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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 have recently taken different positions on the validity of state laws restricting internet services' ability to moderate user content. In May, the Eleventh Circuit largely upheld a preliminary injunction ruling Florida's Senate Bill 7072 likely unconstitutional, preventing the law from taking effect. This ruling contrasts with a September ruling from the Fifth Circuit rejecting a challenge to a somewhat similar Texas law, H.B. 20. As explained in more detail in this Legal Sidebar, the two opinions take different views of whether these laws likely violate the constitutional free speech rights of online platforms. 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 Control

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 could not force newspapers to publish political candidates' responses to editorials criticizing their character. The Court ruled that the newspaper's "choice of material" constituted "editorial control and judgment" that could not be regulated "consistent with First Amendment guarantees." Newspapers and cable operators are classic examples of companies that exercise editorial control, 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" and does not implicate concerns about editorial control. Applying these principles, one federal court of appeals concluded that the First Amendment did not bar net neutrality regulations requiring broadband providers 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

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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." Justice Kavanaugh, then a judge on the federal appeals court, would have held that the net neutrality rule was unconstitutional, saying that internet service providers perform the same kinds of functions as cable operators and thus exercise constitutionally protected editorial discretion.

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 exercises editorial discretion. If courts find that online platforms are exercising protected editorial discretion when they moderate user-generated content, then the First Amendment will limit the government's ability to regulate platforms' content moderation decisions.

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 by favoring certain expression. 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. 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 may only change their "user rules, terms, and agreements" once every 30 days. It also requires platforms to allow users to opt out of certain content-moderation practices. Additional restrictions prohibit 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.

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 most of the disclosure provisions, and the court mainly upheld 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." 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 does not prevent platforms from censoring some 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 may preserve platforms' federal immunity under the Communications Act's Section 230 for removing certain "objectionable" content.

The law also imposes operational 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. This decision was appealed to the Fifth Circuit, which on May 11, 2022, entered a stay of the preliminary injunction pending appeal, allowing the Texas law to go into effect. However, the Supreme Court vacated the Fifth Circuit's stay on May 31, 2022, allowing the preliminary injunction to go into effect again.

On September 16, 2022, the Fifth Circuit issued an opinion rejecting the constitutional challenge and vacating the trial court's preliminary injunction. One judge dissented in part, concluding that H.B. 20's content moderation provisions violated the First Amendment.

Starting with the content moderation provisions, the majority opinion first held that the "history and original understanding" of the First Amendment did not support the platforms' view. The court suggested the Founders were primarily concerned with prior restraints on speech and protections for "good-faith opinions on matters of public concern." In the court's view, H.B. 20 did not operate as a prior restraint or restrict platforms' ability to express their own views because it restricted only the platforms' ability to restrict *others'* speech. The court "reject[ed] the Platforms' efforts to reframe their censorship as speech." It ruled that the covered platforms "exercise virtually no editorial control or judgment," because they "use algorithms to screen out certain obscene and spam-related content" but post "virtually everything else." The court further concluded that the platforms' content moderation decisions were not inherently expressive, and any expressive communication would occur only when a platform explains why it made that decision and how it expresses the platform's views.

The Fifth Circuit suggested that Section 230, the federal immunity provision mentioned above, supported its ruling. Section 230 states that providers and users of "interactive computer services" may not "be

treated as the publisher or speaker" of another's content. The Fifth Circuit believed that this immunity "reflects Congress's judgment that the Platforms do not operate like traditional publishers and are not 'speak[ing]' when they host user-submitted content." The court characterized this statutory immunity provision as a "factual determination" relevant to its constitutional analysis.

The court also ruled that H.B. 20 correctly classified the covered platforms as common carriers and that the law's nondiscrimination requirement was consistent with historical regulation of common carriers. This was again based in part on the court's conclusion that the platforms hold themselves out to serve the public equally, even though they do business only with users who agree to their terms of service and they censor certain types of content.

