

#NoFilter: Can States Regulate the Content of Social Media Platforms?

In this edition of #NoFilter, we will examine a recent September 16, 2022, decision from the Fifth Circuit Court of Appeals upholding a Texas state law impacting the power of social media platforms to moderate content on their platforms. *NetChoice, L.L.C. v. Paxton*¹ creates a circuit split between the Fifth Circuit and the Eleventh Circuit on the limits of free speech and the state's ability to regulate speech on social media. As is typical with issues involving a split of authority between the circuits, the U.S. Supreme Court has been asked to settle the debate as this case reaches its doorstep.

NetChoice, L.L.C. v. Paxton

Plaintiffs NetChoice and the Computer & Communications Industry Association are trade associations that represent companies operating social media platforms. These organizations are challenging Texas House Bill 20 (H.B. 20), which largely prohibits social media platforms from censoring speech based on viewpoint.

The most controversial part of H.B. 20 is Section 7, which provides:

“A social media platform may not 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 another person’s expression; or (3) a user’s geographic location in this state or any part of this state.”

The *NetChoice* plaintiffs’ sued the Attorney General of Texas on September 22, 2021, prior to H.B. 20 taking effect, and obtained a preliminary injunction from the district court on December 1, 2021. The Texas Attorney General appealed the injunction to a panel of three judges at the Fifth Circuit.

The plaintiffs argue that H.B. 20 infringes on First Amendment rights by restricting their ability to moderate, curate, and decide what content to feature on their platforms. They compare themselves to newspapers that exercise free speech by deciding what to print or not. The Texas Attorney General argued that this activity is veiled censorship rather than free speech. Instead, Texas HB 20 protects free speech from social media platforms attempting to “cancel or censor conservative free speech.” Texas urges the court to consider social media platforms as similar to common carriers that should provide equal access to all on their platforms.

In the 2-1 split decision, the Fifth Circuit Court of Appeals reversed the district court’s injunction. The majority stated, “we reject the idea that corporations have a freewheeling First Amendment right to censor what people say.” The split decision claims that H.B. 20 chills censorship, not speech, and the law itself is content-neutral. The plaintiffs immediately appealed the decision to the Supreme Court.

This decision comes at the heels of another similar case involving NetChoice. In May, NetChoice sued Florida for a similar social media law called S.B. 7072, which attempted to restrict social media platforms from “censorship” and “de-platforming” users. The law also permits fines of \$250,000 per day for suspending the accounts of candidates running for statewide office for more than 14 days. It also permits fines of \$25,000 per day for de-platforming any other candidate for public office.

As with the Texas law, a District Court entered a temporary injunction prior to the law taking effect. Unlike the Texas law, the Circuit Court of Appeals upheld the injunction on the basis that Florida’s S.B. 7072 was unconstitutional and violated the First Amendment. Specifically, the Court noted that “the basic principles of freedom of speech and the press, like the First Amendment’s command,



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do not vary when a new and different medium for communication appears.” Social media companies “engage[] in constitutionally protected expressive activity when they moderate and curate the content that they disseminate on their platforms.” As an example, the Eleventh Circuit noted that Florida’s law was “so broad that it would prohibit a child-friendly platform like YouTube Kids from removing—or even adding an age-gate to—soft-core pornography posted by Pornhub, which qualifies as a ‘journalistic enterprise’ [under S.B. 7072] because it posts more than 100 hours of video and has more than 100 million viewers per year.” Lastly, unlike the Fifth Circuit, the Eleventh Circuit rejected Florida’s argument that social media platforms should be treated as common carriers that should provide services to all. Following the Eleventh Circuit’s decision, the State of Florida appealed to the Supreme Court.

The decisions from the Fifth and Eleventh Circuits contradict each other, thereby creating a split of authority on the issue. Both cases have been appealed to the Supreme Court. If granted, it would be the first time the high court has weighed in on the role of social media giants and the First Amendment. These decisions are crucial and can fundamentally change how social media companies regulate all types of speech on their platforms, including hate speech, political speech, or any speech that could be considered an expression of viewpoint. The issues in these cases have a far-reaching impact that is of national importance and can establish the rules for social media content regulation moving forward.

¹ *NetChoice, L.L.C. v. Paxton*, No. 21-51178, 2022 WL 4285917 (5th Cir. Sept. 16, 2022).