United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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No. 21-51178

NETCHOICE, L.L.C., *a 501(c)(6) District of Columbia organization doing business as* NETCHOICE; COMPUTER COMMUNICATIONS INDUSTRY ASSOCIATION, *a 501(c)(6) non-stock Virginia Corporation doing business as* CCIA,

Plaintiffs—Appellees,

versus

KEN PAXTON, *in his official capacity as Attorney General of Texas*,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:21-cv-840

Before JONES, SOUTHWICK, and OLDHAM, *Circuit Judges*.

ANDREW S. OLDHAM, *Circuit Judge*:[*]

A Texas statute named House Bill 20 generally prohibits large social media platforms from censoring speech based on the viewpoint of its speaker. The platforms urge us to hold that the statute is facially unconstitutional and hence cannot be applied to anyone at any time and under any circumstances.

[*] Judge Jones joins all but Part III.E and Part V.B.3 of this opinion.

In urging such sweeping relief, the platforms offer a rather odd inversion of the First Amendment. That Amendment, of course, protects every person's right to "the freedom of speech." But the platforms argue that buried somewhere in the person's enumerated right to free speech lies a corporation's *unenumerated* right to *muzzle* speech.

The implications of the platforms' argument are staggering. On the platforms' view, email providers, mobile phone companies, and banks could cancel the accounts of anyone who sends an email, makes a phone call, or spends money in support of a disfavored political party, candidate, or business. What's worse, the platforms argue that a business can acquire a dominant market position by holding itself out as open to everyone—as Twitter did in championing itself as "the free speech wing of the free speech party." Blue Br. at 6 & n.4. Then, having cemented itself as the monopolist of "the modern public square," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017), Twitter unapologetically argues that it could turn around and ban all pro-LGBT speech for no other reason than its employees want to pick on members of that community, Oral Arg. at 22:39–22:52.

Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say. Because the district court held otherwise, we reverse its injunction and remand for further proceedings.

I.

A.

This case involves HB 20, a Texas statute that regulates large social media platforms.[1] The law regulates platforms[2] with more than 50 million monthly active users ("Platforms"), such as Facebook, Twitter, and YouTube. TEX. BUS. & COM. CODE § 120.002(b). In enacting HB 20, the Texas legislature found that the Platforms "function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States." It further found that "social media platforms with the largest number of users are common carriers by virtue of their market dominance."

Two sections of HB 20 are relevant to this suit. First is Section 7, which addresses viewpoint-based censorship of users' posts. Section 7 provides:

> 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:

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[1] The full text of HB 20 can be viewed here: https://perma.cc/9KF3-LEQX. The portions of HB 20 relevant to this lawsuit are codified at TEXAS BUSINESS AND COMMERCE CODE §§ 120.001–151 and TEXAS CIVIL PRACTICE AND REMEDIES CODE §§ 143A.001–08.

[2] HB 20 defines "social media platform" to include "an Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images." TEX. BUS. & COM. CODE § 120.001(1). The definition expressly excludes internet service providers, email providers, and any "online service, application, or website" that "consists primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider," and "for which any chat, comments, or interactive functionality is incidental to, directly related to, or dependent on the provision of [that] content." *Id.* § 120.001(1)(A)–(C).

> (1) the viewpoint of the user or another person;
>
> (2) the viewpoint represented in the user's expression or another person's expression; or
>
> (3) a user's geographic location in this state or any part of this state.

TEX. CIV. PRAC. & REM. CODE § 143A.002(a). "Censor" means "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." *Id.* § 143A.001(1). For Section 7 to apply, a censored user must reside in Texas, do business in Texas, or share or receive expression in Texas. *Id.* § 143A.004(a)–(b).

This prohibition on viewpoint-based censorship contains several qualifications. Section 7 does not limit censorship of expression that a Platform "is specifically authorized to censor by federal law"; expression that "is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment"; expression that "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge"; or "unlawful expression." *Id.* § 143A.006.

Finally, Section 7 provides a narrow remedial scheme. If a Platform violates Section 7 with respect to a user, that user may sue for declaratory and injunctive relief and may recover costs and attorney's fees if successful. *Id.* § 143A.007. The Attorney General of Texas may also sue to enforce Section 7 and may recover attorney's fees and reasonable investigative costs if successful. *Id.* § 143A.008. Damages are not available.

The other relevant provision of HB 20 is Section 2. It imposes certain disclosure and operational requirements on the Platforms. These requirements fall into three categories. First, Platforms must disclose how they moderate and promote content and publish an "acceptable use policy." TEX. BUS. & COM. CODE §§ 120.051–52. This policy must inform users about the types of content allowed on the Platform, explain how the Platform enforces its policy, and describe how users can notify the Platform of content that violates the policy. *Id.* § 120.052(b).

Platforms must also publish a "biannual transparency report." *Id.* § 120.053. This report must contain various high-level statistics related to the Platform's content-moderation efforts, including the number of instances in which the Platform was alerted to the presence of policy-violating content; how the Platform was so alerted; how many times the Platform acted against such content; and how many such actions were successfully or unsuccessfully appealed. *See ibid.*

Last, Platforms must maintain a complaint-and-appeal system for their users. *See id.* §§ 120.101–04. When a Platform removes user-submitted content, it must generally explain the reason to the user in a written statement issued concurrently with the removal. *Id.* § 120.103(a). It also must permit the user to appeal the removal and provide a response to the appeal within 14 business days. *Id.* § 120.104. Section 2 includes various exceptions to these notice-and-appeal requirements. *See id.* § 120.103(b).

Only the Texas Attorney General may enforce Section 2. *Id.* § 120.151. The Attorney General may seek injunctive relief but not damages. *Ibid.*

B.

NetChoice and the Computer & Communications Industry Association are trade associations representing companies that operate

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