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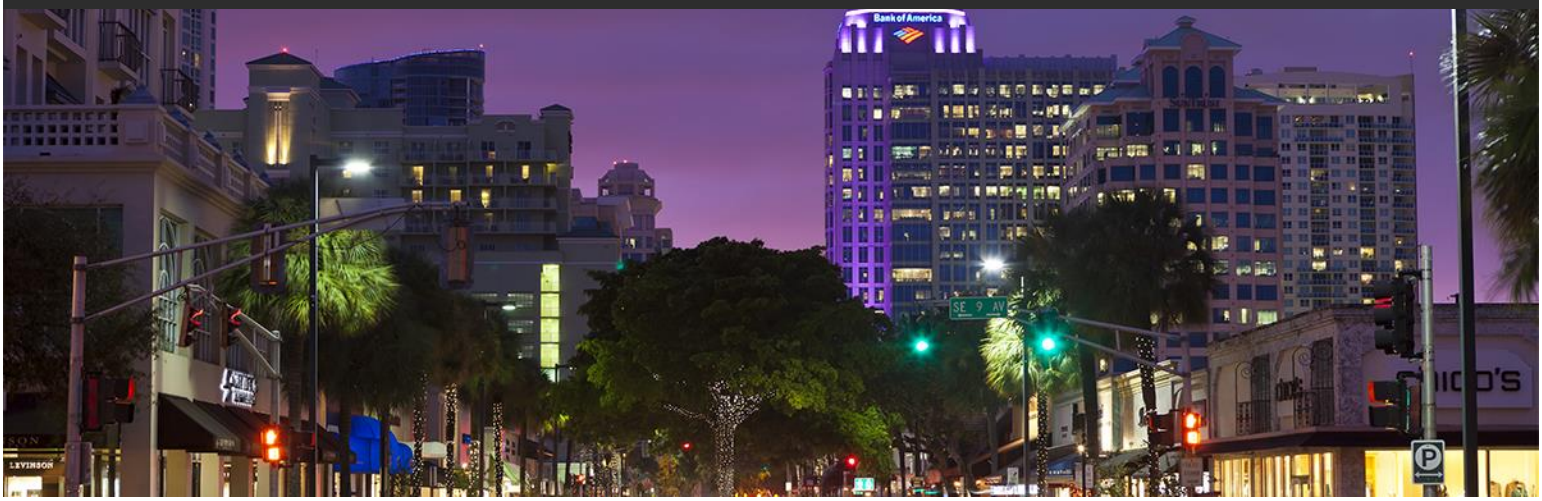

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11th Circuit Substantially Upholds Injunction Against Florida's Social Media Law, Aligning With US Supreme Court Decision Temporarily Blocking Texas' Social Media Law

On May 23, 2022, the Eleventh Circuit upheld a preliminary injunction that prohibits enforcement of material portions of Florida's social media law. The Eleventh Circuit held that it was substantially likely that the law violated the First Amendment.[1] This decision aligns with the U.S. Supreme Court's May 31 decision to lift a stay on a preliminary injunction against Texas' similar social media law pending the Fifth Circuit's decision on the merits of the constitutionality of that law.

Florida's Social Media Law

As detailed in our June 2021 GT Alert, Florida Senate Bill 7072 (the Act) attempted to create a new private right of action under Florida's Deceptive and Unfair Trade Practices Act (FDUTPA) when a social media platform allegedly censors or shadow bans a user's content or material or deplatforms a user from the social media platform in an inconsistent manner among users or without notice to the user.[2] The Act purported to create notice requirements for social media platforms to explain to users the rationale for

[1] *Netchoice, LLC v. State of Florida Attorney General*, No. 21-12355, 2022 U.S. App. LEXIS 13852, at *6-*7 (11th Cir. May 23, 2022).
[2] Fla. Stat. § 501.2041(2)(b).

each action of supposed censoring, shadow banning, or deplatforming.[3] The Act also purported to prohibit social media platforms from allegedly censoring, deplatforming, or shadow banning a "journalistic enterprise based on the content of its publication or broadcast."[4] The Act further attempted to restrict the ability of social media companies to deplatform a candidate running for political office.[5]

