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A 180 on Section 230: State Efforts to Erode Social Media Immunity

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A 180 on Section 230: State Efforts to Erode Social Media Immunity

Leslie Y. Garfield Tenzer¹

Hayley Margulis²

Abstract

The turmoil of the 2020 presidential election renewed controversy surrounding 47 U.S.C § 230. The law, adopted as part of the 1996 Communications Decency Act (CDA), shields Interactive Computer Services (ICS) from civil liability for third-party material posted on their Platforms—no matter how heinous and regardless of whether the material enjoys constitutional protection. Consequently, any ICS, which is broadly defined to include Internet service providers (ISPs) and social media platforms (Platforms), can police its own postings but remains free from government intervention or retribution.

In 2022, members of the Texas and Florida legislatures passed laws aiming to limit the scope of platform immunity. Although substantively different, the Texas and Florida laws are theoretically the same; they both seek to punish Platforms that regulate forms of conservative content that the legislatures argue liberal Platform’s silence, regardless of whether the posted content violates the Platform’s published standards.

Shortly after each law’s adoption, two tech advocacy groups filed suits in federal district courts challenging the laws as violative of the First Amendment. This essay highlights the two laws and the cases that have considered the constitutionality of these laws. The Circuit court decisions have led to a

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split leading to a likely Supreme Court decision on the constitutionality of 47 U.S.C. § 230, with the potential to disrupt the freedom from government intrusion that Platforms currently enjoy.

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I. INTRODUCTION

The turmoil of recent political elections has renewed controversy surrounding 47 U.S.C § 230. The law, adopted as part of the 1996 Communications Decency Act (CDA), shields Interactive Computer Services (ICS) from civil liability for third-party material posted on their Platforms—no matter how heinous and regardless of whether the material enjoys constitutional protection. Consequently, any ICS, which is broadly defined to include Internet service providers (ISPs) and social media platforms (Platforms),³ can police its own postings but remains free from government intervention or retribution.

Despite the arguable *carte blanche* § 230 offers, Platforms have been careful to curtail violent or reprehensible posts.⁴ Twitter, Facebook, and YouTube developed community standards, violations of which can result in temporary or permanent bans from their Platforms.⁵ These rules apply to any user.⁶

On January 8, 2021, Twitter permanently suspended @realDonaldTrump.⁷ The decision followed an initial warning to the then-President and conformed to Twitter’s publisher standards as defined in its public interest framework.⁸ The day before, Meta (then Facebook) restricted President Trump’s ability to post content on Facebook or Instagram.⁹ Both

3. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Social media allows users to know “current events, check [] ads for employment, speak [] and listen [] in the modern public square, and otherwise explor[e] the vast realms of human thought and knowledge.” *Id.*

4. Meta has created detailed standards on what people can communicate in order to keep abuse off the service. *Facebook Community Standards*, META, <https://transparency.fb.com/policies/community-standards/?source=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards%2F> (last visited Sept. 11, 2022).

5. *See id.*; *The Twitter Rules*, TWITTER HELP CENTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules> (last visited Sept. 11, 2022); *Community Guidelines*, YOUTUBE, <https://www.youtube.com/howyoutubeworks/policies/community-guidelines/> (last visited Sept. 11, 2022).

6. Meta has ensured that everyone’s voice is valued and has created these standards to include a wide range of different views and beliefs. *See Facebook Community Standards*, *supra* note 4.

7. In a blog post, Twitter advised Trump has been permanently suspended. *Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.

8. Twitter’s public interest framework enables the general population to hear directly from world leaders and elected officials. The principle behind this framework is that the public should have the right and power to account in the open. However, world leaders and elected officials must still abide by Twitter’s rules and cannot use the platform to incite violence. *Id.*

9. Meta is the corporate conglomerate that used to be called Facebook. Meta has upheld

companies cited President Trump's posts praising those who violently stormed the U.S. Capitol on January 6, 2021, in support of their decisions.

Members of the Texas and Florida legislatures, together with their governors, were seemingly enraged that these Platforms would silence President Trump's voice.¹⁰ In response, each immediately passed laws aiming to limit the scope of Platforms.¹¹ Although substantively different, the Texas and Florida laws are theoretically the same; they both seek to punish Platforms that regulate forms of conservative content that the legislatures argue liberal Platforms silence, regardless of whether the posted content violates the Platform's published standards.¹²

Shortly after each law's adoption, two tech advocacy groups, NetChoice¹³ and Computer and Communication Industry Association (CCIA),¹⁴ filed suits in federal district courts challenging the laws as violative of the First Amendment. Each case has made its way through the federal courts on procedural grounds. The Eleventh Circuit upheld a lower court's preliminary injunction prohibiting Florida from enforcing the statute until the case is decided on the merits.¹⁵ In contrast, the Fifth Circuit overruled a lower court preliminary injunction.¹⁶ Texas appealed the Fifth Circuit ruling to the Supreme Court of

Facebook's decision to keep Donald Trump's accounts suspended. Nick Clegg, *Oversight Board Upholds Facebook's Decision to Suspend Donald Trump's Accounts*, META (May 5, 2021), <https://about.fb.com/news/2021/05/facebook-oversight-board-decision-trump/>.

10. In a press conference during the signing of Texas House Bill 20, Governor Abbott stated, "[T]here is a dangerous movement by social media companies to silence conservative viewpoints and ideas." Press Release, *Governor Abbot Signs Law Protecting Texans From Wrongful Social Media Censorship*, OFFICE OF THE TEXAS GOVERNOR (Sept. 9, 2021), <https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship>. Governor DeSantis also condemned the Silicon Valley oligarchs during the signing of S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021) for de-platforming Trump and other conservatives. Press Release, *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, FLGOV.COM (May 24, 2021), <https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/>.

11. See H.B. 20, 87th Leg., 2d Spec. Sess. (Tex. 2021); FLA. STAT. § 501.2041 (2022); *infra* notes 42 and 56.

12. See *infra* notes 53–63 and accompanying text.

13. See *About Us*, NETCHOICE, <https://netchoice.org/about/#our-mission>.

14. See *News*, CCIA, <https://www.cciagnet.org/>.

15. See *NetChoice, LLC v. Att'y Gen.*, Fla., 34 F.4th 1196 (11th Cir. 2022).

16. See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022), *vacated sub nom. NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1715 (2022).

the United States, which, by a vote of 5-4, voted to reinstate the injunction and remand the issue to the lower court. The Fifth Circuit on review found that the district court abused its discretion in granting a preliminary injunction.¹⁷ The court upheld the Texas statute on constitutional grounds, but subsequent proceedings stayed enforcement of the law.¹⁸ The Supreme Court's decision and the split between the Fifth and Eleventh Circuits make clear that these cases are headed to the Supreme Court on the merits.

This essay highlights the two laws and the cases that have considered the constitutionality of these laws. Part I of this essay briefly describes § 230 of the Communications Decency Act, illustrating the policy reasons behind Congress' bipartisan adoption of the federal law.¹⁹ Part I also highlights 47 U.S.C. § 230's legislative intent that ICSSs, which includes Platforms, remain free from government intrusion. Part II explains Florida's section 501.2041 and Texas House Bill 20, the social media regulations that each state adopted. Part III summarizes the judicial paths of *NetChoice, LLC v. Moody* and *NetChoice, LLC v. Paxton*, which were preliminary injunction challenges to the Florida and Texas laws respectively. Part IV illustrates the Supreme Court's keen interest in considering the constitutionality of 47 U.S.C. § 230 and makes clear that both the Florida and Texas cases are headed to the Supreme Court on the merits with the potential to disrupt the freedom from government intrusion that Platforms currently enjoy.

