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## **If Supreme Court lets Texas censor law proceed, internet will be a cesspool. Or not.**

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May 19, 2022

As the U.S. Supreme Court mulls Big Tech's emergency bid to halt the imminent enforcement of Texas' anti-censorship law for large social media companies, the law's potential impact is very much a matter of which side you ask.

Texas Attorney General Kenneth Paxton argued in a brief filed Wednesday that it's no big deal if the Supreme Court allows the bill to take effect as two tech trade groups challenge its constitutionality. The Texas law, which prohibits social media companies with more than 50 million users in the U.S. from "censoring" users based on their viewpoints, contains exceptions, the AG's brief said, to assure that the sites can continue to block objectionable content, such as posts inciting violence or exploiting children.

Twitter, Facebook and YouTube - the only sites actually affected by the law, according to Texas - can also block entire categories of content, like, say, pornography videos or posts from government officials outside of the U.S., if they're worried that the law would otherwise require them to host offensive material.

In short, according to the Texas AG, the law "narrowly applies." There won't be any irreparable harm to Twitter, Facebook or YouTube - let alone the rest of the internet - if the Supreme Court allows the AG to enforce the statute while the trade groups' challenge proceeds.

That is not at all what the trade groups - NetChoice, LLC and the Computer and Communications Industry Association - and their amici told the Supreme Court in their briefs over the last week in NetChoice, LLC v. Paxton.

Filings from such groups as the Anti-Defamation League, the Cato Institute and the think tank TechFreedom predicted that the Texas law will lead to a proliferation of hateful speech and videos; material encouraging sex with children and extolling terrorists; depictions of animal cruelty; and social media posts celebrating suicide and other self-destructive behavior.

To underscore that point, TechFreedom's lawyers from Hogan Lovells even reproduced (or graphically described) content that has previously been censored by Facebook, Twitter and YouTube but would purportedly be irremovable under the Texas law. Believe me, it's not stuff you want to see or even read about.

But according to the tech groups and their amici, if the Supreme Court allows the Texas law to take effect, social media platforms will have no choice but to open the floodgates, or else face an endless litany of lawsuits from the Texas AG or just from individual users disgruntled with their editorial decisions.

Without a stay of the law, they insisted, these behemoth social media sites will be forced immediately to revamp worldwide content moderation systems that have cost them billions of dollars to develop, argued the tech groups and amici. The platforms will also face the loss, according to NetChoice and CCIA, of untold millions of dollars in revenue from advertisers “who do not want their ads to appear next to vile, objectionable expression.”

So we are either on the verge of a small (but necessary) course correction to response balance to social media -- or an irreversible swerve into a cesspool of unmoderated content.

And all before any appeals court has even issued an opinion on the constitutionality of the Texas law.

That's the key context for the debate in the Supreme Court briefing on the tech groups' request to block the law for now. The 5th U.S. Circuit Court of Appeals threw the usual process into chaos, argued the trade groups' lawyers from Lehotsky Keller and Kirkland & Ellis, when it issued an unsigned, one-sentence order on May 11 that stayed a trial court's preliminary injunction decision barring the Texas law from taking effect.

The 5th Circuit order, issued days after oral argument in Texas's appeal of the injunction, offered no explanation or rationale for allowing enforcement of a law deemed unconstitutional by a federal trial judge. Moreover, the trade groups' petition said, the 11th Circuit is already deep into consideration of a similar anti-censorship law passed by Florida legislators, after a Florida trial court enjoined the law last June as a violation of the First Amendment.

The trade groups and their amici told the Supreme Court that its most prudent course would be to preserve the status quo, allowing social media platforms to continue their content moderation practices until the 5th and 11th Circuits have issued actual opinions on whether the Texas and Florida anti-censorship laws violate the First Amendment or are pre-empted by Congressional protection for internet publishers under Section 230 of the Communications Decency Act.

The Texas AG, meanwhile, contends that it would be an extraordinary departure from standard practices for the Supreme Court to reverse the 5th Circuit without any reason to believe that the lower court's reasoning was wrong -- after all, we don't know what the 5th Circuit's reasoning was -- or that the appellate ruling will cause irreparable harm. The AG's insistence that its law will cause only a ripple in the social media flow is intended to undermine the tech companies' best argument for a stay.

Of course, both sides also argued strenuously that they're right on the merits of the Texas law's constitutionality. There will be plenty of opportunity as the litigation progresses to dive into the constitutional arguments, but, in brief, Texas portrays social media sites alternatively as "hosts" of user content that aren't entitled to the First Amendment protections afforded to publishers or as "common carriers," like telephone or telegraph companies, subject to government regulation. (That argument aligns with a 2021 concurrence from Justice Clarence Thomas in a case involving former President Trump's Twitter account.)

The tech trade groups and their amici assert that social media sites are publishers, not mere pipelines for user content, and are therefore entitled to First Amendment protection from government intrusion on their editorial decisions.

These arguments deserve the Supreme Court's measured consideration. The issue now is whether it will be too late to repair any damage if the tech companies are right.