PROGRAM MATERIALS
Program #3310
January 17, 2023

Will the Courts Destroy Social Media? The 5th and 11th Circuits Clash on Content Moderation

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WILL THE COURTS DESTROY SOCIAL MEDIA?: The 5th and 11th Circuits Clash on Content Moderation

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NEW YORK

CELESQ JANUARY 17,2023

Introduction: Social Media

What was the promise of social media?

- **Connecting with friends, family and local communities.**
- **Exchanging photos and short videos.**
- **A platform for focused discussions on any topic "under the sun."**
- **The open Public Forum for a lively public debate on issues of local, national, or international interest.**
- **Games, cartoons and diversions.**

Introduction: Social Media

What has been the reality of social media?

- The spread of prejudice and hate speech.
- The harassment of public and private individuals.
- "Free" advertising for all politicians and political groups.
- The spread of objectively false and sometimes dangerous information.
- The proliferation of profane and obscene materials.
- The spread of extreme political views on the Left and Right.
- A platform for foreign enemies to publish deceptive posts seeking to cause social divisions.

Introduction: Social Media

How did social media companies like Facebook, Twitter and Instagram respond?

- **Establishing and publishing strict Terms of Use.**
- **Creating large teams of content moderators working in every major region and language.**
- **Using artificial intelligence to scan the flood of content and identify potential offending words, images and content.**
- **Deleting content that violated the company's Terms of Use.**
- **Blocking groups and individuals who repeatedly violated the Terms of Use.**

Introduction: Social Media

The heightened use of social media in 2016 and 2020 national election cycle.

Some political groups and individuals violated the social media company's Terms of Use, and their content was blocked or deleted.

A few political figures who repeatedly violated the Terms of Use and were banned as users.

Misinformation about Covid-19 was deleted as potentially harmful.

The social media companies were criticized for having a Silicon Valley and West Coast "liberal bias."

Introduction: Social Media

The criticism of social media companies by conservative groups erupts when Donald Trump is banned from Twitter.

> *"After close review of recent Tweets from the @realDonaldTrump account and the context around them we have permanently suspended the account due to the risk of further incitement of violence*," **Twitter's official "Safety" account, January 8, 2021**

This account had 88 million followers. The reaction was predictable…..

The Florida Legislation

Texas and Florida pass legislation seeking to impose controls on social media companies.

Florida enacts Senate Bill 7072. Gov. Ron DeSantis asserts that the bill

"guaranteed protection against the Silicon Valley elites."… "If Big Tech censors enforce rules inconsistently, to discriminate in favor of the dominant Silicon Valley ideology they will now be held accountable." (Signing Statement, May 24, 2021)

The Florida Legislation

The May 24, 2021 Signing Statement continued:

"What we're seeing today across the U.S. is an effort to silence, intimidate, and wipe out dissenting voices by the leftist media and big corporations. …Florida is taking back the virtual public square as a place where information and ideas can flow freely."
Lt. Gov. Jeanette Nunez

The law was represented as "leveling the playing field" for politicians, particularly those claiming social media bias against their conservative political views.

The Florida Legislation

Terms of Florida Senate Bill 7072
(Florida Statutes §§106.072. 501.2041.)

The law is intended to protect all forms of political speech, particularly active political candidates, and to restrict social media companies from "deplatforming" candidates for political office in Florida.

The statute defines "deplatforming" as temporarily or permanently deleting or banning a user from a website.

The Florida Legislation

Key provisions include:

- To “censor” is defined as any action taken by a social media platform to delete, restrict, edit or suspend a right to post.
- To “shadow ban” is defined as any action to limit or eliminate the exposure of a user or content or the material posts of a user and which are not readily apparent apparent to the user.

The Florida Legislation

- **A social media platform may not knowingly edit, shadow ban or deplatform a political candidate in Florida and may face a fine for these actions.**
- **A social media platform may not censor a user's content or deplatform a user without notifying the user.**
- **If any social media content is "censored" the social media site must provide a precise and thorough rationale explaining its actions for censoring the content.**
- **Obscene materials are not covered and do not require notice.**

The Florida Legislation

Enforcement of Senate Bill 7072

- The Florida Department of Legal Affairs (DLA) is authorized to investigate any deplatforming or other violation of the statute.
- DLA may investigate suspected violations.
- DLA may bring administrative or civil actions.
- Individuals have a limited private right of action based on failures of notice of censoring.
- A proven claim may result in statutory damages of up to $100,00 or actual or punitive damages plus equitable relief.
- A proven case of deplatforming may result in attorney fees and costs.

The Texas Legislation

“Silencing conversative views is un-American, it’s un-Texan and it’s about to be illegal in Texas”

Gov. Greg Abbott (Twitter, March 5, 2021, 8:35PM)

The Texas Legislation

Texas enacts HB 20
(Tex. Civ. Prac. & Rem. Code §143.001 *et seq*.)

