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Social Media Platforms as Publishers: Evaluating the First Amendment Basis for Content Moderation

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Introduction

In recent years, many Republican politicians have become increasingly vocal about the content censorship imposed by social media companies. These Republicans are concerned that social media companies have taken actions to censor conservative speech and have engaged in a type of viewpoint policing. This concern has turned into action, with Jim Jordan, Chairman of the U.S. House Committee on the Judiciary, subpoenaing the heads of several large companies, including Apple and Meta, to testify on what he calls "the federal government's reported collusion with Big Tech to suppress free speech." On the state level, several Republican-controlled legislatures have attempted to handle the issue. Notably, Texas and Florida have both passed laws restricting social media companies' ability to censor content in an attempt to prevent viewpoint-based censorship.

Since their passing, both of these laws have faced legal challenges in federal court. These challenges revolve around the notion that social media platforms have the First Amendment right to censorship and content restriction. Specifically, challengers of the Constitutionality of the two laws argue that platforms exhibit editorial control of the content hosted on their sites, and thus should be granted rights similar to those of a newspaper, or similar publisher of content. This idea has

created contradictions in federal court rulings and presented an issue ripe for the Supreme Court's guidance. In this article, I argue that social media platforms do not exhibit editorial control on their platforms, do not serve as the publishers of online content, and do not have the First Amendment right to restrict speech.

I. Texas HB 20 and Florida SB 7072

Texas House Bill 20 was signed into law in September of 2021. The bill, which only applies to companies with more than 50 million active users each month, aims to protect the First Amendment rights of Texas citizens. It requires companies to disclose information about their moderation process and search algorithms and to create clear usage policies detailing what qualifies as prohibited content. Most importantly, the law prohibits companies from censoring users based on viewpoint or geographic location.

Florida Senate Bill 7072 was signed in May of 2021 and is similar in substance to the Texas law. The law is aimed specifically at large social media companies, through a provision that only applies the law to platforms with more than 100 million global monthly users, and establishes a hefty fine structure for social media companies that deplatform candidates for local and statewide office. Like in Texas, the recent Florida law prohibits viewpoint-based restrictions on online platforms. Unlike in Texas, the censorship prohibitions in the Florida law are afforded exclusively to journalistic enterprises and candidates for public office, as well as posts about candidates for public office.

II. Legal Challenges

Soon after Texas and Florida passed these laws, NetChoice, a trade association advocating for limited government regulation on the Internet, filed legal challenges to them. With members such as Twitter, Google, Meta, and TikTok, NetChoice represents the interests of a number of today's largest technology and social media companies. The Computer & Communications Industry Association, another trade association representing social media platforms' interests, joined NetChoice in its legal efforts. NetChoice filed lawsuits against both the Texas and Florida laws (*NetChoice v. Paxton* and *NetChoice v. Moody*, respectively).

In both cases, the NetChoice argued that the laws infringed on their First Amendment rights. In doing so, they claim that the amendment grants platforms the right to censor. They argue that because they exhibit editorial control over the content of the platform, akin to a publisher, they have the right to choose what kinds of content are displayed on their platform. In both cases, the petitioners also

argued that the reporting and disclosure requirements implemented by both laws constitute an undue burden on their companies. The respondents disagreed with this analysis, arguing that social media companies are not the publishers of the speech users post on their platforms, meaning that the companies do not have the First Amendment right to censor and restrict content posted online.

Paxton was heard by the Fifth Circuit Court, and *Moody* was heard by the Eleventh Circuit Court. Both circuit court panels were comprised of three Republican-nominated judges. Despite their similar fact patterns, the circuit court panels decided *Moody* and *Paxton* in contrasting ways. In *Paxton*, the court found in favor of the respondents, upholding the Texas law. On the other hand, in *Moody*, the court found partially in favor of NetChoice, striking down the component of the Florida law prohibiting viewpoint-based censorship, while still allowing the law's reporting and disclosure requirements to stand. These different decisions have created a court split, making the Supreme Court more likely to grant review. Indeed, the Court has already reached out to the federal government for their opinion on the matter.

In *Paxton*, the Fifth Circuit found in favor of the Texas law, overturning the lower court's ruling. While the court cited several prominent and novel arguments that aided in their judgment, central among those was their conclusion that the law "protects other people's speech and regulates the Platform's conduct." The court ruled that social media companies are not the publishers of content posted on their platforms, and thus have no First Amendment claim, which would have protected their right to engage in censorship. Central to the court's rejection is Section 230 of the Communications Decency Act, passed in 1996 and a key factor in modern cases involving digital speech. Specifically, the Act states that "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." Per the Fifth Circuit's interpretation, Section 230 means that social media companies are not the publishers of content posted on their platforms, and thus are not afforded the same First Amendment protections as other publishers.

