NetChoice, L.L.C. v. Paxton

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49 F.4TH 439 (5TH CIR. 2022)

In *NetChoice, L.L.C.*[1] *v. Paxton*, the Fifth Circuit heard First Amendment claims of trade associations representing companies affected by Texas House Bill 20, which regulates the ability of online platforms to censor the viewpoints of their users.[2] The court reversed the Western District of Texas's preliminary injunction and held that the statute does not violate the First Amendment.[3] Under First Amendment doctrine, the court held the statute does not chill the speech of online platforms, it regulates the conduct of online platforms rather than their speech in light of 47 U.S.C. § 230, and assuming the statute did regulate their speech, the regulations survive the intermediate scrutiny test applied to content-neutral rules.[4] Additionally, the court concluded that common carrier doctrine further empowered the Texas legislature to prevent online platforms from discriminating against the viewpoints of Texas users.[5] This case created a split with the Eleventh Circuit's decision in *NetChoice, LLC v. Attorney General of Florida* which invalidated a similar Florida statute on First Amendment grounds.[6] The United States Supreme Court heard both cases on February 26, 2024.[7]

I. BACKGROUND

On September 9, 2021, Texas Governor Greg Abbott signed House Bill 20 into law.[8] The provisions of House Bill 20 apply to social media platforms with more than fifty million monthly users in the United States.[9] The trade associations NetChoice and the Computer & Communications Industry

1. While the petitioner's name is "NetChoice, LLC," this brief will use the official title of this case "NetChoice, L.L.C. v. Paxton."
2. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 445-47 (5th Cir. 2022), *cert. granted*, 144 S. Ct. 477 (2023) (No. 22-555).
3. *Id*. at 447-48.
4. *Id*.
5. *Id*. at 448.
6. *NetChoice L.L.C.*, 49 F.4th at 490; NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022).
7. *NetChoice, LLC v. Paxton*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/netchoice-llc-v-paxton/ (last visited Apr. 9, 2024) [https://perma.cc/JK55-HMNZ].
8. *History for HB 20*, TEX. LEGISLATURE ONLINE, https://capitol.texas.gov/BillLookup/History.aspx?LegSess=872&Bill=HB20 (last visited Apr. 9, 2024) [https://perma.cc/MSQ2-QDGN].
9. TEX. BUS. & COM. CODE ANN. § 120.002(b) (2023); *see also* TEX. BUS. & COM. CODE ANN. § 120.001(1) (2023) (defining "social media platform" as "an Internet 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").

Association (CCIA) sued the Attorney General of Texas arguing that House Bill 20 was an unconstitutional violation of the First Amendment with a focus on two provisions of the law: Section 2 and Section 7.[10] Section 2 requires social media platforms to disclose how they moderate content, publish a biannual transparency report, and create a system of notice and appeal when the platform removes user-submitted content.[11] Section 7 prohibits a social media platform from censoring "a user, a user's expression, or a user's ability to receive the expression of another person based on . . ." viewpoint or geographic location in Texas.[12]

On December 1, 2021, the district court held for the plaintiffs and issued a preliminary injunction against House Bill 20 finding that both Section 2 and Section 7 of the law were facially unconstitutional, that the law discriminates based on content and speaker since it permits some censorship and only applies to large social media platforms, and that the law fails the heightened scrutiny required by the First Amendment.[13] The defendant appealed to the Fifth Circuit and moved for a stay of the preliminary injunction, which the Fifth Circuit granted and the Supreme Court vacated.[14]

II. ANALYSIS

On appeal, the Fifth Circuit reversed the district court's preliminary injunction, rejecting the appellee's contention that Section 2 (platform disclosure requirements) and Section 7 (prohibition of censorship by platforms) of House Bill 20 unconstitutionally chill their speech.[15]

A. Constitutionality of the Prohibition on Platform Censorship of User Viewpoints

The court began with Section 7 and considered judicial doctrine regarding facial challenges to statutes, First Amendment doctrine, and common carrier doctrine.[16]

1. Pre-Enforcement Facial Challenges and Application of First Amendment Overbreadth Doctrine

The court began by noting the online platforms argued that it must invalidate House Bill 20 entirely before any instance of its enforcement under

