Content Moderation Circuit Split: NetChoice v. Attorney General, State of Florida and NetChoice v. Paxton

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34 F.4TH 1196 (11TH CIR. 2022)
49 F.4TH 439 (5TH CIR. 2022)

In 2021, both Florida and Texas enacted statutes to curtail social media platforms' ability to moderate content on their sites.[1] These statutes were intended to mitigate anti-conservative bias on social media platforms and restrict their ability to deplatform or deprioritize conservative content.[2] Plaintiffs NetChoice and Computer & Communications Industry Association (referred to collectively as "NetChoice") are trade associations that represent social media companies such as Facebook, Twitter, and Google.[3] NetChoice challenged these laws, arguing that restricting social media platforms' ability to moderate content unconstitutionally infringes on the platforms' First Amendment free speech rights.[4] The district courts in both cases granted plaintiffs' motions for preliminary injunctions and both Florida and Texas appealed these rulings.[5] The Eleventh Circuit reviewed the constitutionality of the Florida statute and affirmed the district court's decision, holding that social media platforms are private actors with constitutionally protected free speech rights, and they are acting within these rights when they make editorial judgements about the content they allow on their sites.[6] The Fifth Circuit reviewed the Texas statute and came to the opposite conclusion, holding that because these companies have such dominant market share and the vast

1. *See* S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021) (enacted); H.B. 20, 87th Leg., 2d Spec. Sess. (Tex. 2021) (enacted).
2. NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1208 (11th Cir. 2022) (holding that social media companies are private actors with First Amendment free speech rights and content moderation is a constitutionally protected exercise of these rights); NetChoice, LLC v. Paxton, 49 F.4th 439, 439 (5th Cir. 2022) (holding that content moderation by social media companies does not fall under the definition of speech protected by the First Amendment), *petition for cert. docketed*, No. 22-555 (U.S. Dec. 19, 2022).
3. *NetChoice*, 34 F.4th at 1207.
4. *Id.* at 1207; *Paxton*, 49 F.4th at 463.
5. *NetChoice*, 34 F.4th at 1196; *Paxton*, 49 F.4th at 439.
6. *NetChoice*, 34 F.4th at 1204.

majority of posts go unreviewed, they should be treated as common carriers that are subject to nondiscrimination requirements.[7]

I. ELEVENTH CIRCUIT

A. Background

On May 24, 2021, the State of Florida enacted S.B. 7072, which aimed to limit social media platforms' ability to moderate content on their sites.[8] S.B. 7072 was signed by Governor DeSantis in his purported effort to "fight [ ] against big tech oligarchs that contrive, manipulate, and censor if you voice views that run contrary to their radical leftist narrative."[9] NetChoice sought to enjoin enforcement of §§ 106.072 and 501.2041 of the law, which imposed liability on social media platforms for their decisions to remove content or users from their sites.[10] NetChoice argued that these provisions: (i) violate their First Amendment free speech rights, and (ii) are preempted by federal law.[11] The district court granted plaintiffs' motion to enjoin §§ 106.072 and 501.2041, which Florida appealed.[12]

B. Analysis

In its appeal, the State argued that the Florida law was not preempted by federal law and that plaintiffs' First Amendment rights were not violated because the conduct at issue does not constitute protected speech under the First Amendment.[13] NetChoice argued that by restricting social media platforms' ability to remove content from their sites, the State is both preventing the platforms from exercising editorial discretion and forcing the platforms to publish certain speech.[14] The Eleventh Circuit concluded that §§ 106.072 and 501.2041 were substantially likely to violate plaintiffs' First Amendment rights and that there was no need to consider the preemption challenge.[15]

The State argued that because these social media platforms have such significant market power and public importance, they should be treated as common carriers that have diminished First Amendment rights and must adhere to nondiscrimination requirements.[16] The Eleventh Circuit rejected the State's common carrier argument, citing § 230(c)(2)(A) of the Telecommunications Decency Act of 1996, which recognizes social media

7. *Paxton*, 49 F.4th at 459.
8. S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021) (enacted).
9. NetChoice, LLC vs. Att'y Gen., 34 F.4th 1196, 1205 (11th Cir. 2022).
10. *Id.* at 1207.
11. *Id.*
12. *Id.* at 1208.
13. *Id.*
14. *Id.* at 1215.
15. *NetChoice*, 34 F.4th at 1209.
16. *Id.* at 1221-22.

platforms' ability to discriminate among the type of messages allowed on their platforms.[17]

Before considering whether the content-moderation restrictions violated plaintiffs' First Amendment rights, the Eleventh Circuit considered whether the law triggered the First Amendment at all.[18] The State argued that platforms are not engaging in speech that is worthy of First Amendment protection because the vast majority of content that is posted is never reviewed.[19] The Eleventh Circuit rejected this argument because the conduct at issue here deals precisely with the content that *is* reviewed by the platforms.[20]

The Eleventh Circuit compared the platforms' decisions about what content to remove or deprioritize to the kind of editorial judgment that is exercised by newspapers.[21] The platforms' unwillingness to publish certain types of content reflects their views on what is appropriate and worth disseminating to their users.[22] The Eleventh Circuit stated that the appropriate inquiry is whether a reasonable person would interpret a platform's content moderation decisions as communicating "some sort of message."[23] The Eleventh Circuit held that by exercising judgment about what messages they are willing to convey, platforms signal to users the type of online community they want to create.[24]