However, in *Moody*, the Eleventh Circuit found that the Florida law's censorship restrictions are unconstitutional, since "Social-media platforms like Facebook, Twitter, YouTube, and TikTok are private companies with First Amendment rights." Citing previous cases (*Miami Herald*, *Pacific Gas & Electric Co.*, *Hurley*), the court reaffirmed that the First Amendment protects editorial discretion and that private entities have the right to exclude speech based on its content. The court found, among other arguments, that social media companies possess editorial discretion, and therefore, that any restriction of their content moderation efforts is a

First Amendment violation. This ruling in *Moody* creates a contradiction with the ruling in *Paxton*, leaving the subject ripe to be taken up by the Supreme Court, with the states arguing that social media companies are not publishers, and the companies arguing that they act as publishers.

III. Resolution

To resolve this contradiction in court rulings, it is important to determine whether social media companies should be treated as the publishers of the content posted on their platforms. Traditionally, editorial discretion and the rights of publishers were privileges afforded to more standard media, such as newspapers, or even TV broadcasts. With the advent of social media, it is unclear where platforms fall on an editorial spectrum. On one hand, they use algorithms to recommend and sort content. On the other hand, they don't produce their own content, and organize content in a content-neutral manner.

Yet, while platforms exhibit some characteristics that suggest they serve as publishers of content, a common-sense approach to the issue reveals that platforms are nothing like newspapers and television channels. If an offensive Tweet were to be widely shared, the Tweet would be attributed to the user who created the Tweet and would never be attributed to Twitter in any way. In contrast, an offensive news article, or parade float, would be attributed to the editor or organizer in at least a minimal capacity. Facebook and the *New York Times* are not viewed or treated the same way by their users, or society as a whole, and should not be conflated in First Amendment cases. Indeed, an offensive news article written by a journalist at the *New York Times* would be attributed to the paper, since the paper employs the journalist, edited the offensive article, and chose to publish it on their website. In this situation, the New York Times exhibits editorial control over the offensive article. On the other hand, an offensive Tweet would not come from someone with a professional affiliation with Twitter, would not have been edited by Twitter, and would not have been selected for publication by Twitter. Thus, the company demonstrates no editorial control over the content posted on its platform. The 5th Circuit's argument more aptly reflects the nature of the cyber landscape, while the 11th Circuit fails to acknowledge the novelty of digital content hosting by treating these companies as publishers. Social media platforms should not be treated as publishers of content. Platforms and publishers are not the same thing.

This argument is supported by the argument of social media companies themselves in other recent cases. Argued on February 21st, 2023, *Gonzales v. Google LLC*. dealt with Google's recommendation of ISIS recruitment and fundraising videos

before a 2015 terror attack. In this case, the petitioner argues that Section 230 of the Communications Decency Act does not protect all content recommendation practices, while Google argues Section 230 shields them from liability, claiming that "Section 230 flows from Congress's recognition that today's internet could not exist if the law treated every website and user as the publisher or speaker of the third-party content they disseminated." In *Gonzalez*, Google is using the regulations and statutes laid out by Section 230 to protect them from liability, claiming that they should not be held responsible as a publisher of content. In contrast, NetChoice, of whom Google is a member, is arguing in *Paxton* and *Moody* that, because of the content organization practices of large platforms such as Google's YouTube, they are the publishers of content and have First Amendment rights.

It appears that social media companies want to have Section 230 both ways; they wish to be afforded the First Amendment rights of a publisher, claiming that they hold editorial discretion over the content that appears on their platforms. Yet, at the same time, they want to be immune from liability based on the content posted to their platforms. The arguments made by these platforms in different cases are inconsistent with one another. The Supreme Court's rulings in the upcoming cases should do much to clarify the issue and resolve the numerous contradictions present in the recent group of First Amendment cases.

The Supreme Court's recent interest in Section 230 illustrates the growing importance of the statute in internet litigation and reveals the challenge the novelty of the Internet provides to lawmakers and judicial bodies. Until Congress acts to reform Section 230, it is up to the Court to shape the rules that govern the digital landscape. The Court should hold that internet platforms are not publishers or editors of the content hosted on their platforms.