II. 47 U.S.C. § 230

In 1996, Congress passed, and President Bill Clinton signed into law, the Communications Decency Act (CDA), which included 47 U.S.C. § 230.²⁰ § 230 shields Platforms from liability for defamatory or other tortious or

17. *Id.*

18. *Id.* The court remanded the decision to the lower court "for further proceedings consistent with [the court's] opinion." *Id.* at 494.

19. See *Reno*, *infra* note 20 and accompanying text.

20. The Supreme Court invalidated much of the Communication Decency Act (CDA) as unconstitutional in the 1997 decision of *Reno v. ACLU*, ruling that the CDA violated free speech protections of the First Amendment because it suppressed a large amount of protected speech to protect minors from harmful speech. 521 U.S. 844, 864 (1997).

criminal posts.²¹ The law was the brainchild of Chris Cox (R-Cal.) and Ron Wyden (D-Or.), Congressmen who were concerned that holding ICSs responsible for user-generated content would chill the Internet's growth.²² They proposed the law, which Congress adopted as part of the Communication Decency Act (CDA),²³ in response to a growing number of lawsuits against ICSs for third-party defamatory content.²⁴

§ 230's legislative intent supports its dual goals of Internet growth and protection against inappropriate online material. Congress adopted the law with stated policies including to "promote the continued development of the Internet and other interactive [online] services"²⁵ and to preserve the

21. 47 U.S.C. § 230 (1996).

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Id. at § 230(c).

22. Senator Wyden, who is often credited with creating the Internet as we know it, stated, "if you unravel 230, then you harm the opportunity for diverse voices, diverse platforms, and, particularly, the little guy to have a chance to get off the ground." Emily Stewart, *Ron Wyden Wrote the Law That Built the Internet. He Still Stands by it - and Everything it's Brought With it*, VOX.COM (May 16, 2019), <https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality>.

23. The CDA imposed criminal sanctions on individuals who transmitted or viewed child pornography. The CDA also criminalized the transmission of "obscene or indecent" materials to persons known to be under eighteen.

24. In cases like *Stratton Oakmont, Inc. v. Prodigy Services Co.*, Prodigy Services controlled the content of its bulletin board, Money Talk, and was deemed a publisher, not a distributor, therefore being held liable for the information and posts on Prodigy's platform. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). This was overruled by *Force v. Facebook, Inc.* in 2019 which stated 47 U.S.C. § 230(c)(1) provides that "no . . . interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 934 F.3d 53, 63–64 (2d Cir. 2019) (quoting 47 U.S.C. § 230(c)(1)).

25. *See* 47 U.S.C. § 230(b)(1).

competitive free market that exists on the Internet.²⁶ The provisions of the bill are, naturally, consistent with these goals.

Two provisions make up the primary framework for a Platform’s immunity. § 230(c)(1) states that service providers and users are not considered publishers of content that third parties provide on their Platforms.²⁷ § 230(c)(2) states that online service providers and users are not liable for voluntarily acting in good faith to restrict access to “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” material.²⁸ Together, these create the “Good Samaritan” or “Safe Harbor” provision of the CDA, relieving ICSs from liability for third-party content published on their Platforms.

Since its passage, courts have adopted an interpretation of ICSs to include web sites and Platforms.²⁹ Consequently, policy groups,³⁰ scholars,³¹ and most notably politicians,³² have called for its revision, arguing that as currently applied, the statute is overly broad. Two states, Texas and Florida, have

26. *Id.* at § 230(b)(2). The third is to “encourage the development of technolog[y] which maximize[s] user control over what information is received.” *Id.* at § 230(b)(3). The fourth is to remove disincentives and utilize blocking and filtering technology to help parents protect children from inappropriate material online. *Id.* at § 230(b)(4). The last is to ensure enforcement of “criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of [the Internet].” *Id.* at § 230(b)(5).

27. *Id.* at § 230(c)(1).

28. *Id.* at § 230(c)(2)(A).

29. *See, e.g., Doe v. Twitter*, 555 F. Supp. 3d 889 (N.D. Cal. 2021); *Gonzalez v. Google*, 2F4th 871 (9th Cir. 2021) *cert. granted*, 2022 WL 4651229 (mem.); *Poole v. Tumblr, Inc.* 404 F. Supp. 3d 637 (D.C. Conn. 2019); *Banaian v. Bascom*, 220 WL 1482521 (N.H. 2022). *See also* *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1089 (N.D. Fla. 2021) (“Under § 230, a provider of interactive computer services—*this includes, as things have evolved, a social-media provider*—cannot be ‘held liable’ for any action ‘taken in good faith to restrict access to or availability of material that the provider’”) (emphasis added). In April 2021, the Congress Research Service provided an overview of § 230, twenty-five years after its adoption. The report observed concerns that the courts provided an overly broad interpretation of the statute by expanding it to Platforms. Valerie C. Brannon & Eric N. Holmes, *Section 230: An Overview*, CONGRESSIONAL RESEARCH SERVICES, (2021). In 2017, the Supreme Court decided *Packingham v. North Carolina*. In the case, Justice Alito defined the term “social media” broadly to include Facebook, Amazon, online newspapers, and even WebMD. *Id.* at 1736–37.

30. *See* Michael D. Smith & Marshall Van Alstyne, *It’s Time to Update Section 230*, HARV. BUS. REV. (Aug. 12, 2021), <https://hbr.org/2021/08/its-time-to-update-section-230>.

31. Legal scholars have put forward proposals to tie a “platform’s safe-harbor protections to its use of reasonable content-moderation policies.” *Id.*

32. Joe Biden advised that § 230 should be revoked immediately. *Id.*

passed bills seeking limitations on what they see as unfair limitless liability for Platforms.³³

III. STATE LEGISLATION AIMED AT LIMITING THE REACH OF 47 U.S.C § 230

In 2021, Texas and Florida adopted legislation aimed at diluting the immunity that § 230 grants to Platforms. Both states' laws stemmed largely from Twitter and Facebook's decisions to ban then-President Trump from their Platforms following his social media use responding to the insurrectionists on January 6, 2021.

On January 6, 2021, President Trump posted a video to Facebook, Twitter, and YouTube showing demonstrators storming the Capitol. In the video, Trump stated, "I know your pain. I know you're hurt. We had an election that was stolen from us. It was a landslide election and everyone knows it, especially the other side," ending by stating, "I know how you feel, but go home, and go home in peace."³⁴ Trump also shared a post to Twitter stating, "[t]hese are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long."³⁵ The Platforms quickly deleted the video, Tweet, and other posts from Trump.³⁶ In a statement, Twitter wrote, "[a]fter close review of recent Tweets from the @realDonaldTrump account and the context around them—specifically how they are being received and interpreted on and off Twitter—we have permanently suspended the account due to the risk of further incitement of

33. See H.B. 20, 87th Leg., 2d Spec. Sess. (Tex. 2021); FLA. STAT. § 501.2041 (2022); see also *infra* notes 39 and 40.

34. See WBUR Newsroom, *TRANSCRIPT | 'Go Home': Trump Tells Supporters Who Mobbed Capitol to Leave, Again Falsely Claiming Election Victory*, WBUR (Jan. 6, 2021), <https://www.wbur.org/news/2021/01/06/go-home-trump-supporters-us-capitol-transcript>.

35. *Tweets of January 6, 2021*, THE AMERICAN PRESIDENCY PROJECT (Jan. 6, 2021), <https://www.presidency.ucsb.edu/documents/tweets-january-6-2021>.