In June 2021, the U.S. District Court for the Northern District of Florida enjoined enforcement of the Act based on findings that the Act: (1) violated the First Amendment rights of the social media platforms to moderate user content on the platforms; and (2) is preempted by Section 230 of the Communications Decency Act (CDA).[6] Section 230(c)(1) of "the CDA bars a plaintiff's claims when (1) defendant is a provider or user of an interactive computer service; (2) the relevant content contains information provided by another information content provider; and (3) the complaint seeks to hold defendant liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content."[7]

The Eleventh Circuit Decision

In a decision handed down only 25 days after oral argument, a three-judge panel of the Eleventh Circuit unanimously concluded that material portions of the Act violated the First Amendment, and therefore substantially affirmed the preliminary injunction against enforcement of the Act.[8] Significantly, the Eleventh Circuit stripped the private right of action created under the Act, which applied only when a social media platform allegedly shadow bans or censors a user's content or material or deplatforms a user without notice or in an inconsistent manner.[9]

The Eleventh Circuit concluded that social media platforms exercise their First Amendment rights when they make editorial decisions to curate which content to retain, prioritize or discard.[10] As such, the Eleventh Circuit applied strict or intermediate scrutiny to invalidate the substantial provisions of the Act including the content-moderation restrictions and some of the disclosure requirements.[11] In so holding, the Eleventh Circuit rejected arguments that social media platforms were akin to common carriers, reasoning that these platforms "never acted like common carriers" and pointing to prior precedent and federal statutes that suggest that such platforms are not common carriers.[12]

The Fifth Circuit Order

Meanwhile, on Sept. 9, 2021, Texas enacted its own social media law, Texas House Bill 20 (HB 20). HB 20 purported to make it unlawful for a "social media platform" to allegedly "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."[13] HB 20 also attempted to impose disclosure

[3] Fla. Stat. § 501.2041(2)(a).
[4] Fla. Stat. § 501.2041(2)(j).
[5] Fla. Stat. § 106.072(2).
[6] *Netchoice, LLC v. Moody*, No. 21-cv-00220-RH-MAF 546 F. Supp.3d 1082 (N.D. Fla. June 30, 2021).
[7] *Mezey v. Twitter, Inc.*, No. 1:18-CV-21069, 2018 U.S. Dist. LEXIS 121775, at *2 (S.D. Fla. Jul. 19, 2018); 47 U.S.C. § 230(f)(2) (an "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.")
[8] *Netchoice, LLC*, 2022 U.S. App. LEXIS 13852, at *6-*7.
[9] § 501.2041(6), Fla. Stat.
[10] *Netchoice, LLC*, 2022 U.S. App. LEXIS 13852, at *22.
[11] *Id.* at *21-22.
[12] *Id.* at *43-48.
[13] TEX. CIV. PRAC. & REM. CODE § 143A.002.

requirements, such as publication of "acceptable user policies" and how the platform curates and targets content to users.[14]

Like the result in the Florida district court, a Texas district court preliminarily enjoined enforcement of HB 20 in its entirety pending a full trial, holding that HB 20 violated the First Amendment rights of the social media platforms and was prohibitively vague.[15]

However, on May 11, 2022, the Fifth Circuit in a divided one-sentence order stayed the preliminary injunction against HB 20 pending a full appeal on the merits.[16] Two days later, NetChoice filed an application in the U.S. Supreme Court to vacate the Fifth Circuit's stay, seeking to reinstate the preliminary injunction.[17] In response, Florida's attorney general filed an *amicus curiae* brief opposing the application,[18] and NetChoice then notified the U.S. Supreme Court of the Eleventh Circuit decision.[19]

Supreme Court Decision

In a 5-4 decision issued May 31, the U.S. Supreme Court vacated the stay imposed by the Fifth Circuit, thereby reimposing the preliminary injunction against HB 20 pending the full merits appeal before the Fifth Circuit.[20] The majority did not issue a formal decision, but Justice Alito authored a dissenting opinion, joined by Justices Thomas and Gorsuch. Justice Alito cautioned that he had "not formed a definitive view on the novel legal questions that arise from" HB 20, but argued that NetChoice had not shown a substantial likelihood of success on the merits that warranted vacating the stay imposed by the Fifth Circuit because the applicable law was "novel" in nature. Echoing an argument made both by Florida and in Texas, the dissent suggested that social media companies might be treated as "common carriers." The dissent also argued that lifting the stay would be procedurally improper because HB 20 had never been applied and it was "not clear how state courts would apply this statute if it were applied to applicants' businesses."