10. *NetChoice L.L.C.*, 49 F.4th at 445-46.
11. *Id*. at 446.
12. *Id*. at 445-46 (citing TEX. CIV. PRAC. & REM. CODE ANN § 143A.002(a) (2023); *see also id.* at 446 (citing TEX. CIV. PRAC. & REM. CODE ANN § 143A.001(1) (2023) (defining "censor" as "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or other- wise discriminate against expression")).
13. *NetChoice L.L.C.*, 49 F.4th at 447.
14. *Id*.
15. *Id*.; *Id*. at 485.
16. *Id*. at 447-48.

the First Amendment overbreadth doctrine.[17] Before applying the doctrine, the court recognized that judicial disfavor to pre-enforcement facial challenges such as this one must meet an "extraordinarily high legal standard" for three reasons.[18] First, the court looked to the Founders to conclude that there was no intention to allow Article III judges to void legislation, as they expressly rejected this mechanism upon consideration.[19] Additionally, Article III limits the judicial power to decide "Cases" and "Controversies" which prohibits courts from "anticipat[ing] a question of constitutional law in advance of the necessity of deciding it."[20] Finally, the court considered the risk of facial challenges to a state statute in the federalist system, as it creates an avenue for unelected judges to invalidate the decisions of an elected legislature.[21] With these considerations, the court concludes that a pre-enforcement facial challenge to legislation must show that there is no situation where the law in question would be valid, and they found the online platforms made no attempt to argue this circumstance.[22]

The court turned to the platforms' argument regarding Section 7 of House Bill 20 under the overbreadth doctrine, which is the other valid facial challenge to a law like House Bill 20.[23] Courts apply this doctrine to invalidate a law only "where there is a substantial risk that the challenged law will chill protected speech or association" in the First Amendment context.[24] Crucially for the court's analysis, the overbreadth doctrine "'attenuates' as the regulated expression as the regulated expression moves from 'pure speech towards conduct."[25]

These considerations led the court to reject the online platforms' overbreadth argument with respect to Section 7 (the prohibition on platform censorship of user viewpoints) on three grounds.[26] First, the court holds that platform censorship addressed in Section 7 constitutes conduct rather than the "pure speech" at which the doctrine is aimed to protect.[27] Then the court looked to the context of the overbreadth doctrine, which seeks to address the constitutional rights of third parties whose speech is likely to be chilled because they must avoid the "burden" and risk of litigation due to an overbroad law.[28] The court illustrated this point with individual citizens who refrain from expression due to criminal sanctions imposed by an overbroad law as the exemplary third party the doctrine is intended to protect.[29] In stark contrast to the example, NetChoice and CCIA represent all the parties

17. *Id.* at 448.
18. *Id*. at 449.
19. *NetChoice L.L.C.*, 49 F.4th at 448.
20. *Id*. at 449 (quoting Liverpool, N.Y.C. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)).
21. *Id.*
22. *Id*.
23. *Id*. at 450.
24. *Id*.
25. *NetChoice L.L.C.*, 49 F.4th at 450 (quoting L.A. Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32, 40 (1999)).
26. *Id.*
27. *Id*. at 451.
28. *Id*.
29. *Id.*

regulated under Section 7, all the parties have the resources to litigate an enforcement action under Section 7, and Section 7 only provides for declaratory and injunctive relief rather than criminal sanctions or even damages.[30] Finally, the court cited the Supreme Court's requirement to avoid speculation about hypothetical cases under the overbreadth doctrine and assessed the facial requirements of the statute to find that House Bill 20 allows the censorship of "unlawful expression" and speech that "incites criminal activity or consists of specific threats."[31]

2. Analysis of the Merits of the Platforms' First Amendment Claim

The platforms also claimed that Section 7 regulations prohibiting censorship violated their First Amendment rights which they exercise through content moderation.[32] First Amendment doctrine prohibits regulations that force a host to express something or "interfer[e] with the host's own message."[33] Thus, in its analysis of applicable precedent, the court found that a party that hosts speech can make a First Amendment challenge to a law when it compels the host to speak or restricts the host's own speech.[34]