36. On January 6, 2021, Twitter took the steps of removing three of former President Trump's tweets. The third tweet read, "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!" *Id.* All three tweets are no longer available because it violated the Twitter Rules.

violence.”³⁷ Its decision came after an earlier warning that it would not tolerate additional violations of its policies. Shortly after Twitter and Facebook removed the posts, and on the same day as the insurrection on the Capitol, Twitter banned Trump’s account for twelve hours due to severe violations of its Civic Integrity Policy.³⁸

The bans prompted two states, Florida and Texas, to adopt legislation strictly limiting social media companies’ ability to police its content. The Florida law prohibits Platforms from silencing any political candidate’s speech and sets administrative procedures for finding these Platforms in violation of Florida antitrust laws.³⁹ The Texas legislation outlaws de-platforming particular viewpoints and puts limits on a Platform’s ability to use algorithms.⁴⁰ Both laws provide significant financial penalties and potential severe restrictions to their present business practices.

A. *The Florida Legislation—FLA. STAT. § 501.2041 (2022)*

On May 24, 2021, Florida Governor Ron DeSantis signed into law section 501.2041 (2022).⁴¹ Stated most broadly, section 501.2041 sanctions Platforms for “knowingly” de-platforming a candidate for office.⁴² The law includes additional provisions relating to consequences for antitrust violations

37. See *Permanent Suspension of @realDonaldTrump*, *supra* note 7.

38. Twitter cited its Civic Integrity Policy as support for its decision. See *Civic Integrity Policy*, TWITTER HELP CENTER, <https://help.twitter.com/en/rules-and-policies/election-integrity-policy> (last visited Sept. 17, 2022). Having his personal account suspended on Twitter, Trump attempted to tweet from associated accounts which were promptly blocked as well. Twitter also banned Trump’s campaign account and the @TeamTrump account. Brian Fung, *Twitter Bans President Trump Permanently*, CNN.COM (Jan. 9, 2021, 9:19 AM EST), <https://www.cnn.com/2021/01/08/tech/trump-twitter-ban/index.html>.

39. See FLA. STAT. § 501.2041 (2022).

40. See H.B. 20, 87th Leg., 2d Spec. Sess. (Tex. 2021).

41. While signing § 501.2041, DeSantis stated, “[w]hen you de-platform the president of the United States but you let Ayatollah Khamenei talk about killing Jews, that is wrong.” Richard Luscombe, *Florida Governor Signs Law Against Tech Firms De-Platforming Politicians*, THE GUARDIAN (May 25, 2021), <https://www.theguardian.com/us-news/2021/may/25/florida-governor-de-platforming-politicians-law-ron-desantis>.

42. See § 501.2041(1)(c). The law defines de-platforming as any “action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days.” *Id.*

and a private user's right to sue.⁴³

Section 501.2041 makes it unlawful for Platforms to post prioritized content, which is the act of favoring certain content so that it figures prominently into a user's feed.⁴⁴ The statute likewise states that a Platform may not use "shadow ban" algorithms. Section 501.2041 defines shadow ban to mean any action that blocks a user, whether by "a natural person or an algorithm," from limiting or removing a user's exposure to posted material on a Platform without the user's knowledge.⁴⁵ The law includes provisions that impose financial consequences on Platforms that censor a political candidate's content.⁴⁶ The statute defines Platforms as "information service, system, Internet search engine, or access software provider that . . . have annual gross revenues of \$100 million or has at least 100 million monthly individual Platform participants globally."⁴⁷

In addition, section 501.2041 establishes restrictions for receiving State economic benefits and prohibits contracts with public entities for any Platforms that violate Florida's antitrust laws. If the Attorney General designates an antitrust violation against a social media company for failure to comply with state or federal antitrust laws, the Platform is placed on an Antitrust Violator Vendor List and prohibited from contracting with the State.⁴⁸ A Platform that fails to comply with the requirements of section 501.2041 may be found in violation of the Florida Deceptive and Unfair Trade Practices Act by the Department of Legal Affairs.

Section 501.2041 creates a "blacklist" of any "information service,

43. See § 501.2041, *supra* note 39.

44. *Id.*

45. See § 501.2041(1)(f). Shadow banning is a practice used in online moderation that consists of preventing a user's content from being seen by others without the user being notified or aware of it, typically done as a consequence for violating a Platform's rules. *Shadow Banning*, DICTIONARY.COM, <https://www.dictionary.com/browse/shadow-ban> (last visited Sept. 17, 2022).

46. *Id.* (stating a platform may be liable of up to \$100,000 in statutory damages per proven claim against them).

47. See § 501.2041(1)(g)(4)(a); § 501.2041(1)(g)(4)(b). As originally drafted, the law exempts from the definition of Platforms "any information service, system, internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex." Act of 2022, Pub. L. No. SB 6-C (2022).

48. See FLA. STAT. § 287.137 (2022). The bill provides for exceptions from the applicability of the antitrust violator provisions. *Id.*

system, Internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex accused of removing a candidate or violating any antitrust law.⁴⁹ The law acknowledges that its enforcement is limited by 47 U.S.C. § 230, the CDA’s Safe Harbor provisions, which grants Platforms immunity from lawsuits for third-party posts.⁵⁰

The law also grants social media users a private cause of action. Users may bring a cause of action for failure to comply with section 2 of the law—the provision that requires Platforms to publish its censorship, de-platforming and shadow banning standards.⁵¹ The law grants successful users up to \$100,000 in statutory damages per claim as well as actual and punitive damages. If a Platform illegally de-platforms a user, the user may also recover costs and attorney’s fees.⁵²

At the time Governor DeSantis signed the bill into law, he said the Platforms’ “primary mission, or one of their primary missions, seems to be suppressing ideas that are either inconvenient to the narrative or that which they personally disagree with.”⁵³ In his circuit court opinion, which considered granting a motion to uphold a preliminary injunction to stop enforcement of the law, Judge Hinkle wrote, “The Governor’s signing statement and numerous remarks of legislators show rather clearly that the legislation is viewpoint-based.”⁵⁴ Commentators agree with Judge Hinkle that the law is politically

49. See Dominick Reuter, *The New Florida Law That Fines Tech Platforms for Removing Politicians Has a Huge Loophole for Companies That Own Theme Parks in the State*, INSIDER (May 25, 2021), <https://www.businessinsider.com/florida-censorship-law-loophole-for-theme-park-operators-2021-5>. This provision is aimed at immunizing Disney and Universal Studios, both of which have theme parks located in Orlando, Florida. *Id.*

50. See § 501.2041(9).

51. See § 501.2041(7). Each failure to comply with the individual provisions of subsection (2) shall be treated as a separate violation, act, or practice.

52. See § 501.2041(6). The law grants successful users up to \$100,000 in statutory damages per claim as well as actual and punitive damages. If a Platform illegally de-platforms a user, the user may also recover costs and attorney’s fees.

53. John Kennedy, *Florida Governor Oks Social Media Crackdown*, HERALD-TRIBUNE (May 24, 2021), <https://www.heraldtribune.com/story/news/politics/state/2021/05/24/florida-gov-desantis-signs-legislation-cracking-down-social-media/5243573001/>.

54. NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1084 (N.D. Fla. 2021), *aff’d in part, vacated in part, remanded sub nom.* NetChoice, LLC v. Att’y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022).

motivated.⁵⁵ The Florida law’s limitation to the censorship of candidate—as opposed to all user—speech, coupled with the timing of the bill’s introduction favor the notion that the law is a retributive measure aimed at the government’s belief that Platforms unfairly favor a particular point of view.

