As discussed in a prior Legal Sidebar, a federal trial court granted a preliminary injunction temporarily staying enforcement of Florida's law on June 30, 2021. The trial court held that the law was likely unconstitutional under the First Amendment after concluding that it discriminated based on the content and viewpoint of speech. Florida appealed that decision to the Eleventh Circuit.

On May 23, 2022, the Eleventh Circuit partially affirmed this preliminary injunction, agreeing that many aspects of the law were likely unconstitutional but upholding some of the disclosure provisions. The court first held that platforms engaged in content moderation are exercising protected "editorial judgment that is inherently expressive." The court stated that "when a platform removes or deprioritizes a user or post, it makes a judgment about whether and to what extent it will publish information to its users—a judgment rooted in the platform's own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site." Citing a variety of platforms' moderation policies, the court noted that by removing certain users or types of content, platforms "cultivate different types of communities" and sometimes "promote explicitly political agendas." This, in the court's view, was protected editorial activity. The state had argued that the covered platforms should be treated as common carriers, which can be held to equal access obligations. The court disagreed, stating that unlike telecommunications service providers like telegraph companies, social media platforms had never acted as common carriers but had instead always restricted the use of their platforms. The court further concluded that the state could not designate the platforms as common carriers if it would abrogate the platforms' First Amendment rights.

Accordingly, the court ruled that the law triggered First Amendment scrutiny by restricting platforms' "ability to speak through content moderation." The content moderation provisions limited the platforms' editorial judgment, and the disclosure provisions—with one exception—indirectly burdened that judgment. The exception: The court believed the provision granting users the right to access existing data about the number of people who viewed their content likely did not place any significant burden on editorial judgment and therefore did not trigger any level of constitutional scrutiny.

Although the court held that both the content moderation provisions and the rest of the disclosure requirements affected the platforms' editorial judgment, it treated those two types of provisions differently in its First Amendment analysis. The court held that the content moderation provisions were subject to some form of heightened constitutional scrutiny and likely could not survive that review. Reasoning that the state had no substantial interest in "leveling the playing field" for speech, the court found the law did not further any substantial government interest. Neither did the state show that the burden on speech was no greater than necessary, given how broadly the law restricted platforms' editorial discretion.

A more lenient standard of review applied to the rest of the disclosure provisions, and the court upheld most of those provisions. Specifically, the court applied a relaxed standard applicable to commercial disclosure requirements. The court said that most of the transparency requirements likely permissibly served an interest "in ensuring that users—consumers who engage in commercial transactions with platforms by providing them with a user and data for advertising in exchange for access to a forum—are fully informed about the terms of that transaction and aren't misled about platforms' content-moderation policies." The provision requiring platforms to provide notice and justification for all content moderation actions, though, was deemed "unduly burdensome and likely to chill platforms' protected speech."

The Eleventh Circuit's opinion therefore allowed portions of Florida's law to go into effect but otherwise affirmed the trial court's preliminary injunction preventing the law from taking effect. This judgment stands in contrast to the Fifth Circuit's recent ruling on Texas's somewhat similar social media law.

Texas

H.B. 20

Texas enacted H.B. 20 on September 9, 2021, months after Florida's law was adopted—and preliminarily enjoined by a trial court. H.B. 20 defines "social media platform" more narrowly than Florida's law does, applying the term only to a "website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images." Thus, unlike the Florida law, which broadly sweeps in a variety of internet service providers, the Texas law focuses on sites with the primary purpose of enabling user communication. H.B. 20 further applies only to platforms with "more than 50 million active users in the United States in a calendar month," which could still encompass a number of platforms beyond the biggest social media companies such as Facebook and YouTube. The definition expressly excludes certain services such as internet service providers, email, or certain news sites. (Some provisions of the law, however, impose separate restrictions on email providers.)

Like the Florida law, the Texas law imposes both content moderation restrictions and disclosure requirements on covered platforms. The Texas law prohibits social media platforms from "censor[ing]" users or content based on viewpoint or the user's geographic location in the state. However, the law says it does not prevent a platform from censoring a few specific types of content, including unlawful expression or specific discriminatory threats of violence. The law also says social media platforms can continue to censor content when "specifically authorized . . . by federal law," a provision that one of the bill's authors said was intended to refer to a provision of the Communications Act's Section 230 that grants sites federal immunity for removing certain "objectionable" content.

