Supreme Court blocks Texas social media moderation ban

The legal fight over HB 20 continues

Adi Robertson

May 31, 2022

A Texas law that would have banned much social media moderation is once again on hold. In a 5-4 ruling handed down today, the Supreme Court vacated an earlier decision by the Fifth Circuit Court of Appeals, meaning that HB 20 — which forbids banning, demonetizing, or downranking Texas users' posts based on "viewpoint" — will be blocked while a lawsuit over its constitutionality proceeds. A lower court had already blocked the law in 2021 before the Fifth Circuit unblocked it this May.

NetChoice and the Computer and Communications Industry Association (CCIA), who filed suit to stop HB 20, petitioned the Supreme Court for a ruling earlier this month — responding to a surprising and unexplained ruling from the Fifth Circuit. Justice Samuel Alito initially reviewed the emergency request and referred it to the rest of the court. While Alito himself didn't favor vacating that ruling, he was in the minority. Justices John Roberts, Stephen Breyer, Sonia Sotomayor, Amy Coney Barrett, and Brett Kavanaugh voted in support of the decision, while Alito was joined by Justices Clarence Thomas, Neil Gorsuch, and Elena Kagan.

Alito's dissent describes the case as concerning "issues of great importance that will plainly merit this Court's review," namely "a groundbreaking Texas law that addresses the power of dominant social media corporations to shape public discussion of the important issues of the day." It suggests that the Texas law, as well as a similar one from Florida, could occupy courts for years to come.

NetChoice counsel Chris Marchese celebrated the decision in a statement. "Texas's HB 20 is a constitutional trainwreck," said Marchese. "We are relieved that the First Amendment, open internet, and the users who rely on it remain protected from Texas's unconstitutional overreach."

Following the Supreme Court's decision over the stay, the lawsuit over HB 20 will continue in a lower court, leading to a more final decision about whether to overturn it. While a district court was highly critical of the law, the Fifth Circuit ruling followed a hearing where judges appeared to dismiss concerns about the First Amendment and Section 230 of the Communications Decency Act, both of which NetChoice and the CCIA allege are violated by HB 20.

Texas Attorney General Ken Paxton defended the law in a filing with the Supreme Court. Paxton argued that large social media platforms (defined as having more than 50 million monthly active users) are "common carriers" that should be required to treat all content neutrally, saying they would not be seriously harmed by the rule taking effect as the lawsuit moves forward. "The platforms are the twenty-first century descendants of telegraph and telephone companies," Paxton wrote. "While the platforms compare their business policies to classic examples of First Amendment speech, such as a newspaper's decision to include an article in its pages, the platforms have disclaimed any such status over many years and in countless cases."

But NetChoice and the CCIA argued that HB 20 would make basic moderation decisions unworkable. "Platforms should not be compelled by government to disseminate the vilest speech imaginable — such as white supremacist manifestos, Nazi screeds, Russian-state propaganda, Holocaust denial, and terrorist-organization recruitment," they said in a brief filed with the Supreme Court. A lower court judge reached a similar conclusion and blocked the law late last year before the Fifth Circuit's reversal, saying moderation would "benefit users and the public." A judge blocked a comparable Florida law as well, although he singled out some provisions that weren't in the Texas rule, like a bizarre exception for theme park operators. The Eleventh Circuit Court of Appeals also upheld the block earlier this month.

HB 20's practical implications are confusing, particularly after a recent comment from its author, Texas House of Representatives lawmaker Briscoe Cain. In a tweet following the mass shooting in Buffalo, New York, Cain claimed HB 20 wouldn't stop site operators from removing content mentioned by Section 230, including "excessively violent" content like a video of the attack. But Section 230 also protects moderating *any* content that is legal but "objectionable" — contradicting an earlier claim and implying that the law would be effectively meaningless. Meanwhile, the bill includes a provision forbidding sites from banning Texas-based users, a requirement with little legal precedent.

Nonetheless, briefs from several organizations and policy experts weighed in on its legality, mostly in favor of NetChoice. (One of Texas' supporters was the state of Florida, whose own legal situation would be bolstered by a Texas victory.) The bill's opponents included groups whose missions diverge significantly otherwise, including the libertarian-leaning Cato Institute and TechFreedom, the Anti-Defamation League, the American Civil Liberties Union, and the Wikimedia Foundation. Chris Cox, who co-authored Section 230 as a Republican congressional representative, also filed in support of NetChoice.

Individual tech companies, by contrast, have been almost entirely silent on the law. Meta, Twitter, and Google all declined to provide comment on their plans after the Fifth Circuit's decision. So did other companies whose services would likely be affected, including the Match Group (which operates Tinder and many other dating apps) and Automattic (which owns Tumblr and WordPress.com). TikTok, Pinterest, Reddit, Discord, and others did not reply to a request for comment. So far, no legal complaints appear to have been filed against them under HB 20.