In its application of precedent on compelled speech, the court distinguished the Section 7 regulations from the unconstitutional right-of-reply statute at issue in *Miami Herald*, where a newspaper publishing critical commentary about a public figure was required to provide space in its paper for that party to publish a reply.[35] In *Miami Herald*, the Supreme Court found the right-of-reply statute unconstitutional because newspapers exercise discretion in affirmatively choosing to publish material, so they are essentially *speaking* to the value of the speech that they publish.[36] As a result, a regulation requiring a newspaper to publish certain information effectively forces them to speak.[37] In contrast, the court here concluded online social media platforms do not exercise the same form of discretion in moderating content.[38] Rather, the court characterized social media platforms as receivers of user information with no editorial discretion outside filtering "obscene and spam-related content," which fails to meet the same level of "substantive, discretionary review akin to newspaper editors."[39]

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30. *Id*.
31. *NetChoice L.L.C.*, 49 F.4th at 451 (quoting TEX. CIV. PRAC. & REM. CODE ANN § 143A.006(a) (2023)).
32. *Id*. at 455.
33. *Id*.
34. *Id*. at 455-59 (citing Mia. Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 15 (1986); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 576 (1995); Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 60 (2006)).
35. *Mia. Herald Pub. Co.*, 418 U.S. at 258.
36. *NetChoice LLC*, 49 F.4th at 459 (citing *Mia. Herald Pub. Co.*, 418 U.S. at 258).
37. *Id*.
38. *Id.* at 459-60.
39. *Id*. at 459; *see also id*. at n. 8.

The court rejected the platforms' counterargument that forced hosting of speech could infringe on their ability to express their own message since someone could equate the hosting of certain speech with an expression of support for its message.[40] First, they reasoned that the Supreme Court rejected this premise in its precedent except where the host is "intimately connected" with the speech.[41] Analogizing this distinction to the case at hand, the court held social media platforms lack the requisite connection that would cause a party to attribute speech on their platform to the company itself because they permit any user to post on virtually any topic as long as the user agrees to their "boilerplate terms of service."[42]

On the second leg of its analysis, the court found Section 7 does not restrict social media platforms from speaking.[43] First, it reasoned platforms do not have limited space to express their speech like the newspaper in *Miami Herald* or the newsletter in *PG&E* where regulatory requirements on what had to be included harmed the parties to speak as they would in their own forums.[44] Second, platforms have the ability to distance themselves from any speech they host unlike parade organizers or any other speech host who is "intimately connected" with the speech they are hosting.[45] Finally, Section 7 lacks a content-based trigger on social media platform's speech unlike *Miami Herald* where the law required newspapers to publish a response if they ran a negative piece on a political candidate.[46]

The court also addressed the platforms' argument that Section 7 infringes on their First Amendment right to editorial discretion.[47] First, they rejected the notion that editorial discretion is a free-standing category of protected expression under the First Amendment, as editorial discretion served as a consideration about the "presence or absence of protected speech" in precedent as opposed to protected expression itself.[48] Furthermore, they concluded that, even if editorial discretion is a protected right, the platforms fail to exercise it because they disclaim the legal responsibility for content that traditionally adheres to editorial discretion and they fail to perform the pre-publication "selection and presentation" that editorial discretion entails.[49]

3. Application of 47 U.S.C. § 230

The court also considered the history of 47 U.S.C. § 230 to conclude that platforms' censorship of users cannot be considered their protected

40. *Id.* at 460.
41. *Id*. at 461-62 (distinguishing the speech in *Pruneyard* and *Rumsfeld* not inherently associated with the owner of the forum and the inherent connection between a parade organizer and the messages expressed in the parade in *Hurley*).
42. *NetChoice L.L.C.*, 49 F.4th at 461-62.
43. *Id.* at 462.
44. *Id.* (citing *Mia. Herald Pub. Co.*, 418 U.S. at 256; *Pac. Gas & Elec. Co.*, 475 U.S. at 24)).
45. *Id.* (citing *Hurley*, 515 U.S. at 576).
46. *Id.* at 462-63 (citing *Mia. Herald Pub. Co.*, 418 U.S. at 244).
47. *Id.* at 463.
48. *NetChoice, L.L.C.*, 49 F.4th at 463.
49. *Id*. At 464-65 (citing Associated Press v. NLRB, 301 U.S. 103, 127 (1937); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998)).