The law also imposes procedural restrictions on platforms, requiring them to "provide an easily accessible" system for users to submit complaints about illegal content or content removals. Platforms must generally act on these complaints within 48 hours. Further, platforms must notify users when the platforms remove their content and provide users with the opportunity to appeal such a decision under statutorily specified procedures.

The law additionally requires platforms to "disclose accurate information" about their content and data management and "business practices," including publishing an acceptable use policy explaining their content moderation policies. It further requires the biannual publication of a transparency report with information about takedowns of illegal or policy-violating content.

NetChoice v. Paxton

On December 1, 2021, a federal trial court ruled H.B. 20 likely unconstitutional and entered a preliminary injunction preventing the state from enforcing the restrictions on social media platforms discussed above. In brief, the court concluded that the covered platforms "have a First Amendment right to moderate content disseminated on their platforms." The court stressed that Texas lawmakers seemed to premise their bill on the idea that these platforms exercise editorial discretion in order to "skew their platforms ideologically." In the court's view, the law's censorship prohibition and other "constraints on how social media platforms disseminate content" violated the First Amendment by impermissibly compelling the platforms to "alter and distort" their expressive activity. In addition, the court held that the operational and disclosure requirements were "inordinately burdensome given the unfathomably large numbers of posts on these sites and apps."

This decision was appealed to the Fifth Circuit, which heard oral argument on the case on May 9, 2022. In its briefing and at oral argument, the state largely argued that the platforms should be viewed as common carriers and can be subject to legal requirements to serve all comers. The trade group challenging the law

continued to claim that it was unconstitutional, describing it as "an extraordinary assertion of government power to substitute the government's editorial preferences for those of private publishers."

Two days after the oral arguments, the Fifth Circuit entered a stay of the preliminary injunction pending appeal, allowing the Texas law to go into effect. The Fifth Circuit's order did not explain the reasoning for granting a stay, nor did it explicitly state the panel's view of the law's constitutionality. Nonetheless, a federal appellate court may generally not enter such a stay unless it believes "the stay applicant has made a strong showing that he is likely to succeed on the merits," suggesting the Fifth Circuit believed the state was likely to prevail.

The Supreme Court vacated the Fifth Circuit's stay on May 31, 2022, allowing the trial court's preliminary injunction to go into effect again. The ruling was not unanimous: four Justices would have left the stay in place. In a dissenting opinion, Justice Alito explained that he had "not formed a definitive view on the novel legal questions" presented by the appeal—but it was the very novelty of those questions that, in his view, prevented the Supreme Court's intervention in the proceedings. The Fifth Circuit has not yet issued an opinion on the merits of the appeal, and it could ultimately reverse the trial court's preliminary injunction if it does not believe Texas's law is unconstitutional.

Considerations for Congress

While the Florida and Texas laws are not identical and the Fifth Circuit has not yet issued a full opinion, the courts' rulings could reflect different views of social media platforms' First Amendment rights. Thus far, most court rulings on online platforms' constitutional rights to freely moderate content have come from trial courts, so appellate decisions could have special significance in this evolving area. In particular, if courts find that online platforms are exercising protected editorial discretion when they moderate user-generated content, that will limit the government's ability to regulate platforms' content moderation decisions. Decisions weighing in on this constitutional question could be significant not only for Florida and Texas but also other states that have indicated that they are considering similar legislation. A possible circuit split, along with the various trial court rulings on related issues, creates some ambiguity for states seeking to assess possible legal challenges. It also means that a state's ability to enact similar laws may depend on the federal judicial circuit in which it is located.

The scope of online platforms' First Amendment rights is also relevant to Congress as it considers bills proposing to regulate online content moderation. Some federal proposals would, in ways somewhat distinct from the Texas law, seek to penalize online services that restrict content based on viewpoint, or would otherwise require platforms to host lawful content. Other federal bills would institute transparency requirements with some similarities to certain portions of the Florida and Texas laws. Further decisions on the constitutionality of state laws may suggest how courts are likely to review federal laws regulating social media platforms.

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