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A Plea to Act in Good Faith: How Two State Laws Challenge Social Media Platforms' Editorial Practices

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Recent controversy surrounding the constitutionality of two state laws regulating social media platforms reveals that modern technology is presenting unprecedented challenges for the legal system. Two laws passed in Texas and Florida in 2021, HB 20 and SB 7072 have raised questions about whether states can make laws that regulate social media platforms' free speech policies. Tech advocacy groups Net Choice and Computer & Communications Industry Association filed a joint lawsuit against Texas and Florida, arguing that the states' bills unconstitutionally violated first amendment protections for online platforms. The U.S. Court of Appeals for the Fifth Circuit vindicated Texas' law, which prohibits social media platforms from engaging in viewpoint based censorship[1] and requires platforms to be transparent in their policies. Contrarily, the U.S. Court of Appeals for the Eleventh Circuit struck down Florida's law, which restricts platforms from unfairly censoring users and deplatforming political candidates.

Despite the similarities in Texas' HB 20 and Florida's SB 7072, the courts have handed down two very different rulings. Because of this, both bills have now been brought to the attention of the Supreme Court–a move which *The Washington Post* claims will bring "the most controversial debates of the internet age to the country's highest court."[1] While the Supreme Court has vacated the Texas case, there is no update as to whether the Court will hear the Florida one.

But, a question currently pervading the legal sphere is: how do two courts rule differently on two nearly identical state bills? A look at the Fifth Circuit and Eleventh Circuit rulings reveal that differing legal interpretations of intermediate scrutiny and editorial discretion led to different outcomes for Texas and Florida's legislation. As such, the rulings raise the following questions: to what extent do social media platforms have immunity in editorial discretion? And, do Texas and Florida have a legitimate state interest for regulating the free speech practices of social media platforms?

Let us first address the question of editorial discretion. Section 230 of the United States Communications Decency Act is referenced in both the Fifth and Eleventh Circuit court cases. It grants online services immunity in how they choose to moderate their content. It reads:

(1) 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) 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 or not 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).

It is evident in both rulings that Section 230 of the United States Communications Decency Act has strong implications when determining the extent to which social media companies can exercise editorial discretion. In the Eleventh Circuit court opinion, the judges argued against Florida, claiming that a social media company's "'content-moderation' decisions constitute protected exercises of editorial judgment." In the court's perspective, Florida's law would restrict a platforms' "content moderation" rights. Implied in the court's argument is the expectation that social media platforms *properly* and *fairly* moderate content on their platforms. The court wrote:

The platform will have exercised editorial judgment in two key ways: First, the platform will have removed posts that violate its terms of service or community standards—for instance, those containing hate speech, pornography, or violent content…Second, it will have arranged available content by choosing how to prioritize and display posts—effectively selecting which users' speech the viewer will see, and in what order, during any given visit to the site.

Florida and Texas find a problem with these two so-called exercises of editorial judgment: social media companies have unclear community standards and

inconsistently "prioritize and display posts." Recognizing this, the Fifth Circuit came to a conclusion contrary to the Eleventh Circuit: that corporations do not "have a freewheeling First Amendment right to censor what people say."

The good faith stipulation in Section 230 2(A) would be beneficial in clarifying the confusion surrounding editorial discretion. While the Fifth Circuit briefly referenced the "good faith" stipulation in Section 230, the Eleventh Circuit did not. According to the Congressional Research Service (CRS), Section 230 (1) offers online platforms immunity when providing content, but Section 230 (2) offers online platforms immunity when regulating content *only* when their regulation practices are conducted in *good faith*. Thus, the *good faith* stipulation is a limitation placed on social media platforms to ensure platforms engaged in fair and reasonable practices. Section 230 2(A) states that "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." If an action by a social media provider is not "taken in good faith," then ought not the provider be held liable?

A "good faith" *test* ought to be applied when determining whether a platform is properly exercising its editorial discretion. The fact that both Texas' HB 20 and Florida's SB 7072 articulate that social media companies are not currently engaging in good faith practices should call into question platforms' editorial practices. SB 7072 states that "social media platforms that unfairly censor, shadow ban, deplatform, or apply post-prioritization algorithms to Florida candidates, Florida users, or Florida residents are not acting in good faith." And, Texas' HB 20 mentions that platforms should actively "make a good faith effort to evaluate the legality of the content or activity." So, if platforms are engaging in bad faith practices by favoring some views over others and applying their policies unfairly, then this calls back into question a key consideration in the appellate court rulings: do states then have a legitimate interest in ensuring platforms act in good faith?

Florida and Texas argued that they had legitimate state interests in regulating social media platforms' free speech policies, yet only Texas' law was upheld by the Courts. Texas argued that it had a "fundamental interest in protecting the free exchange of ideas and information," which the Fifth Circuit affirmed. Florida's argument that it had "a substantial interest in protecting its residents from inconsistent and unfair actions by social media platforms," however, was not a substantial reason for the Eleventh Circuit. The Eleventh Circuit upheld the decision of the district court, arguing that "there's no legitimate—let alone substantial—governmental interest in leveling the expressive playing field." Florida's law, which aimed to ensure

that social media companies treat conservatives and liberals fairly on their platforms, was considered unconstitutional.

In part, the district and appellate court rejected Florida's claims to a substantial state interest since the bill was advertised by the state's governor as an attack on big tech bias. As such, both courts came to the conclusion that the bill was nothing more than a scheme to advance conservative ideology. The Eleventh Circuit court claimed that the district court found "the *entire bill* was motivated by the state's viewpoint-based purpose to defend conservatives' speech from perceived liberal 'big tech' bias." Both courts focused on the potential agenda behind the bill that they seemed to miss the relevance of the bill.

Florida's law held social media companies accountable for their unfair practices. So did Texas' law. As the Fifth Circuit recognized, Texas' law could "make censors think twice before removing speech from Platforms in a viewpoint-discriminatory manner." Both HB20 and SB 7072 were aimed at preventing censorship, ensuring fairness, and maintaining transparency on social media platforms. When social media companies cannot ensure good faith practices and apply their own policies without discrimination, states should have a legitimate interest to intervene and ensure private companies treat their citizens' viewpoints with equal dignity and respect.

These two state laws have several implications for future congressional action, as the CRS notes. But there are also considerations for the Supreme Court. If the Florida case makes its way to the Supreme Court, justices will have to clarify what constitutes editorial judgment, what the apparent implications of Section 230 are, the relevance of the "good faith" clause, and whether states have a substantial interest in regulating the private sphere of online communications. As Supreme Court justices have noted in review of Texas' HB 20, these issues concerning state regulations and digital speech rights are unprecedented "issues of great importance."