

SCOTUS Expected to Hear Controversial Social Media Law

By Ross Stone

As social media becomes increasingly prominent, tech companies are presented with rising pressures from legislatures throughout the nation. Various public officials argue that conservative speech is unjustly limited on major platforms such as Facebook and Twitter. On the contrary, tech companies assert that censorship is necessary for the public benefit as the presence of hate speech and misinformation is vast on their platforms. While First Amendment arguments from both sides create a murky outlook concerning online speech, the Supreme Court of the United States is presumed to hear a case which may define the bounds of online speech for the coming decades.

This past May, tech companies experienced a colossal victory when the U.S. Court of Appeals for the Eleventh Circuit held that a Florida law preventing social media platforms from suspending politicians was unconstitutional.¹ Florida's republican-led legislature enacted this law to treat platforms as common carriers which must operate without discrimination, a classification which would substantially limit censorship.² Nonetheless, the Eleventh Circuit reasoned that Florida's law was a violation of free speech since "with minor exceptions, the government can't tell a private . . . entity what to say" under the First Amendment.³

The issue surrounding state-imposed censorship continued, and the victory for social media platforms in Eleventh Circuit was only a short one. A split decision emerged after the Fifth Circuit upheld a similar state law in Texas this past September.⁴ This decision comes after the Supreme Court protected an injunction that ceased the Texas law before it went into effect in 2021.⁵ Unsurprisingly, the Fifth Circuit's decision was met with much dismay. Objectors called the decision an "angrily incoherent First Amendment Decision" and a "troll to get SCOTUS to grant cert" among other things.⁶ Social media platforms were also stunned by the Fifth Circuit decision as no other opinion has permitted the government to regulate speech on social media platforms to such a great extent.⁷

As a result of this jurisdictional split, Florida recently petitioned the Supreme Court to review the constitutionality of its law that restricts social media platforms from banning politicians.⁸ Justices Samuel Alito, Clarence Thomas, and Neil Gorsuch have already shown interest to grant certiorari through their dissenting opinion in the Supreme Court 2021 decision that issued an injunction on Texas' law.⁹ Moreover, Eric Goldman, a law professor at Santa

¹ Jennifer Kay, *Court Allows Social Media to Retain Florida Politician Bans*, BLOOMBERG LAW (May 23, 2022), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/true/X4D256E000000?bna_news_filter=true#jcte.

² *Id.*

³ *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022).

⁴ Joe Schneider, *Texas Social Media Law Upheld by Federal Appeals Court*, BLOOMBERG LAW, (Sept. 16, 2022, 6:52 PM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews>.

⁵ Laurel Calkins, *Social Media Giants Ask to Pause Texas Law for High Court Review*, BLOOMBERG LAW (Sept. 29, 2022, 3:36 PM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news>.

⁶ Alan Z. Rozenshtein, *The Fifth Circuit's Social Media Decision: A Dangerous Example of First Amendment Absolutism*, LAWFARE (Sept. 20, 2022, 12:52 PM), <https://www.lawfareblog.com/fifth-circuits-social-media-decision-dangerous-example-first-amendment-absolutism>.

⁷ Calkins, *supra* note 5.

⁸ Jennifer Kay, *Justices Urged to Weigh Social Media Laws Amid Appeals Split*, BLOOMBERG LAW (Sept.23, 2022, 5:00 AM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news>.

⁹ *Id.*

Clara University specializing in internet regulation, stated that he would be “surprise[d]” if the Supreme Court does not intervene since the circuit split causes a disparity.¹⁰

Assuming the court grants certiorari, the holding will presumably have a substantial effect on how content moderation develops. If the Florida law is upheld as constitutional, tech companies will have to worry about much more than regulations and congressional hearings. While tech companies have more than two hundred years of First Amendment precedent in their rolodex, six out of the nine justices on the Supreme Court are conservative, thus creating optimism among Florida and Texas republican officials who desire to restrain censorship on social media platforms.

¹⁰ *Id.*