B. The Texas Law—H.B. 20, 87th Leg., 2d Spec. Sess. (Tex. 2021)

On August 11, 2021, Texas State Representative Briscoe Cane, a Republican from Deer Park, Texas, introduced Tex. H.B. 20, 87 Leg., 2d Spec. Sess. (Tex. 2021), also known as Texas House Bill 20, which prohibits Platforms with more than 50 million users in the United States from removing or restricting any users’ content based on their viewpoint.⁵⁶ Section 1(3) of the law defines Platforms as common carriers,⁵⁷ and section 1(4) legislates that the market dominance of large social media companies supports its conclusion of the common carrier definition.⁵⁸ The legislature likely designated Platforms as common carriers since courts have held that common carriers do not enjoy unfettered free speech rights.⁵⁹ In so doing, the legislation forces the court to

55. See, e.g., Adrian Moore, *Florida’s Social Media Law is Unconstitutional*, REASON FOUNDATION (July 9, 2021), <https://reason.org/commentary/floridas-social-media-law-is-unconstitutional/>; Steven Lemongello, *DeSantis Loses Again in Court as Critics Say His Political Ambition Drives Challenged Law*, ORLANDO SENTINEL (Aug. 3, 2021), <https://www.orlandosentinel.com/politics/os-ne-desantis-agenda-courts-20210809-v73gdekj7ffddaswwpvnbrqnm-story.html>.

56. See Tex. H.B. 20 § 143A.002(a).

A social media platform may not censor 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.

Id.

57. *Id.* at § 1(3).

58. *Id.* at § 1(4).

59. In *Biden v. Knight First Amendment Institute At Columbia University*, Justice Thomas states, “[T]his Court long ago suggested that regulations like those placed on common carriers may be justified, even for industries not historically recognized as common carriers, when ‘a business, by circumstances and its nature, . . . rise[s] from private to be of public concern.’” 141 S. Ct. 1220, 1223 (2021) (citing *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1914)). In *NetChoice, LLC v. Paxton*, the legislature recognized Texas’ right to regulate Platforms through the common carrier doctrine. 49 F.4th 439, 445 (5th Cir. 2022). See Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021).

contemplate an issue that opponents of § 230 have long been advocating.

Section 120.001 of the law defines Platforms as any application that allows users to communicate with other users with the “primary purpose of posting information, comments, messages, or images.”⁶⁰ It excludes ISPs, companies that provide access to the Internet, and electronic mail carriers such as Microsoft Outlook, which does not offer an ability to share views outside a designated addressee.⁶¹

Section 143A.002 is the heart of the law. This section prohibits a Platform from censoring any user’s expression based on their viewpoint.⁶² The law reaches beyond viewpoint posts to prohibit Platforms from censoring a user’s post, even if the decision is based on “disagreeable” comments that appeared elsewhere.⁶³ Section 143A.007 is the statute’s remedial section. It allows individual users to recover against Platforms that violate rights stated in the law. The remedies in the Texas statute are narrower in scope than those of the Florida law and limit the user to declaratory and injunctive relief along with costs and attorney’s fees if successful.⁶⁴ The law grants the Texas Attorney General authority to enforce all provisions of House Bill 20.⁶⁵

There are several consumer-type provisions to the law. Section 120.051 mandates broad disclosure requirements for Platforms, including an accurate explanation of how the Platform curates and targets users and moderates its content, among other practices. The provision also requires Platforms to maintain an “acceptable use policy.”⁶⁶ Section 120.101 also mandates that social media companies provide consumers with an accessible complaint system,⁶⁷ but also allows aggrieved social media users to sue Platforms for illegal

60. See Tex. H.B. 20 § 120.001(1).

61. *Id.* at § 120.001(1)(A)–(1)(B). See TEX. BUS. & COM. § 324.055(a)(1) (defining an ISP as “a person providing connectivity to the Internet or another wide area network”).

62. See Tex. H.B. 20 § 143A.002.

63. *Id.* at § 143A.002(b).

64. *Id.* at § 123A.007.

65. *Id.* at § 143A.008.

66. A Platform must “publicly disclose accurate information regarding its content management, data management, and business practices.” *Id.* at § 120.051(a). Specifically, a Platform must easily disclose how they moderate content to its users. *Id.*

67. *Id.* at § 120.101.

content or activity.⁶⁸

House Bill 20 carves out exceptions that are favorable to the State. House Bill 20 does not include “platforms that are devoted to news, sports, entertainment [or] other information [where] their users do not primarily generate” the material.⁶⁹ The second exception is that the Platforms retain the power and discretion to take down any content involving sexual exploitation, or other content that directly incites criminal activity or threats of violence that are targeted against a person or group because of race, color, disability, religion, national origin, age, sex, or status as a peace officer or judge.⁷⁰ The law itself aims to prohibit judges or arbitrators from permitting waivers of the exception, denying Platforms an avenue of exemption.⁷¹

Section 143.002 of House Bill 20’s language singling out the limitation on user viewpoint censorship based on the user’s geographic location suggests the law is directly aimed at the legislature’s perceived threat of censorship.⁷² Implicit in the language is that Platforms tend to censor red state views. State Representative Briscoe Cain (R-Deer Park) who authored House Bill 20, confirms this interpretation. In proposing the bill, he argued that “a small handful of Platforms drive the national narrative and have massive influence over the progress and developments of medicine and science, social justice movements, election outcomes, and public thought.”⁷³ Silencing the conservative viewpoint, he maintained, was tantamount to discrimination because it unfairly favored one set of voices over another.⁷⁴ There is little evidence, however, that Platforms stifle conservative viewpoints unless they run contrary to a Platform’s rules and regulations.⁷⁵ Absent evidence that Platforms are

68. *Id.*

69. See Adam Liptak, *Supreme Court Blocks Texas Law Regulating Social Media Platforms*, THE NEW YORK TIMES (May 31, 2022), <https://www.nytimes.com/2022/05/31/us/politics/supreme-court-social-media-texas.html?referringSource=articleShare>.

70. *Id.*

71. *Id.* at § 123A.003.

72. See § 123A.002. “A social media platform may not censor a user . . . based on . . . a user’s geographic location in this state or any part of this state.” *Id.*

73. See Kailyn Rhone, *Social Media Companies Can’t Ban Texans Over Political Viewpoints Under New Law*, THE TEXAS TRIBUNE (Sept. 2, 2021), <https://www.texastribune.org/2021/09/02/texas-social-media-censorship-legislature/>.

74. *Id.*

75. See *Differences in How Democrats and Republicans Behave on Twitter*, PEW RESEARCH

removing conservative conversations without cause, the law is not likely to change its stated goal of assuring a diversity of political viewpoints.

From the start, observers argued that both Texas House Bill 20 and Florida's section 501.2041 were direct threats to free speech and nothing more than reactions to social media's limitation on President Trump's agenda. The statutes, they argued, violated Constitutional rights, and infringed on the non-governmental companies' rights to do business as they choose. Within weeks of the passage of each bill, private citizen groups challenged the laws in federal courts.⁷⁶

IV. CHALLENGES TO STATE LEGISLATION

Not-for-profits reacted swiftly to the Florida and Texas bills. The Computer & Communication Industry Association (CCIA), a technology advocacy group,⁷⁷ and NetChoice, a not-for-profit whose mission is to "make the Internet safe for free enterprise and free expression,"⁷⁸ joined forces to challenge both laws. In both instances, the plaintiffs alleged that the laws violated Platforms' First Amendment rights by compelling them to host objectionable content inconsistent with both their terms of service and their companies' policies and beliefs.⁷⁹

On May 27, 2021, three days after Governor DeSantis signed the bill into law, NetChoice and CCIA filed suit in federal district court to invalidate

CENTER (Oct. 15, 2020), <https://www.pewresearch.org/politics/2020/10/15/differences-in-how-democrats-and-republicans-behave-on-twitter/>.

76. See *About Us*, *infra* note 78.

77. "CCIA promotes open markets, open systems, open networks, and full, fair, and open competition." *Who We Are*, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, <https://www.ccianet.org/about/who-we-are/> (last visited Sept. 17, 2022). Its members include a wide range of communications companies, technology manufacturers, developers, service providers, and integrators. *Id.* Members include ISPs, software companies and telecom companies like Apple, Amazon, eBay, Google, Facebook, Pinterest, and Yahoo. See *Members*, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, <https://www.ccianet.org/about/members/> (last visited Sept. 17, 2022).

