

Updates

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Supreme Court Reinstates Injunction Against Texas Social Media Law

In a 5-4 decision, the U.S. Supreme Court [vacated](#) the U.S. Court of Appeals for the Fifth Circuit's stay of a temporary injunction in *NetChoice, LLC v. Paxton*, a closely watched case involving a novel Texas law purporting to bar "social media platforms" from engaging in "viewpoint" discrimination. The majority did not issue a written opinion, but Justice Samuel Alito authored a dissent that was joined by Justice Clarence Thomas and Justice Neil Gorsuch. The May 31, 2022, ruling is a win for the world's largest online social media platforms, albeit a temporary one. The decision reinstates a temporary injunction barring the Texas attorney general from enforcing the Texas law, known as H.B. 20. The decision does not prevent users from suing covered platforms under H.B. 20's private right of action.

This update summarizes the Texas law, the history of the litigation leading to the Supreme Court's decision, and the Supreme Court's decision yesterday. It also briefly forecasts the near future for state and private enforcement of H.B. 20.

Texas House Bill 20

H.B. 20's Requirements

H.B. 20 is a vague and sweeping new Texas law that became effective on December 2, 2021. At a high level, it requires "social media platforms" with more than 50 million active monthly users to comply with certain reporting and moderation requirements. "Social media platform" is defined to mean "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) (further exempting from that definition internet providers, email services, and websites hosting user content "incidental to" that site's provision of nonuser-generated content).

- With respect to reporting, H.B. 20 requires covered platforms to make specific disclosures regarding their content moderation practices, publish biannual transparency reports about their content moderation decisions, and establish a detailed notice and appeals process related to content removal.
- With respect to moderation, H.B. 20 prohibits covered platforms from "censor[ing] 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." Tex. Civ. Prac. & Rem. Code § 143A.002. "Censor" is defined broadly to mean "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." *Id.* § 143A.001(1).

The Texas attorney general may bring suits against covered platforms to enforce H.B. 20's transparency and moderation requirements.

H.B. 20 also creates a private right of action for individual users, allowing them to sue platforms if they believe platforms have violated the law's moderation prohibitions. These private lawsuits (which we call "143A" lawsuits because they arise under Section § 143A.007 of the law) cannot seek damages; they may seek only declaratory or injunctive relief, along with fees and costs.

The H.B. 20 Litigation

The Supreme Court's decision is the latest chapter in an ongoing lawsuit challenging H.B. 20, which is summarized briefly below.

On September 22, 2021, NetChoice, LLC and the Computer & Communications Industry Association (CCIA) filed suit in the U.S. District Court for the Western District of Texas against Texas Attorney General Ken Paxton. The plaintiffs sought to invalidate H.B. 20 on several bases, including on the grounds that it is preempted by Section 230 of the Communications Decency Act (CDA) and violates the First Amendment of the U.S. Constitution. The plaintiffs further argued that H.B. 20 violates several other constitutional provisions, namely, the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Full Faith and Credit Clause, and the Commerce Clause.

On December 1, 2021, the district court preliminarily enjoined the Texas attorney general from enforcing H.B. 20, holding that the law violates the First Amendment by (1) impermissibly restricting platforms' rights to engage in editorial discretion with respect to user-generated content on their platforms and (2) imposing unduly burdensome disclosure and operational requirements.

On December 15, the Texas attorney general appealed the district court's ruling to the Fifth Circuit. The Texas attorney general also asked the Fifth Circuit to stay the district court's injunction pending the appeal. After full briefing and oral argument on May 9, in a one-sentence order, the Fifth Circuit 2-1 granted the Texas attorney general's motion to stay the district court's preliminary injunction pending appeal on May 11, 2022. Notably, however, the Fifth Circuit has not yet issued an opinion on the merits of the preliminary injunction.

On May 13, the plaintiffs filed an emergency application with the Supreme Court, asking it to vacate the Fifth Circuit's order staying the district court's preliminary injunction pending appeal.

Supreme Court Vacatur

On May 31, 2022, the Supreme Court voted 5-4 to vacate the Fifth Circuit's order staying the district court's preliminary injunction. The majority did not issue an opinion. The effect of the Supreme Court's vacatur is to reinstate the existing preliminary injunction, which prohibits the Texas attorney general from enforcing H.B. 20 while the Fifth Circuit considers the merits of the pending appeal. According to [a press release from NetChoice following the Supreme Court's decision](#), the case will return to the district court for arguments on the merits. But how the Fifth Circuit responds to the Supreme Court's action remains to be seen. There is no Supreme Court opinion to follow—only a decision that shows a majority of the justices disagree with what the Fifth Circuit did.