Signed September 9, 2021.

The law provides a framework so that "[a] social media platform may not censor a user's expression, or a user's ability to receive the expression of another person"

The statute is applicable to social media sites with "50 million active users in the United States in a calendar month" and is open to individuals who wish to communicate information, comments or images" (§ 143A.004)

The Texas Legislation

Key provisions prohibited censoring based on:

- **The viewpoint of a user or another person;**
- **The viewpoint of the user represented in any expression;**
- **The user's location with the state of Texas.**

The Texas Legislation

The only exceptions to this broad prohibition:

- **An explicit federal law authorizing some form of censorship;**
- **Preventing the sexual exploitation of children;**
- **Protection of survivors of sexual abuse;**
- **The direct incitement of criminal activity or threats of violence; and**
- **Other "unlawful" expression.**

The Texas Legislation

The enforcement of HB 20:

- **An Individual may bring an action for**
  - **Declaratory or injunctive relief.**
  - **Reasonable attorney's fees.**
- **The Texas Attorney General may**
  - **Seek injunctive relief for a violation or a "potential violation" of HB 20.**

Free Speech and the CDA

The Florida and Texas legislation was a direct challenge to the free speech rights of social media sites which are all owned by private corporations.

The U.S. Congress recognized the social media sites generally did not create their own content but relied upon "user generated content" which could be posted without editorial review.

User generated content, particularly the potential access to pornography by children, created a huge liability risk for social media sites.

Free Speech and the CDA

In 1995 Congress passed the Communications Decency Act (CDA) 47 U.S.C. §230

The CDA offers broad immunity to any interactive computer service. It states that a service cannot be held liable for any action,

> **"voluntarily taken in good faith to restrict access to …material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable, whether or not such material is constitutionally protected."** 47 U.S.C. §230(c)(2)(A)

The Florida Litigation - District Court

An industry group, Netchoice LLC, promptly files an application in U.S. District Court to enjoin the enforcement of the new law.

Netchoice, LLC v. Attorney General, State of Florida, 546 F. Supp.3d 1082 (N.D. Fla. 2021)

District Judge Robert L. Hinkle, issued an injunction on June 30, 2021, ruling:

- **The statute likely violates the federal CDA.**
- **The statute infringes on the First Amendment and the free speech rights of the social media site owners to exercise editorial judgment.**
- **The statute discriminates against social media sites based on their size and if they own a theme park in Florida (i.e., Disney).**

The Florida Litigation- 11th Cir. Appeal

Florida appealed to the Eleventh Circuit to overturn the District Court's injunction.
Netchoice v. Attorney General, 34 F.4th 1196 (11th Cir. 2022)

The Eleventh Circuit's decision began its First Amendment analysis by citing Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

> **"The Supreme Court has long recognized that the First Amendment freedom of speech encompasses the freedom to select, edit, and present speech. Writing in the context of a newspaper editorial page, the Court explained that "[t]he choice of material . . . the decisions made as to limitations on the size and content . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."**

The Florida Litigation - 11th Cir. Appeal

On the application of the First Amendment, the Eleventh Circuit upheld the District Court and concluded that,

> **"…a private entity's decisions about whether, to what extent, and what manner to disseminate third-party content to the public are editorial judgments protected by the First Amendment…[S]ocial media platforms' content moderation decisions constitute the same sort of editorial judgments and thus trigger First Amendment scrutiny."**

The Florida Litigation - 11th Cir. Appeal

Florida also asserted that social media sites are "common carriers" for transmitting the users' content and it had the right to regulate common carriers.

- **The Eleventh Circuit disagreed, noting, "…social media platforms aren't 'dumb pipes.'"**
- **"Rather the platform will have exercised editorial judgment in two key ways: First, the platform will have removed the posts that violate its terms of service or community standards…Second it will have arranged available content by choosing how to prioritize and display posts-effectively selection which users' speech the viewer will see…"**

The Florida Litigation - 11th Cir. Appeal

The Eleventh Circuit also relied on the terms of the Federal Telecommunications Act of 1996 which differentiated "interactive computer services," like social media platforms, from common carriers or telecommunications providers. 47 U.S.C. 223(e)(6).

Its decision concludes that social media sites "are not common carriers with diminished First Amendment rights."

The Texas Litigation – District Court

Texas HB 20 was also the subject of litigation to enjoin its enforcement.