78. See *About Us*, NETCHOICE, <https://netchoice.org/about/#our-mission> (last visited Sept. 17, 2022). Its members include many companies similar to CCIA like Twitter, Facebook, Amazon, and Uber. *Id.*

79. Complaint for Declaratory and Injunctive Relief at 44, *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1084 (N.D. Fla. 2021), *aff'd in part, vacated in part, remanded sub nom.* *NetChoice, LLC v. Att'y Gen.*, Fla., 34 F.4th 1196 (11th Cir. 2022) (No. 4:21-CV-00220-RH-MAF).

section 501.2041. In *NetChoice, LLC v. Moody*,⁸⁰ the plaintiffs filed for a preliminary injunction to prevent enforcement of section 501.2041 until a federal court could hear the case on the merits. The complaint took aim at the statute's unworkable mandate of the law's de-platforming provision, which, they argued, strips social media companies' First Amendment right to terminate a candidate's views even if they are illegal or egregious.⁸¹ The plaintiffs claimed that section 501.2041 impermissibly granted Florida the right to regulate a Platform's community guidelines, violated the commerce clause, and ran afoul of § 230.⁸²

On the merits, the plaintiffs argued that section 501.2041 violates an individual's First Amendment right to Free Speech and Free Press by compelling businesses to host highly objectionable speech and grants the State the right to supervise online conduct, thereby overruling community guidelines. The parties also made a void-for-vagueness claim, charging that the statute uses ill-defined words that are hard or impossible to gauge.⁸³

The companies made First Amendment arguments regarding Texas House Bill 20 that were similar to their arguments against the Florida law. In their motion for a preliminary injunction, filed in the District Court for the Western District of Texas on September 22, 2021, both NetChoice and CCIA explained why the law violated 47 U.S.C. § 230. First, they argue that Congress titled § 230 "[p]rotection for private blocking and screening of offensive material"⁸⁴ and Texas House Bill 20 removes from social media companies the very conduct that the title of § 230 sought to grant. § 230 preempts that

80. *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1084 (N.D. Fla. 2021), *aff'd in part, vacated in part, remanded sub nom.* *NetChoice, LLC v. Att'y Gen.*, Fla., 34 F.4th 1196 (11th Cir. 2022). Ashley Moody (R) is the 38th Attorney General for the State of Florida and has been serving as such since January of 2019. The defendants also include Joni Poitier, Commissioner of the Florida Elections Commission; Jason Allen, Commissioner of the Florida Elections Commission; John Hayes, Commissioner of the Florida Elections Commission; Kymberlee Smith, Commissioner of the Florida Elections Commission; and Patrick Gillespie, Deputy Secretary of Business Operations of the Florida Department of Management Services.

81. *Id.* at 1085.

82. *Id.*; see § 501.2041(1)(g)(4)(a); § 501.2041(1)(g)(4)(b), *supra* note 47. Plaintiffs also cited the law's exemption of large theme parks as violative of the Equal Protection Clause. The Florida Legislature subsequently removed that portion of the statute.

83. *Id.*

84. See 47 U.S.C. § 230.

portion of the Texas Law that purports to impose liability for other decisions to remove or restrict access to content and the parts of the Bill applicable to a Platform's restriction of access to posted material.⁸⁵ The complaint also raised a Commerce Clause argument noting that Texas House Bill 20 regulates how the Platforms may display content to non-Texan users.⁸⁶

On October 1, 2021, NetChoice and CCIA sued the State of Texas in federal district court on the merits of the legislation. The claims were similar to those raised in their motion for a preliminary injunction—that Texas House Bill 20 violates the First, Fifth, and Fourteenth Amendments. Under the First Amendment, NetChoice and CCIA claimed that the law violates a company's right to decide whether to host specific kinds of speech, violates the rights of online businesses by having Texas police control speech online, forces private businesses to host speech they would otherwise remove or restrict, and punishes and discriminates against specific speakers by only targeting companies over a certain size. The other claims the plaintiffs made against Texas House Bill 20 include that it is void for vagueness,⁸⁷ it violates the Commerce Clause, the Full Faith and Credit Clause, the Fourteenth Amendment's Due Process Clause, and the Equal Protection Clause.⁸⁸ Finally, plaintiffs argued that the law is preempted under the Supremacy Clause.

The district courts in Florida and Texas swiftly took up the complaints, with the companies arguing first for a preliminary injunction and then for a hearing on the merits.⁸⁹ The cases took divergent paths as they made their way through the federal courts.

85. See Tex. H.B. 20 § 143A.006(b).

86. NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1101 (W.D. Tex. 2021), *vacated and remanded sub nom.* NetChoice LLC v. Paxton, No. 21–51178, 2022 WL 4285917 (5th Cir. Sept. 16, 2022).

87. “A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. . . . [U]nduly vague laws violate Due Process whether or not speech is regulated.” ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 1229 (6th ed. 2020).

88. See, e.g., 42 U.S.C. § 1983.

89. See NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1091 (N.D. Fla. 2021), *aff'd in part, vacated in part, remanded sub nom.* NetChoice, LLC v. Att’y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022); Paxton, 573 F. Supp. 3d at 1101.

A. *NetChoice, LLC v. Moody*

A district court for the Northern District of Florida granted the plaintiff's motion for a preliminary injunction. Judge Robert Hinkle, authoring the order, found that the law was mostly preempted by federal regulation and for this reason plaintiffs were likely to succeed on the merits.⁹⁰ The nineteen-page order, which Judge Hinkle laid out by numbering each of his responses to the defendant's arguments, took issue with almost every part of the law, writing that it was enacted as "an effort to rein in social-media providers deemed too large and too liberal."⁹¹

In his opinion, Judge Hinkle observed that Florida violated § 230 by prohibiting Platforms from censoring lewd or criminal content.⁹² The judge found that the State's First Amendment argument—that it has a right to regulate content it finds offensive—was "wholly at odds with accepted constitutional principles," since the law is an effort of government to regulate private speech.⁹³ The limits of the First Amendment, he observed, end with governmental—and not private—intrusion on individual rights.⁹⁴

Judge Hinkle then turned his attention to whether the statute would survive strict scrutiny. Strict scrutiny, according to Judge Hinkle, was the appropriate standard considering the law, which applied to candidates for office and no other citizens, was "as content-based as it gets."⁹⁵ Judge Hinkle used the words of those who were defending the legislation against them. Citing quotes by Governor DeSantis and Senator Ana Maria Rodriguez,⁹⁶ Judge Hinkle noted that the elected officials' legislative intent to promote conservative voices was not a "compelling state interest."⁹⁷ Ultimately, the judge found that section 501.2041 was an ideological effort to promote conservative

90. *See Moody*, 546 F. Supp. 3d at 1084.

91. *Id.* at 1096.

92. *Id.* at 1089–90. Judge Hinkle concluded that de-platforming requires a company to post content that violates its standards and policies, violating § 230(e), which provides that a Platform is immune from any good faith action to restrict objectionable constitutionally protected material. *Id.*

93. *Id.* at 1090.

94. *Id.* at 1090–91.

95. *Id.* at 1093.

96. *Id.* at 1094.

97. *Id.* at 1095.

voices, and since the State was unlikely to succeed on the merits, the plaintiffs met their burden to justify a preliminary injunction.⁹⁸

Judge Hinkle noted the public policy implications of finding in favor of the Florida law. Upholding section 501.2041 would discriminate between public speakers. It was also unlikely to result in the type of balance that the Florida politicians sought to secure.