speech.[50] This statute creates broad immunity for most online platforms by expressly stating that they are not treated as the "publisher or speaker" of information provided by another party unless they contribute to the "creation or development" of the content.[51] While recognizing that Congress cannot legislate the definition of what does or does not constitute protected speech, the court reasoned that Congressional fact-finding deserves deference and such deference was particularly warranted in this analysis because online platforms regularly rely on Congress' policy behind § 230 and defend its reasoning.[52] While § 230(c)(2) does allow online platforms to retain immunity even if they remove "objectionable" content, the court interpreted this provision to mean that platforms are still "not like publishers *even when they engage in censorship*."[53]

4. Constitutional Applicability of Common Carrier Doctrine to Online Social Media Platforms

The court invoked common carrier doctrine to hold that Section 7 permissibly creates nondiscrimination requirements for online social media platforms that are consistent with First Amendment protections.[54] This doctrine allows states to create such obligations "on communication and transportation providers that hold themselves out to serve all members of the public without individualized bargaining."[55] In its analysis of the history of common carrier doctrine, the court found two major factors when previous courts have decided whether to impose common carrier requirements on new technologies. First, they looked at whether the "carrier [held] itself out to serve any member of the public without individualized bargaining."[56] Second, courts considered whether the company was "affected by the public interest" which applies if its "service played a central economic and social role in society."[57] The court affirmed precedent that has found common carrier nondiscrimination regulations compatible with individual constitutional protections, as past courts repeatedly upheld such regulation except for cases decided under now-rejected principles.[58]

On the first factor, the court held that online social media platforms fit the category of communications firms because they "held themselves out to serve the public without individualized bargaining" since they only require users to agree to standard terms of service.[59] The platforms argued they did

50. *Id.* at 466.
51. *Id*. (quoting 47 U.S.C. § 230 (2018)).
52. *Id.* at 466-67.
53. *Id*. at 468.
54. *NetChoice L.L.C.*, 49 F.4th at 469.
55. *Id*.
56. *Id*. at 471 (citing JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 495 (9th ed. 1878)).
57. *Id.*
58. *Id*. at 473 (noting the Supreme Court upheld common carrier nondiscrimination obligations except for cases marked by the now-rejected principles of *Lochner v. New York*, 198 U.S. 45 (1905) and the racism of *Plessy v. Ferguson*, 163 U.S. 537 (1896)).
59. *Id.* at 474.

not serve the public equally because they only served those who agreed to their terms of service and they were not generally open to the public because they discriminate against certain users and forms of expression through their content moderation.[60] However, the court concluded that a state can still properly impose common carrier obligations on a communications firm that requires consent to terms and conditions when it offers the same terms to all potential users.[61] Moreover, the court rejected the platforms' second point on the grounds that states have regulated businesses as common carriers even though the businesses have a right to exclude certain customers.[62]

The court then applied the second prong to find that "Texas reasonably determined that the Platforms are 'affected with the public interest.'"[63] Citing recent decisions, the court determined that social media platforms have become a central hub of social and political activity.[64] In addition, it concluded the unique ability of large online platforms to disseminate information and the fact that many of these platforms earn most of their revenue through advertising show that the platforms have become a key part of the economy thus justifying the Texas legislature's decision to regulate them as common carriers.[65] The platforms contended that common carriage regulations are disfavored unless the government contributed to a carrier's monopoly, but the court found previous case law did not require a conferred monopoly and determined that the previously addressed § 230 protections provided by Congress constituted sufficient government report to justify the Texas legislature's common carrier regulations.[66] Finally, the court rejected the platforms' counterarguments that carriage is different from the processing of data and that nondiscrimination obligations of House Bill 20 go beyond the scope of common carrier doctrine and will interfere with how they process the communications.[67] In its reasoning, the court found these arguments based on the premises that common carrier requirements cannot apply to a more complex communication technology like social media, and disagreed finding that these obligations may be drafted to fit the medium they seek to regulate as the doctrine has previously evolved to apply to new technologies and should continue doing so.[68]

60. *NetChoice L.L.C.*, 49 F.4th at 474.