As an alternative basis for its holding, the Fifth Circuit said that even if the platforms engage in protected speech when they moderate content, the law would be subject only to an intermediate level of scrutiny because it was content-neutral. As discussed in this prior Legal Sidebar, content-based laws ordinarily trigger strict constitutional scrutiny, while content-neutral laws receive intermediate scrutiny. The Supreme Court has explained that a law is content-based if it applies to speech because of the substantive message being expressed. The Fifth Circuit ruled that H.B. 20 is content-neutral because it does not discriminate based on the content or viewpoint of the platforms' moderation decisions. The court said that even though the law allows platforms to restrict certain types of content such as specific threats of violence, these exceptions did not make the law content-based because they were not based on *hostility* toward the message expressed by moderation. In some contrast to the Eleventh Circuit's conclusion that the government does not have a substantial interest in ensuring a level playing field for speech, the Fifth Circuit held that Texas's interest in promoting the free exchange of ideas from a variety of sources was a sufficiently important interest and that H.B. 20 was the least speech-restrictive way to achieve this goal.

Turning to the disclosure requirements, the Fifth Circuit concluded, like the Eleventh Circuit, that these provisions were constitutional under the lower level of constitutional scrutiny applicable to commercial disclosure requirements. However, unlike the Eleventh Circuit, the Fifth Circuit held that the operational provisions requiring explanation and appeals of content removal decisions were also constitutional, dismissing the platforms' complaints about the burdens on their moderation activity.

This ruling likely creates a circuit split on the constitutional protections that should be afforded to private companies that host others' speech. The Fifth Circuit acknowledged that—although the Florida and Texas laws differed in some ways—it disagreed with the Eleventh Circuit on key legal issues relating to constitutional protections for editorial discretion and the common carrier doctrine. Although the Fifth Circuit acknowledged that the Supreme Court has said certain businesses exercise editorial discretion, the appeals court rejected the idea that the First Amendment protects editorial control in and of itself. Instead, it said that regulation of editorial decisions implicates the First Amendment only when the regulation "either coerces" the host "to speak or interferes with their speech." The dissenting judge, however, agreed with the Eleventh Circuit that the Supreme Court has clearly stated "that protected expression lies not merely in the message or messages transmitted but in the process of collecting and presenting speech."

Considerations for Congress

The Fifth Circuit's views of social media platforms' First Amendment rights stand in contrast to the Eleventh Circuit's ruling and opinions from a number of trial courts. Decisions weighing in on online platforms' constitutional rights to freely moderate content could be significant not only for Florida and Texas, but also for other states that have indicated that they are considering similar legislation limiting viewpoint discrimination or encouraging moderation of harmful content. This circuit split 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. Online platforms' obligations may also depend on where they operate.

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 analyze federal laws regulating social media platforms.

The Fifth Circuit ruling also raises questions about the relevance of Section 230 to these discussions. Because the Fifth Circuit relied on Section 230's "publisher or speaker" immunity in assessing whether online platforms should be considered speakers for First Amendment purposes, amendments that alter or restrict Section 230 immunity could suggest a new "determination" by Congress that these moderation decisions represent the platform's speech. Even without any change to Section 230, though, other courts might question whether the Fifth Circuit correctly interpreted Section 230 as expressing a clear congressional view on whether online platforms engage in constitutionally protected speech by hosting third-party speech.

NetChoice, one of the trade associations challenging both the Florida and Texas laws, has said it believes that the Supreme Court will eventually vindicate platforms' First Amendment rights. Justice Alito, in an opinion joined by Justices Thomas and Gorsuch, agreed that the issues involved in the Fifth Circuit dispute "will plainly merit this Court's review." Florida has appealed the Eleventh Circuit's ruling to the Supreme Court. NetChoice's statement suggests it is likely to appeal the Fifth Circuit's ruling, presenting the Supreme Court with another opportunity to weigh in on this issue. Further, the rulings in these cases are somewhat related to another case the Supreme Court is set to hear in its upcoming October 2022 term. In *303 Creative, LLC v. Elenis*, the Court agreed to consider whether a state would violate the Free Speech Clause by applying its nondiscrimination laws to a website designer who does not want to create a website for a same-sex wedding. Although the free speech claim in *303 Creative* is not phrased in terms of editorial discretion, it presents related questions regarding when website design qualifies as speech, particularly when the message conveyed by the website could be attributed to a third party.

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