A unanimous panel for the Eleventh Circuit renamed the case *NetChoice, LLC v. Attorney General of Florida*, reviewed the district court for abuse of discretion, and affirmed the lower court's ruling.⁹⁹ While the appellate court reached the same conclusion as the lower court, its reasonings differed.¹⁰⁰ The circuit court was unclear whether intermediate or strict scrutiny was the appropriate level of review.¹⁰¹ In their opinion, Judge Hinkle's reliance on section 501.2041 proponents' rhetoric was not enough to justify his conclusion that the law was viewpoint-based.¹⁰² Consequently, the court found some, but not all, of the law viewpoint-based.¹⁰³

Regardless of the appropriate level of scrutiny, the Eleventh Circuit concluded that section 501.2041 would not pass constitutional muster.¹⁰⁴ The law impacted the Platforms' constitutionally protected editorial judgment.¹⁰⁵ Moreover, "a law that requires the Platform to disseminate speech with which it disagrees interferes with its message and thereby implicates its First Amendment rights."¹⁰⁶ Applying a host of Supreme Court precedent, the court reached the conclusion that Platforms are akin to most other private businesses, all of which have a right to regulate the contents that they

98. See *About Us*, *supra* note 78.

99. See *Att'y Gen., Fla.*, 34 F.4th at 1231.

100. *Id.*

101. *Id.* at 1210.

102. *Id.*

103. *Id.* at 1208.

104. *Id.*

105. *Id.* at 1210. The Court has protected the right to editorial judgment of both the left and the right. Some platforms exercise editorial judgment to promote explicitly political agendas. On the right, ProAmerica Only promises "No Censorship | No Shadow Bans | No BS | NO LIBERALS." And on the left, The Democratic Hub says that its "online community is for liberals, progressives, moderates, independent[s] and anyone who has a favorable opinion of Democrats and/or liberal political views or is critical of Republican ideology."

106. *Id.* at 1217.

moderate, curate and deliver.¹⁰⁷ For that reason, the First Amendment prohibits a state from regulating their message.¹⁰⁸

The court rejected Florida's argument that Platforms were common carriers.¹⁰⁹ Unlike the Texas Law, which included Platforms in their definition of common carriers, the Florida Attorney General raised the issue in her argument before the court, claiming that the large sector of the public that Platforms serve place them within the group of non-governmental actors that states may regulate. Common carriers, like railways and telecommunication companies, according to federal law, hold themselves out as serving members of the public and therefore have limited First Amendment rights.¹¹⁰ The circuit court rejected Florida's claim on three grounds: first, that Platforms never acted like common carriers; second, that Supreme Court does not support including Platforms in its definition of common carriers; and third, that Congress, through its legislation, has distinguished social media companies from common carriers it regulates.¹¹¹

While the court rejected most of Florida's arguments, it did agree that there were parts of section 501.2041 that would survive a challenge on the merits. The court found a compelling governmental interest in those parts of section 501.2041 related to consumer awareness, such as granting user data access and publishing Platform standards. Because the court found that over half of the statute as written would not survive a constitutional challenge, it upheld the district court opinion.¹¹²

107. See *United States v. Stevens*, 559 U.S. 460, 473 (2010); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46–48 (1986); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 106 (1986); *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

108. See *Att'y Gen., Fla.*, 34 F.4th at 1217.

109. *Id.* at 1215.

110. *Id.* at 1231.

111. *Id.* at 1215.

112. See *Moody*, *supra* note 54. See also § 106.072(2) (candidate de-platforming would be unconstitutional); § 501.2041(2)(h) (posts by/about candidates would be unconstitutional); § 501.2041(2)(j) (“[j]ournalistic enterprises” would be unconstitutional); § 501.2041(2)(b) (“consistency” would be unconstitutional); § 501.2041(2)(c) (30-day restriction would be unconstitutional); § 501.2041(2)(f),(g) (user opt-out would be unconstitutional); § 501.2041(2)(d) (explanations (per decision) would be unconstitutional); § 501.2041(2)(a) (standards would be constitutional); § 501.2041(2)(c) (rule changes would be constitutional); § 501.2041(2)(e) (user view count would be,

By the end of May 2022, the court ruled in favor of NetChoice and granted the preliminary injunction against section 501.204. The decision prohibited Florida from enforcing the law.¹¹³ The legislature had overreached its authority to regulate Platforms. Justice Hinkle, writing for the district court which granted a preliminary injunction, seemed to chastise Florida politicians for using their personal political agendas to moderate speech.¹¹⁴

Florida appealed to the Eleventh Circuit, which wrote a shorter, slightly more balanced opinion. The panel struck down most of the law under the First Amendment. It rejected Florida's legal argument that Platforms were common carriers.¹¹⁵ Thus, following appellate review, the preliminary injunction against section 501.2041 remained.

At the same time the Eleventh Circuit considered section 501.2041, the Fifth Circuit considered whether to block enforcement of the Texas law. Although the heart of the Texas law differed from that of the Florida law—the Texas law applied limited censorship of any user, while the Florida was limited to candidate speech—the District Court for the Western District of Texas reached the same conclusion as its sister district court. At the appellate level, however, the courts resolved the matter quite differently. The Eleventh Circuit, in an opinion that seemed to mock Justice Hinkle's district court opinion, upheld the House Bill 20 ruling contrary to the Fifth Circuit on both First Amendment and Common Carrier grounds.¹¹⁶

B. *NetChoice, LLC v. Paxton*

On December 1, 2021, a federal judge in Texas granted a preliminary injunction and blocked Texas House Bill 20.¹¹⁷ Judge Robert Pitman held that the law violates the Platforms' First Amendment right to moderate user-submitted content, restricts discretion, and puts burdens on the Platforms to

constitutional); § 106.072(4) (candidate "free advertising" would be constitutional; § 501.2041(2)(i) (user-data access would be constitutional).

113. On September 23, 2022, Attorney General Ashley Moody filed a petition for certiorari to the Supreme Court. Docket No. 22-277.

114. See *Moody*, 546 F. Supp. 3d at 1084.

115. See *Att'y Gen., Fla.*, 34 F.4th at 1215.

116. See Milner, *infra* note 147.

117. *NetChoice, LLC v. Paxton*, 573 F. Supp.3d 1092, 1113–14 (W.D. Tex. 2021).

implement new operational requirements.¹¹⁸ Judge Pitman also declared the law unconstitutionally vague.¹¹⁹ In response to the district court, the State of Texas appealed to the United States Court of Appeals for the Fifth Circuit, and unlike the Eleventh Circuit, on May 11, 2022, the Fifth Circuit, in a per curiam opinion, lifted the district court's stay on the preliminary injunction without explanation.¹²⁰

NetChoice and CCIA immediately filed an emergency application to the United States Supreme Court seeking to overturn the Fifth Circuit ruling. On May 31, 2022, five members of the Supreme Court ruled in favor of NetChoice and CCIA and reinstated the preliminary injunction until a lower court could decide the issue a ruling on the merits.¹²¹ Although the Court offered no majority opinion when considering the preliminary injunction against the Texas law, Justice Alito authored a dissent, with which Justices Thomas and Gorsuch agreed.¹²² Justice Alito seemed to base his decision to allow enforceability of the law pending a decision on the merits, on the purely procedural ground that the district court's decision intruded on Texas' right to state sovereignty.¹²³ He expressed substantive concerns as well and was unclear as to how pre-Internet precedent should relate to "large social media companies."¹²⁴

Following the Supreme Court's ruling, the Fifth Circuit reconsidered the district court's decision to grant a preliminary injunction.¹²⁵ The court would uphold the injunction upon a clear showing that the plaintiff is likely to succeed on the merits.¹²⁶ Judge Oldham, who, prior to becoming a judge served as general counsel to Texas Governor Greg Abbott, authored almost all of the

118. *Id.*

119. *Id.* (vacated and remanded sub nom). *NetChoice, LLC v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022).

120. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 445 (5th Cir.), *vacated sub nom. NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1715 (2022).

121. *See NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022). Justices Alito, Thomas, and Gorsuch voted to deny the application to vacate stay, and while Justice Kagan did not join the dissent, the opinion states that "Justice Kagan would deny the application to vacate stay." *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1715.

125. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022).

126. *Id.*

113 page opinion.¹²⁷ The contemptuous opinion, overturning the preliminary injunction, read at times as if Judge Oldham was a point-by-point contradiction to Justice Hinkle and the Fifth Circuit rather than a decision to deny the preliminary injunction and ultimately uphold the Texas law.¹²⁸ Judge Oldham states, “We reject the Platforms’ attempt to extract a freewheeling censorship right from the Constitution’s free speech guarantee. The Platforms are not newspapers. Their censorship is not speech. They’re not entitled to pre-enforcement facial relief. And HB 20 is constitutional because it neither compels nor obstructs the Platforms’ own speech in any way.”¹²⁹ Each of these points overturns Justice Hinkles’ opinion.

Judge Oldham favored the constitutionality of House Bill 20 for a *variety* of reasons. He concluded that the statute was not overly broad.¹³⁰ The statute’s prohibition on censorship did not violate a Platform’s right to editorial discretion.¹³¹ It was content-neutral and survived intermediate scrutiny¹³² and because the statute, in his opinion, properly included Platforms in the definition of common carriers, the government may regulate them as such.¹³³ In addition to considering the law’s constitutionality the opinion explained why the statute did not violate § 230.¹³⁴

The overbreadth doctrine requires courts to strike down a statute that would chill both protected and unprotected speech.¹³⁵ House Bill 20, according to the court, does not chill speech since it requires Platforms to publish all user viewpoints. In fact, according to the court, the opposite was true. Because section 143A.002, section 7 prohibits Platforms from removing content, the law chills censorship, not user speech.¹³⁶ In other words, Judge Oldham stated emphatically, section 7 of House Bill 20 does not chill speech

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *See Paxton*, No. 21-51178.

134. *Id.*

135. *See Virginia v. Hicks*, 539, U.S. 113, 118 (2003).

136. *See Paxton*, No. 21-51178.

“whatsoever.”¹³⁷

“Even if [section] 7 burdens the Platforms’ First Amendment rights,” Judge Oldham wrote, “it does so in a content-neutral way.”¹³⁸ Based on this conclusion, the majority subjected House Bill 20 to intermediate scrutiny, which demands proof that the statute supports an important governmental interest and is narrowly tailored so as not to place a burden on speech beyond what is necessary to meet that interest.¹³⁹ Texas’ interest in promoting the free exchange of viewpoints was important enough to sustain the first prong of the intermediate scrutiny test.¹⁴⁰ With regard to the second prong, Judge Oldham used the Platforms’ argument against itself. Plaintiffs asserted that Texas could achieve diversity of viewpoints by creating its own Platform. But the assertion that Texas develop the kind of platform it finds ideal acknowledges the value of social media as a vehicle of sharing information to a large group of the population. Telling Texas to create its own Platform is, in Judge Oldham’s words, “almost as absurd” as asking it to create its own cable company.¹⁴¹ Since House Bill 20 serves the State’s important interest in assuring widely distributed and varied views and does not do so in a practical way without an unreasonable burden on free speech, it satisfies intermediate scrutiny.¹⁴²

The court rejected NetChoice’s editorial judgment argument, which the Eleventh Circuit had upheld.¹⁴³ It agreed with its sister court that the First Amendment guarantees media, including newspapers and broadcasters, editorial judgment to determine what it publishes.¹⁴⁴ But unlike the Eleventh Circuit, the Fifth Circuit distinguished Platforms from other media. Platforms, according to Judge Oldham, merely transmit expressions rather than

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *See Paxton*, No. 21-51178.

143. *See id.* (regarding his own opinion Justice Oldham wrote, “The foregoing explains why the Eleventh Circuit’s articulation of its ‘editorial-judgment principle’ conflicts with Supreme Court precedent.”); *see also NetChoice*, 34 F.4th at 1203 (holding the First Amendment protects a Platform’s editorial judgment).

144. *Id.*

disseminate curated collections of speech and are therefore unlike the kind of media that precedent protects.¹⁴⁵

The court accepted wholesale the Texas legislature's decree that Platforms are common carriers; a notion the Eleventh Circuit rejected. The Common Carrier doctrine assigns a quasi-public status to businesses that carry large groups of the population.¹⁴⁶ The doctrine originally applied to transportation companies, but in the second half of the last century, courts extended its applicability to communications companies.¹⁴⁷ Neither the Supreme Court nor any other jurisdiction have extended the Common Carrier doctrine to Platforms. Judge Oldham, however, sought support by analogy. Comparing Facebook to AT&T, both of which allow users to communicate with other individuals, he adopted a novel approach to permissible government regulation of Platforms.¹⁴⁸

The lengthy decision also considered House Bill 20 as it relates to § 230. § 230 relieves the publisher from liability for third-party postings.¹⁴⁹ Once again, the court used the Platforms' argument against itself. Among the Platforms' contentions was that they were entitled to the same First Amendment rights as publishers.¹⁵⁰ But § 230 holds that Platforms may not be treated as publishers of content for purposes of liability. The Platforms, according to the court, cannot have it both ways.

Finally, the decision turned to section 501.2041, the Florida Law, and the Eleventh Circuit's decision to uphold the preliminary injunction.¹⁵¹ Rather than taking issue with their sister court's ruling, the Fifth Circuit distinguished section 501.2041 most notably on the grounds that section 501.2041 prohibits censorship of only one type of speech, political speech, while the Texas Law

145. *Id.*

146. See Matt Milner, *Highest Degree of Confusion: The Case Against the Common Carrier Doctrine*, ARIZ. L. REV. SYL. (2011).

147. See *id.*; Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 957, 973-74 (2005) (arguing if telecommunications services should be included or exempt from the common carrier doctrine).

148. See *Paxton*, No. 21-51178.

149. See *supra* note 21.

150. *Id.* at 468 ("the platforms frequent affirmation of Congress's factual judgment underlying section 230 makes us even more skeptical of their radical switcheroo, that, in this case, they *are* publishers").

151. See *Paxton*, No. 21-51178.

prevents censorship of all speech.¹⁵²

Judge Edith Jones wrote a short concurrence, calling the Platforms' arguments "ludicrous." She labeled the Platforms the "Goliaths of internet communications" as compared to the "Davids who use their platforms."¹⁵³ Judge Leslie Southwick concurred in part and dissented in part.¹⁵⁴ He disagreed with the majority's holding that the First Amendment did not apply to the Platforms' content moderation decisions and that House Bill 20 satisfied intermediate scrutiny.¹⁵⁵ The entire panel agreed to vacate the preliminary injunction and remand the case for further proceedings.¹⁵⁶

In response to the Fifth Circuit's decision, NetChoice and CCIA filed a motion to stay, pending their petition for Writ of Certiorari to the Supreme Court.¹⁵⁷ They argued the Platforms would face irreparable harm should Texas begin enforcing House Bill 20. On October 12, 2022, the Fifth Circuit approved the motion to stay.¹⁵⁸ Consequently, the court prohibited House Bill 20 from taking effect until the parties exhausted the decision on the merits.