61. *Id*. (citing Semon v. Royal Indem. Co., 279 F.2d 737, 739 (5th Cir. 1960)).

62. *Id.* (citing 47 U.S.C. § 223 (granting telephone companies the privilege to filter obscene or harassing expression while otherwise regulated as common carriers); Williams v. Trans World Airlines, 509 F.2d 942, 948 (2d Cir. 1975) (allowing transportation providers to refuse service to disorderly passengers while otherwise imposing common carrier nondiscrimination regulations)).

63. *Id.* at 475.

64. *Id*. (citing Packingham v. North Carolina, 582 U.S. 98, 107 (2017); Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1178-79 (9th Cir. 2022)).

65. *Id.* at 475-76.

66. *NetChoice L.L.C.*, 49 F.4th at 476-77.

67. *Id*. at 478.

68. *Id*. at 478-79.

5. Application of Intermediate Scrutiny to Section 7

The court continued its analysis with an assumption that Section 7 does affect the First Amendment rights of platforms to conclude that the regulation still survives the intermediate scrutiny applied to content-neutral regulations on speech.[69] In its analysis, the court found Section 7 a content-neutral regulation because it does not depend on the "what" the platform purports to express through its censorship.[70] The platforms contended that Section 7 is a content-based regulation because it specifies certain types of online platforms (i.e. social media), specifies the platforms that are regulated by a certain size, permits certain types of censorship but not others, and targets the largest social platforms due to specific disagreement with their style of censorship.[71] In its, dismissal of these arguments the court noted that precedent shows that regulation of a specific medium does not raise concerns of content-based regulation and Section 7's allowance for censorship covers expression unprotected by the First Amendment, which suggests it's unrelated to the underlying expression.[72] Furthermore, the court concluded the major thrust of the law's platform size scope served the interest of broadening expression since Section 7 aimed to foster the diversity of ideas on these large platforms.[73] Finally, the court held there was insufficient evidence or precedent to suggest the Texas legislature targeted specific platforms.[74]

Since the court considered Section 7 content-neutral, it applied the intermediate scrutiny test where a regulation is permissible if it "advances important government interests unrelated to the suppression of free speech and does not burden more speech than necessary to further those interests."[75] The court looked to the Texas legislature's findings to determine that the regulation advanced the important government interest of "protecting free exchange of ideas and information" and confirmed this as a substantial government interest from Supreme Court precedent labeling this as a "government purpose of the highest order."[76] Then, it ruled that the regulation does not burden more speech than necessary citing the platforms' inadequate alternatives of suggesting the government could create its own platform, but with the large platforms' unique prominence and value of their network effects on the dissemination of viewpoints, the court held that there was no realistic less-restrictive alternative.[77]

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69. *Id.* at 480.
70. *Id*.
71. *Id*. at 480-82.
72. *NetChoice L.L.C.*, 49 F.4th at 480-81 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 660 (1994) [hereinafter *Turner I*]; R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992)).
73. *Id.* at 482.
74. *Id.*
75. *Id*. (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997)).
76. *Id.* (citing *Turner I*, 512 U.S. at 663).
77. *Id.* at 483-84.

B. Analysis of Pre-enforcement Facial Relief Against Section 2 of House Bill 20

The Fifth Circuit took up the platform's second contention that they are entitled to relief from the disclosure requirements in Section 2.[78] The court held these requirements were not unduly burdensome under Supreme Court precedent set out in *Zauderer*, where the court held that states can require disclosure of "purely factual and uncontroversial information."[79] The court concluded that the regulation met this requirement because its forms regulations imposed minimal burden by requiring tasks that many of these platforms already perform, and the burdens preferred by the platforms constituted speculation that would be better adjudicated on a case-by-case basis when they actually occurred.[80]

78. *NetChoice L.L.C.*, 49 F.4th at 485.
79. *Id.* (citing Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985)).
80. *Id.* at 485-87.