Court Enjoins Texas Social Media "Censorship" Law

By Avery Westerlund

On December 1, 2021, Judge Pitman of the Western District of Texas granted a preliminary injunction to prevent the Texas Attorney General from enforcing HB 20. NetChoice v. Paxton. HB 20 prohibits large social media platforms from "censoring" content based on "viewpoint." By enacting HB 20, Texas legislators sought to regulate content moderation decisions by social media platforms they believed opposed conservative views. Texas Governor Greg Abbott made this goal clear by tweeting, "Silencing conservative views is un-American, it's un-Texan and it's about to be illegal in Texas." The Court found that this law burdened social media platforms' First Amendment rights and enjoined its enforcement.

Background

HB 20 applies to any website or app "(1) with more than 50 million active users in the United States in a calendar month, (2) that is open to the public, (3) allows users to create an account, and (4) enables users to communicate with each other "for the primary purpose of posting information, comments, messages, or images." The law prohibits these platforms from "censor [ing] 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 (3) a user's geographic location in this state or any part of this state." There are two content-based exceptions that allow platforms to moderate content related to (1) child exploitation and harassment of sexual abuse victims and (2) incitement of criminal activity or violence against individuals or groups based on "race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge."

The law also forces platforms to comply with disclosure and operational requirements which will drastically change how these platforms handle content moderation. The requirements mandate that each platform create acceptable use policies, complaint processes for violative content, and appeals processes for any content removal. Finally, platforms must provide periodic statistics regarding content moderation enforcement.

Any Texan, anyone doing business in Texas, anyone who "shares or receives expression in [Texas]" or the Texas Attorney General may sue to enforce HB 20. The Attorney General can also bring an action to enforce "potential violations."

The plaintiffs, NetChoice LLC and Computer & Communications Industry Association, trade associations with members affected by HB 20, recently obtained a preliminary injunction against a similar Florida statute.

Claims and Ruling

The Court first addressed the State's claim that the plaintiffs did not have standing to sue. It found that the plaintiffs possessed associational standing because their members, like Facebook, Twitter, and YouTube, would have standing, and the plaintiffs' requested relief, an injunction, did not require their members' participation. The Court also found that the plaintiffs possessed organizational standing because they alleged an injury in fact: plaintiffs diverted resources and incurred expenses to prepare for HB 20's effect on their members. As a result, the Court found that the plaintiffs could sue to enjoin the Texas Attorney General's enforcement of HB 20.

The Court focused on the plaintiffs' First Amendment and vagueness claims in ruling on the preliminary injunction. In considering the plaintiffs' likelihood of success on the merits, the Court found that HB 20 restricted the affected social media platforms' editorial discretion in violation of the First Amendment and was impermissibly vague.

First, the Court found that social media platforms exercise editorial discretion. The State claimed the platforms were merely common carriers that acted as passive conduits for user content. The State also claimed that the platforms' use of algorithms to screen content did not constitute discretion. However, the Court found that unlike common carriers that "merely facilitate the transmission of speech of others," these social media platforms screened, moderated, and curated user content. At times, these platforms even added their own speech to user content. This content curation constituted the exercise of editorial discretion by the platforms, similar to newspaper editors "hand-selecting an article to publish." According to the Court, whether the content curation was handled by an algorithm or a human was "a distraction." "The core question [was] still whether a private company exercises editorial discretion over the dissemination of content, not the exact process used."

The Court cited various Supreme Court precedents in stating that "private companies that use editorial judgment to choose whether to publish content—and, if they do publish content, use editorial judgment to choose what they want to publish—cannot be compelled by the government to publish other content." Thus, HB 20's prohibition on alleged censorship violated the First Amendment by compelling social media platforms to publish content they otherwise would not. The prohibition also burdened the platforms' speech by forbidding them from engaging with content they may disagree with, such as labelling posts as misinformation.

The Court also found that HB 20 discriminated based on content and speaker. The State provided no legitimate reason as to why HB 20 permitted platforms to moderate content in two narrow circumstances and not others. The Court did not find convincing any reasons provided for the State's decision to restrict the definition of "social media platform" to platforms with over 50 million users. The evidence clearly indicated the Texas Legislature intended to target social media platforms that they viewed as biased towards conservative views—a motive which did not pass First Amendment scrutiny.

Next, the Court found that HB 20's operational requirements would impermissibly chill speech. The evidence showed that the new complaint and appeal requirements would likely force platforms to review billions of pieces of removed content and that the platforms would be unable to comply with the requirements before the law came into effect. Additionally, the disclosure requirements would force platforms to speak when they otherwise would not. Finally, the threat of enforcement of "potential violations" would likely discourage social media platforms' speech in violation of the First Amendment.

Turning to the plaintiffs' vagueness argument, the Court found that HB 20's requirement that social media platforms give all content "equal access or visibility" was "nearly impossible" given the immense amount of content published. Thus, the requirement was impermissibly vague.

Finally, neither of the alleged interests served by HB 20 could save the statute from strict scrutiny or intermediate scrutiny. First, the State argued that HB 20 allowed for "free and unobstructed use of public forums and of the information conduits provided by common carriers." However, the Court found the platforms subject to the law are not public forums or common carriers. In fact, the Supreme Court had already rejected this as a sufficient governmental interest. Second, the State claimed HB 20 protected citizens from discrimination. However, this interest was also previously rejected by the Supreme Court. Even if the State had presented viable interests served by HB 20, the Court found that the law was not narrowly tailored.

After determining that the plaintiffs had demonstrated their likely success on the merits, the Court briefly discussed the other factors in granting a preliminary injunction—considering irreparable harm, balance of the equities, and whether the injunction served the public interest. On these points, the Court found that the loss of First Amendment freedoms would cause social media platforms irreparable harm, and since the State presented no compelling interests, it would suffer no harm from a preliminary injunction. Finally, the Court held that an injunction protecting First Amendment rights was "always in the public interest." Thus, the Court granted the injunction enjoining HB 20's enforcement.

The State has already appealed the grant of the preliminary injunction to the Fifth Circuit Court of Appeals. The District Court granted the plaintiffs' motion to stay discovery pending appeal and denied the State's motion to stay the preliminary injunction pending appeal.

Avery Westerlund is an associate in the Dallas office of Vinson & Elkins, LLP. She, Tom Leatherbury, and students from the First Amendment Clinic at Southern Methodist University Dedman School of Law assisted David Greene and Mukund Rathi of the Electronic Frontier Foundation in filing an amicus brief supporting the plaintiffs' motion for preliminary injunction. MLRC, RCFP, ACLU, ACLU Texas and Center for Democracy & Technology filed an amicus brief in support of plaintiffs. Plaintiff NetChoice was represented by Scott A. Keller, Lehotsky Keller LLP.