As of October 12, 2022, both states were prohibited from enforcing their social media statutes. While both states await further litigation on the merits, they remain enjoined from enforcing their laws. The Texas and Florida laws differ on the merits, the Florida law limits censorship to candidate speech, the Texas law prohibits censorship of all user content. The Fifth and Eleventh Circuit opinion also differ in their interpretation of the substantive issues. These conflicts set the stage for what is sure to become a hearing on the merits before the Supreme Court.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *See* NetChoice, LLC v. Paxton, No. 1:21-cv-00840-RP (motion to stay), https://netchoice.org/wp-content/uploads/2022/09/NetChoice-CCIA-Unopposed-Motion-to-Stay-Mandate_Sep292022_Filed-1.pdf.

158. *Id.*

V. A BRIEF LOOK TOWARDS THE FUTURE

Justice Alito's opinion signals that the plaintiffs' challenges to Texas House Bill 20 and section 501.2041 are headed to the Supreme Court on the merits. Judge Oldham's Fifth Circuit opinion, which takes direct aim at the Eleventh Circuit,¹⁵⁹ creates the type of split that secures Supreme Court review. A review of these cases will, arguably, grant Justice Alito his chance to start building a body of "social media law precedent" that he seeks to create. More specifically, Supreme Court review of House Bill 20 and section 501.204 allow the Court to resolve various issues, most notably whether a state may limit a Platform's editorial control of its content and whether Platforms fall within the definition of common carriers.

The foundation of both House Bill 20 and section 501.204 rest on each state's limitation on the Platform's editorial control. Under the Florida scheme, subject to minimal limitation, Platforms are prevented from censoring any content posted by any candidate for office.¹⁶⁰ The Texas law is more sweeping than the Florida law. It prohibits Platforms from censoring content based on viewpoint, regardless of who makes the post.¹⁶¹ The Texas law fails to identify what it means by "viewpoint," subjecting the word to the widest of interpretations.

A recent incident concerning the rapper Kanye West illustrates this point nicely. On October 9, 2022, Kanye West posted hateful and violence-inducing antisemitic remarks on Twitter. The site quickly removed them as violative of their engagement rules.¹⁶² Section 501.204 allows a Platform to remove the content as it is offensive content that does not receive the immunity of candidate speech. House Bill 20, however, would require Twitter to keep the content on its Platform as it expresses a user's opinion, and under the law a platform may not censor any user's viewpoint, requiring it to facilitate language that is contrary to its current stated policies. Thus, while section 501.2041 would allow Twitter to limit posts that concentrate their stated

159. *Id.*

160. *Id.*

161. *Id.*

162. See Stuart A. Thompson, *Kanye West's Posts Land Him in Trouble on Social Media*, THE NEW YORK TIMES (Oct. 9, 2022), <https://www.nytimes.com/2022/10/09/business/media/kanye-west-anti-semitic-racist-twitter-instagram.html>.

corporate rules, Texas House Bill 20 restricts the Platforms from using the type of editorial judgment the First Amendment affords businesses.

Upholding House Bill 20's designation of Platforms as common carriers would contradict the legislative intent of § 230. A common carrier label would allow states to treat Platforms as quasi-governmental agencies, subjecting them to First Amendment limitations. Congress enacted § 230, to prevent Platforms from content limitations.¹⁶³ § 230's grant of freedom from liability for content suggests that it did not intend for Platforms to fall into the category of business that are open to government intrusion.

In his *Paxton* dissent, Justice Alito noted his desire to create a precedent that would limit the reach of § 230 and the editorial freedom that social media companies presently enjoy.¹⁶⁴ Justice Thomas, denying certiorari in two cases concerning § 230 in a tangential way, shared his discomfort that lower courts have interpreted § 230 to confer sweeping immunity on some of the largest companies in the world.¹⁶⁵ Should Justices Alito and Thomas convince three other Justices to share their views, which is likely given the makeup of the Court, at least one of the two State laws will survive judicial review.¹⁶⁶

163. See 47 U.S.C. § 230(b)(2) ("It is the policy of the United States to pressure the vibrant and competitive free market for the Internet and other ICS's . . . unfettered by state and federal regulation.").

164. See *Paxton*, 142 U.S. at 1717 ("It is not at all obvious how our existing precedents, which predate the age of the internet, should apply to large social media companies, but Texas argues that its law is permissible under our case law.").

165. *Id.* at 1718 ("The preliminary injunction entered by the District Court was itself a significant intrusion on state sovereignty, and Texas should not be required to seek preclearance from the federal courts before its laws go into effect. The Court of Appeals, after briefing and oral argument, concluded that the District Court's order should be stayed, and a decision on the merits can be expected in the near future. I would not disturb the Court of Appeals' informed judgment about applicants' entitlement to a stay *Paxton*"); see *Biden v. Columbia University*, 141 U.S. 1220 (2021) (deciding whether the First Amendment grants the president of the United States the right to block users of a social media feed); see *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 529 U.S. 141 (2020) (denying certiorari on the issue of whether section 230(c)(2)(B) grants immunity from civil liability for blocking or filtering decisions based on anti-competitive animus).

166. For commentary recognizing the polarization of Supreme Court justices resulting from liberal or conservative viewpoints, see for example Iddo Porat, *Court Polarization: A Comparative Perspective*, 46 HASTINGS INT'L AND COMPAR. L. REV. (2023); Oriana Gonzalez and Daniel Herbert, *The political leanings of the Supreme Court justices*, AXIOS (June 24, 2022), <https://www.axios.com/2019/06/01/supreme-court-justices-ideology>. Compare *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2253 (2022) (Alito, J.) (noting the "trend toward liberalization" as it relates to states relaxing state anti-abortion laws) with *Dobbs v. Jackson Women's Health*

If that is the case, Platforms will be forced to monitor all content that appears on their sites. The onerous obligation to review millions of daily posts that these laws demand will mean that Platforms will likely have to change how they do business or perhaps, instead, choose to no longer exist.¹⁶⁷

Congress enacted § 230 to “promote the continued development of . . . interactive media” and “deter and punish trafficking in obscenity, stalking, and harassment using the computer.”¹⁶⁸ Its goal was to allow companies to grow with unfettered limitations so that Americans could have complete access to the information within the limits of the law. Stripping platforms of immunity will have a chilling effect on their growth. Platforms will squash speech out of a fear of lawsuits. Threats of lawsuits will disincentivize new platforms from emerging. Congress enacted Section 230 to provide a safe harbor for social media companies that serve as an intermediary for the free exchange of ideas. Although the Internet grew in ways not foreseen by Congress in 1996, changes to the federal law should not result from politically motivated state regulation.

VI. CONCLUSION

Constitutional arguments aside, these laws have some real-life implications that go to the spirit of the laws that allowed them to flourish. § 230 was designed with the twin goals of preventing government intrusion that might discourage technological growth and preventing illegal conduct from flourishing on the Internet. Section 501.2041 and Texas House Bill 20 directly contravene these goals.

Although the Supreme Court seems poised to rule on what appears to be the long arm of Platforms, the practicalities of asking social media companies to conform to these laws may result in a hands-off approach to all content. Inevitably, some viewpoints will be chilled at the expense of protecting the

Organization, 142 S. Ct. 2228, 2349 (Sotomayor, J dissenting) (“A state senator who championed both Mississippi [anti-abortion] laws said the obvious out loud. . . . ‘[F]inally, we have’ a conservative court ‘and so now would be a good time to start testing the limits of Roe.’”).

167. Dan L. Burk, Algorithm Fair Use, 86 Univ. of Chi. L. Rev. 283, 284 (“On YouTube, Google, and many other online platforms, both internet service providers (ISPs) and copyright owners have deployed detection and removal algorithms that are intended to purge illicit content from their sites.”).

168. See 47 U.S.C. § 230(b)(1); § 230(b)(5).

greater harm of de-policing social media conduct. Ultimately, the judiciary, most likely the Supreme Court, will decide the fate of social media content.