C. Holding

The Eleventh Circuit concluded that because social media platforms are exercising editorial judgment by making content moderation decisions, and because a reasonable person would interpret this as communicating "some sort of message," this behavior is constitutionally protected under the First Amendment.[25] Therefore, the Florida law's provisions that limit social media platforms' ability to moderate content are most likely unconstitutional.[26]

II. FIFTH CIRCUIT

A. Background

On September 9, 2021, Texas enacted HB 20, which, like the Florida law, tried to restrict social media companies' ability to regulate content on

17. *Id.* at 1221 ("Federal law's recognition and protection of social-media platforms' ability to discriminate among messages—disseminating some but not others—is strong evidence that they are not common carriers with diminished First Amendment rights.").
18. *Id.* at 1209.
19. *Id.* at 1214.
20. *Id.*
21. *NetChoice*, 34 F.4th at 1210-11.
22. *Id.* at 1210.
23. *Id.* at 1212 (quoting Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 6 F.4th 1247, 1254 (11th Cir. 2021)).
24. *Id.* at 1213.
25. *Id.* at 1212 (quoting *Coral Ridge*, 6 F.4th at 1254).
26. *Id.* at 1214.

their platforms.[27] The law, which applies to social media companies that have over 50 million monthly active users, was largely anchored in the argument that these companies essentially function as common carriers and public forums, and thus, should not be able to censor speech on their platforms.[28] NetChoice challenged the law and sought a preliminary injunction, arguing that it substantially and unconstitutionally burdened their free speech rights.[29] The district court granted plaintiffs' motion for a preliminary injunction, and Texas appealed.[30]

B. Analysis

The Fifth Circuit rejected NetChoice's arguments that the Texas law chilled their free speech rights, finding that the statute "does not regulate the Platforms' speech at all; it protects *other people's* speech and regulates the Platforms' *conduct*."[31] The Fifth Circuit rejected plaintiffs' argument that the platforms are exercising free speech rights by moderating content on their sites and contrasted these passive decisions with the types of affirmative editorial judgments that are exercised by newspapers when they select content to publish.[32] The Fifth Circuit cited the terms of service from both Twitter and Facebook in which they tell users that they are not responsible for any content nor should the publication of content on their platform be interpreted as an endorsement.[33] The Fifth Circuit held that these companies are still empowered to speak in whatever way they want, and HB 20 only serves to prevent them from censoring others' ability to do the same.[34]

The opinion likened the platforms to "common carriers" because, rather than exercising independent editorial judgment, they serve as a conduit for communication between others.[35] The Fifth Circuit held that these big social media companies should be regulated as common carriers, which would empower the Texas Legislature to pass laws to ensure that the platforms do not discriminate against users.[36] These platforms, the Fifth Circuit noted, represent themselves as open to the public and essentially operate as "the modern public square."[37]

C. Holding

The Fifth Circuit held that social media companies are not "speaking" for the purposes of the First Amendment when they restrict users' ability to

27. NetChoice, LLC v. Paxton, 49 F.4th 439, 439 (5th Cir. 2022), *petition for cert. docketed*, No. 22-555 (U.S. Dec 19, 2022).
28. *Id.* at 445.
29. *Id.* at 455.
30. *Id.* at 439.
31. *Id.* at 448.
32. *Id.* at 459-60.
33. *Paxton*, 49 F.4th at 460.
34. *Id.* at 455.
35. *Id.* at 467.
36. *Id.* at 448.
37. *Id.* at 445 (quoting Packingham v. North Carolina, 582 U.S. 98, 107 (2017)).

post on their platforms.[38] Because of the dominant market share that these platforms have and the significant public interest in them, the Fifth Circuit held that they operate like common carriers more than newspapers exercising editorial judgment.[39] Thus, they do not have a constitutional right to censor what others say.[40] The Fifth Circuit reversed the district court's opinion and vacated the preliminary injunction.[41]

III. SUMMARY OF CIRCUIT SPLIT

In sum, the Eleventh Circuit struck down the Florida statute, arguing that social media companies are private actors engaging in constitutionally protected free speech when they make content moderation decisions.[42] The Fifth Circuit came to the opposite conclusion, finding that large social media companies are not engaging in speech when they censor users' content, and instead they operate more like common carriers (which means they are subject to nondiscrimination requirements).[43] The Supreme Court has delayed a decision about whether it will hear the cases, asking the U.S. Solicitor General to provide an opinion.[44] Whether the Supreme Court takes up the cases will have tremendous implications for this area of the law and how social media companies can moderate content on their platforms going forward.

38. *Id.* at 448.
39. *Paxton*, 49 F.4th at 494.
40. *Id.*
41. *Id.*
42. NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1204 (11th Cir. 2022).
43. *Paxton*, 49 F.4th at 448.
44. *See* Lauren Feiner, *Supreme Court Punts on Texas and Florida Social Media Cases That Could Upend Platform Moderation*, CNBC (Jan. 23, 2023, 2:58 PM), https://www.cnbc.com/2023/01/23/supreme-court-punts-on-texas-and-florida-social-media-law-cases.html [https://perma.cc/NBA4-4HKG].