NetChoice LLC v. Ken Paxton, 573 F. Supp. 3rd 1092 (W.D.Tx. 2021)

District Judge Robert Pittman issued a preliminary injunction staying enforcement of HB 20 until a trial on the merits. He concluded that the plaintiff was likely to succeed on the merits because,

- **The social media sites were private actors exercising editorial controls to make the sites user friendly.**
- **The sites wanted to avoid postings that were pornographic, propaganda, substantive misinformation and otherwise offensive.**

The Texas Litigation – District Court

- **Prior Supreme Court decisions on First Amendment litigation, including *Miami Herald Pub.*, which stated newspapers had the right to exercise "editorial control and judgment" and may decide to treat "public issues and public officials- whether fair or unfair."**

Pittman's decision concluded that "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press…"

The decision rejected the comparison of social media sites to common carriers.

The Texas Litigation – Appeals

Texas promptly appealed Judge Pittman's decision and injunction to the Fifth Circuit.

On May 11, 2023, the Fifth Circuit stayed Judge Pittman's injunction in a summary ruling with no opinion.

Netchoice appeals the Fifth Circuit's ruling to the Supreme Court.

Justice Alito refers the appeal to the full Supreme Court, which vacated the Fifth Circuit's actions and reinstated the District Court's injunction on May 31, 2022.

Justice Alito files a dissent.

The Texas Litigation – Appeals

The Alito dissent considered whether social media sites are common carriers.

Justice Alito's dissent was joined by Justices Thomas and Gorsuch.

Justice Alito stated "[i]t is not obvious how our existing precedents, which predate the age of the internet, apply to large social media companies…"

Noting that the Texas statute only applies to the largest entities, Alito asserts that they have "some measure of common carrier-like power" to "shut out [disfavored] speakers."

The Texas Litigation – Appeals

Subsequently, on September 16, 2022, the Fifth Circuit issued a 2-1 opinion upholding HB 20 and rejecting Netchoice's arguments.

Netchoice v. Paxton, 2022 U.S. App. LEXIS 26062 (5th Cir.)

In considering the First Amendment issues, the Fifth Circuit repeatedly adopts the language of the statute in referring to the "censorship" exercised by the subject social media companies.

The Court's decision also addressed the issue of whether social media companies should be considered common carriers, as asserted by Texas.

The Texas Litigation – Appeals

The Fifth Circuit adopts the view of social media sites as "common carriers."

The concept of common carriers was first raised in a concurring opinion of Justice Thomas in Biden v Knight First Amendment Institute at Columbia University, 141 S.Ct. 1220 (2021).

The Fifth Circuit considered the broad user base impacted by the social media sites and their expressed purpose of communicating expression and images.

The Court concluded that considering the broad communications impact of the sites. It was appropriate to consider the to be common carriers for purposes of legal analysis.

The Supreme Court Appeals

On October 12, 2022, the Fifth Circuit agrees to stay HB 20's enforcement pending a petition of certiorari to the Supreme Court.

Netchoice filed its *Writ of Certiorari with* the Supreme Court on December 15, 2022. It sought to reverse the Fifth Circuit's decision and ruling of September 16, 2022.

Previously, the State of Florida filed its *Writ of Certiorari* on September 21, 2022.

The Supreme Court Will Decide

The Supreme Court must consider the conflicting Circuit Court decisions relating to the Florida and Texas statutes.

Open issues include:

- **Does the CDA preempt the actions of both states?**
- **Should only the largest social media sites be considered to be common carriers?**
- **May a state regulate the speech of social media companies?**

The Supreme Court Will Decide

- **Do the disputed statutes infringe the First Amendment rights of the largest social media companies?**
- **Can social media companies be compelled to allow all political speech, no matter how false, prejudiced, violent or sourced from foreign propaganda efforts?**
- **May a state require social media companies to notify users when their content has been deleted and provide a detailed reason for such actions?**
- **Will social media become overwhelmed by hate speech, threats, obscenity, and the worst elements of society?**

Other Supreme Court Cases to Follow

- **Gonzalez v. Google, No. 21-1333**

  Challenging CDA, § 230(c)(1) because Google aided in the dissemination of ISIS videos which lead to the death of a U.S. citizen. Did Google aid and abet ISIS? Does it have financial liability for aiding in the death?

- **Twitter v. Taamneh, No. 21-1496**

  Challenging CDA, § 230(c)(1) because while Google's generic search resources seek to identify and block terrorist information, Google could have taken more aggressive action to eliminate all sources of this information.

Questions?

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Peter Brown - speaker

Peter Brown has focused his legal practice on Information Technology matters for over 30 years. He is currently the principal of Peter Brown & Associates PLLC, a NY boutique law firm concentrating in IT and IP transactions, litigation, and arbitrations. He was previously a partner at large national law firms. Mr. Brown has served as an arbitrator on over one hundred matters relating to technology and intellectual property. "The Best Lawyers in America" ® publication honored his firm as a National Tier One practice for Information Technology Law in 2023. Mr. Brown co-authored the seminal treatises *Emerging Technologies and the Law* and *Computer Law*. He can be reached **pbrown@browntechlegal.com**.