Notably, Justice Elena Kagan did not join either the majority or the dissent, but nevertheless voted to deny the plaintiffs' application to vacate the Fifth Circuit's stay without issuing an opinion. She has previously criticized the Court's "shadow docket" and the issuance of seemingly precedent-worthy decisions when ruling upon emergency motions and without full merits treatment. That could explain her position. She has, however, also criticized "weaponizing the First Amendment" and may not wish to use the First Amendment to foreclose large swaths of regulation of social media. Her departure from the majority is a concern for social media platforms, as is the reality that Justice Stephen Breyer—a member of the majority—will be replaced at the end of the term by Justice Ketanji Brown Jackson, whose views on these issues are not well known.

Justice Alito's Dissent

Justice Alito penned a short dissent, joined by justices Thomas and Gorsuch. The dissent argued that the Fifth Circuit's stay ought to remain in place because the plaintiffs had not shown that they were likely to succeed on the merits of their claims "under existing law." That is an important qualification on Justice Alito's position and may have been a modest defense of the Fifth Circuit, which, unlike the Supreme Court, may only apply "existing law." How the dissenters would rule in a case on the merits where "existing law" can be reconsidered is difficult to predict. But Justice Alito's dissent contained several portions that could be troubling to platforms.

For example, the dissent analogized to state laws requiring malls to allow pamphleteers, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and Federal Communications Commission (FCC) regulations requiring cable operators to carry local broadcast stations, *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994). Accepting either of those models would reject or seriously discount platforms' First Amendment claims and give weight to the Texas attorney general's arguments that platforms ought to be regulated as common carriers. A footnote in the dissent also suggested that the Supreme Court ought to have "some skepticism" of platforms' arguments that they engage in editorial discretion warranting First Amendment protection while (according to Justice Alito) at the same time disavowing "publisher" status each time they invoke Section 230 of the CDA. That "skepticism" echoes related concerns about Section 230 recently expressed by Justice Thomas in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 592 U.S. __ (2020) (statement of Thomas, J., respecting denial of certiorari) and more recently in *Doe v. Facebook, Inc.*, 595 U.S. __ (2022) (statement of Thomas, J., respecting denial of certiorari).

Lastly, the dissent expressed concern over the procedural posture of the stay, arguing that because the plaintiffs sought preenforcement review of H.B. 20, many aspects of the law remain unknown (such as determination of what platforms are even covered). The dissent did not address the U.S. Court of Appeals for the Eleventh Circuit's recent and related ruling largely upholding an injunction against Florida's similar "social media law," S.B. 7072, in *NetChoice, LLC v. Attorney General, State of Florida*, __ F.4th __ (11th Cir. 2022). But the dissent unmistakably signaled that at least some justices may take seriously the arguments by Texas and Florida legislators that large social media platforms should be treated as something other than speakers or editors akin to newspapers and other traditional speakers that receive full First Amendment protection.

Nonetheless, given that a majority of the Supreme Court vacated the Fifth Circuit's stay on grounds that almost certainly related to the challengers' likelihood of success on the merits, it would be surprising if a lower court were to conclude that, going forward, platforms can be required to comply with laws like H.B. 20.

Takeaways

Tuesday's Supreme Court ruling permits platforms to conduct business as usual, at least for now. The injunction reinstated by the Supreme Court prohibits the Texas attorney general from enforcing any of H.B. 20's provisions. But, notably, that injunction does not bar private litigants from filing the aforementioned 143A lawsuits. Given the significant public attention on H.B. 20 generated both by the Fifth Circuit's stay and the subsequent Supreme Court review, we anticipate that platforms may be served with these 143A lawsuits.

The fight over H.B. 20 is also far from over. Although the next procedural steps are somewhat unclear, as noted above, it is possible that the Fifth Circuit may soon issue an opinion on the injunction's merits, which could prompt another opportunity for Supreme Court review. And even if that does not happen, the case would not be over; rather, the district court would consider the parties' arguments on the merits.

Finally, while the Eleventh Circuit upheld significant portions of an existing injunction against enforcement of Florida's similar S.B. 7072, it vacated portions of that injunction related to S.B. 7072's reporting and disclosure

requirements. Many platforms may already be complying with (or in a position to comply with) those reporting requirements. Pending further appeals in these cases, however, other platforms may want to consider how to prepare to comply with such requirements.

Businesses that may be affected by H.B. 20 or S.B. 7072 should consult with knowledgeable counsel. Perkins Coie's experienced team advises on these matters and routinely represents platforms in moderation litigation.

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