Key Takeaways

These developments have several takeaways. The U.S. Supreme Court's decision relieves social media platforms of the obligation to comply with HB 20 in Texas pending the full appeal on the merits by the Fifth Circuit.[21] But, because the Fifth Circuit's decision only addressed whether the injunction should be stayed pending a full appeal, the Fifth Circuit has yet to decide the legality of the injunction against HB 20 on the merits. Although the Supreme Court decision strongly signals the court's stance, decisions on the constitutionality of HB 20 and the Act may be taken to the U.S. Supreme Court following a full trial on the merits.

The Eleventh Circuit declined to invalidate the entirety of the Act, holding that certain provisions were severable and survived constitutional scrutiny. If the Eleventh Circuit opinion is affirmed or remains intact, social media platforms may still need to consider whether they need to comply with the standards

[14] TEX. BUS. & COM. CODE § 120.051, 120.101-.104.
[15] *NetChoice, LLC v. Ken Paxton*, Attorney General of Texas, No. 1:21-CV-840-RP, 2021 U.S. Dist. LEXIS 233460, at *1 (W.D. Tex. Dec. 1, 2021).
[16] *NetChoice, LLC d v. Ken Paxton,* Attorney General of Texas, No. 21-51178 (5th Cir. May 11, 2022).
[17] Emergency Application for Immediate Administrative Relief And To Vacate Stay of Preliminary Injunction Issued by the United States Court of Appeals for the Fifth Circuit, *NetChoice, LLC v. Ken Paxton,* Attorney General of Texas, No. 21-51178 (U.S. May 13, 2022).
[18] Motion for Leave to file Amicus Curiae of State of Florida, *NetChoice, LLC v. Ken Paxton*, Attorney General of Texas, No. 21-51178 (U.S. May 18, 2022).
[19] Letter of Supplemental Authority, *NetChoice, LLC v. Ken Paxton*, Attorney General of Texas, No. 21-51178 (U.S. May 23, 2022).
[20] *NetChoice, LLC etc. v. Ken Paxton, Attorney General of Texas*, No. 21A720, 596 U.S. _ (2022).
[21] HB 20 applies to a user who "resides," "does business", or "shares or receives expression in this state," or to "expression that is shared or received in this state." TEX. CIV. PRAC. & REM. CODE § 143A.004.

and notice requirements of the Act that the Eleventh Circuit left intact.[22] The provisions to consider include the following requirements to:

- "publish the standards, including detailed definitions, it uses or has used for determining how to [allegedly] censor, deplatform, and shadow ban."[23]
- "inform each user about any changes to its user rules, terms, and agreements before implementing the changes and may not make changes more than once every 30 days."[24]
- allow consumers to "request the number of other individual platform participants who were provided or shown the user's content or posts," and allow a user to request such counts.[25]
- allow an alleged deplatformed user to access his or her user data for at least 60 days after he or she has been deplatformed.[26]
- inform the candidate of an in-kind contribution for any "free advertising."[27]

Finally, while the Eleventh Circuit did not decide whether Section 230 of the CDA preempted the Act's provisions, the court's reasoning dovetails with the reasoning found in many Section 230 cases. For example, the Eleventh Circuit held that "when a platform removes or deprioritizes a user or post, it makes a judgment about whether and to what extent it will publish information to its users – a judgment rooted in the platform's own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site." This is similar to the inquiry in Section 230 litigation, which looks to whether a claimant seeks to hold a social media platform liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone, or alter content. Because the Eleventh Circuit left open the potential that the district court could revisit the burdens of the other provisions of the Act later in the case, the reasoning could be important at a later stage in the case.

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[22] The Act applies to "users", defined as a "person who resides or is domiciled in this state." Fla. Stat. § 501.2041(1)(h).
[23] Fla. Stat. § 501.2041(2)(a).
[24] Fla. Stat. § 501.2041(2)(c).
[25] Fla. Stat. § 501.2041(2)(e).
[26] Fla. Stat. § 501.2041(2)(i).
[27] Fla. Stat. § 106.072(4).