

Social Media, The Supreme Court, and The First Amendment

Darian Fautz

There have been many changes in the social media world lately, such as Meta's development and use of AI and Twitter's rebrand to X, with many more to come. Some of these forthcoming changes could come from state legislatures and maybe even the Supreme Court. These changes will have a major impact on social media platforms and First Amendment rights.

The Supreme Court recently decided that during their 2023-2024 term, it will review the constitutionality of two state laws that address social media companies' ability to remove posts based on the views the posts express.¹ These laws come from Florida and Texas and were challenged in *Moody v. NetChoice, LLC* and *NetChoice, LLC v. Paxton*.² The laws, which were enacted in 2021, stemmed from the viewpoint that tech platforms were specifically censoring conservative posts and opinions.³ To summarize the laws, Judge Andrew S. Oldman wrote in an opinion upholding the Texas law that "the Florida law "prohibits all censorship of some speakers," while the Texas law "prohibits some censorship of all speakers" when based on the views they express."⁴ The laws also require certain disclosure processes from the social media platform when they censor or moderate something online.⁵

The main function of the Florida law, also known as S.B. 7072 or the Stop Social Media Censorship Act, is to prohibit social media sites from banning journalistic enterprises and political candidates.⁶ The prohibition on banning political candidates from a social media platform lasts until the day of the election or until the candidate ceases his or her candidacy.⁷ The social media site must also "provide each user a method by which the user may be identified as a qualified candidate and which provides sufficient information to allow the social media platform to confirm the user's qualification by reviewing the website of the Division of Elections or the website of the local supervisor of elections."⁸ The law also prohibits social media platforms from shadow banning political candidates and journalistic enterprises.⁹ The law defines shadow banning as limiting or eliminating exposure to a user's content, whether this is through a real person or an algorithm.¹⁰ The bill listed some of the findings of the legislature in preparing the bill. These findings said that social media companies are in a unique position when it comes to protecting First Amendment rights for Floridian citizens and that "[s]ocial media platforms that unfairly censor, shadow ban, de-platform, or apply post-prioritization algorithms to Florida

¹ Adam Liptak, *Supreme Court to Hear Challenges to State Laws on Social Media*, THE NEW YORK TIMES (Sept. 29, 2023), <https://www.nytimes.com/2023/09/29/us/supreme-court-social-media-first-amendment.html?searchResultPosition=2>.

² Amy Howe, *Justices take major Florida and Texas social media cases*, SCOTUSBLOG (Sept. 29, 2023, 9:48 AM), <https://www.scotusblog.com/2023/09/justices-take-major-florida-and-texas-social-media-cases/>.

³ *Id.*

⁴ Adam Liptak, *Supreme Court to Hear Challenges to State Laws on Social Media*, THE NEW YORK TIMES (Sept. 29, 2023), <https://www.nytimes.com/2023/09/29/us/supreme-court-social-media-first-amendment.html?searchResultPosition=2>.

⁵ *Id.*

⁶ Amy Howe, *Justices take major Florida and Texas social media cases*, SCOTUSBLOG (Sept. 29, 2023, 9:48 AM), <https://www.scotusblog.com/2023/09/justices-take-major-florida-and-texas-social-media-cases/>.

⁷ S. 7072, 2021 Leg., (Fla. 2021).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

candidates, Florida users, or Florida residents are not acting in good faith.”¹¹ In a statement that came with his signing of the bill, Ron DeSantis said, “if Big Tech censors enforce rules inconsistently, to discriminate in favor of the dominant Silicon Valley ideology, they will now be held accountable.”¹² His statements reinforced the overall conservative purpose of the bill.

The Texas law talked about the importance of social media platforms being the current public forum for debate and focused on the size of different platforms by saying those “with the largest number of users are common carriers by virtue of their market dominance.”¹³ The Texas legislature limited the law’s application to social media platforms with more than 50 million active users in a month.¹⁴ This law is quite broad in its censorship prohibitions. The law prohibits censorship of users’ content if the censoring was based on a user’s viewpoint, a viewpoint represented in an expression, and geographic location in Texas.¹⁵ The Texas law carves out some exceptions for censorship in the case of sexual exploitation of children, incitement of criminal activity, and certain threats of violence.¹⁶

The U.S. Solicitor General, Elizabeth Prelogar, filed the brief to the Court asking it to consider these laws. The two main questions presented to the Court were whether the restrictions regarding how social media platforms can decide to censor material on their sites is a violation of the First Amendment and whether the requirement that companies disclose their process in determining which materials get moderated violates the First Amendment.¹⁷ There were two other questions presented in the cases at the circuit court level that both courts rejected, and they will not be considered when the case gets to the Supreme Court; these questions involved general disclosure requirements and whether large social media companies were targeted for their censorship of conservative content.¹⁸

The Supreme Court will probably consider this case next year, and it is the second case involving social media and the First Amendment on the docket for the term.¹⁹ Three of the Supreme Court Justices have already expressed some thoughts on these issues when dealing with an appeal of the Texas case last year. Justices Samuel A. Alito Jr., Clarence Thomas and Neil M. Gorsuch stated in an opinion that “they would have left the law in place and that the issues were so novel and significant that the Supreme Court would have to consider them at some point.”²⁰

This will certainly be a case to stay updated on. One of the laws was upheld by the Circuit Court while the other was struck down. With such a blatantly politicized case, it will be interesting to see how the current conservative skewing court rules.

¹¹ *Id.*

¹² Adam Liptak, *Supreme Court to Hear Challenges to State Laws on Social Media*, THE NEW YORK TIMES (Sept. 29, 2023), <https://www.nytimes.com/2023/09/29/us/supreme-court-social-media-first-amendment.html?searchResultPosition=2>.

¹³ H.R. 20, 2021 Leg., (Tex. 2021).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Amy Howe, *Justices take major Florida and Texas social media cases*, SCOTUSBLOG (Sept. 29, 2023, 9:48 AM), <https://www.scotusblog.com/2023/09/justices-take-major-florida-and-texas-social-media-cases/>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Adam Liptak, *Supreme Court to Hear Challenges to State Laws on Social Media*, THE NEW YORK TIMES (Sept. 29, 2023), <https://www.nytimes.com/2023/09/29/us/supreme-court-social-media-first-amendment.html?searchResultPosition=2>.