

Will the Supreme Court Let Social Media Attempt to Remain “Free?”

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Americans use social media – a lot. Nearly 70 percent of adults in this country use Facebook, and almost half of Americans use Instagram.¹ In addition to these large platforms, a significant portion of Americans also use Pinterest, TikTok, Reddit, and Twitter (X).² On these platforms people share opinions, photos, and memories of their lives. In addition to sharing parts of our lives, social media is also a place to absorb the opinions and experiences of others. In fact, social media has replaced traditional sources of news in America. Researchers estimate that 30 percent of Americans get their news from Facebook.³

The rise in social media use has also correlated with an increase of the spread of incorrect or misleading information – misinformation.⁴ Examples of misinformation vary, from information about political candidates, to conspiracy theories, to unfounded statements about public-health crises.⁵ Research has found that pervasive misinformation creates a distrust in the media and undermines democratic processes.⁶ There are also reports of an increase of hate speech on social media platforms that correlates to a rise in misinformation.⁷

To combat the ramifications of misinformation, platforms are implementing new community standards. For example, Meta’s Community Standards are designed to have Facebook only have content that is “newsworthy and in the public interest.”⁸ These qualities are determined by “weighing the public interest value against the risk of harm.”⁹ The site purports to make these determinations in line with international human rights standards.¹⁰ Content that may not be newsworthy and in the public interest, such as posts about Holocaust denial, can be removed at Facebook’s discretion.¹¹

While content-moderation policies may seem common sense, some states certainly do not necessarily feel that way. In 2021, both Florida and Texas passed laws regulating social media

¹ Jeffrey Gottfried, *Americans’ Social Media Use*, PEW RESEARCH CENTER (Jan. 31, 2024), <https://www.pewresearch.org/internet/2024/01/31/americans-social-media-use/>.

² *Id.*

³ *Social Media and News Fact Sheet*, PEW RESEARCH CENTER (Nov. 15, 2023), <https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/>.

⁴ *How Misinformation on Social Media Has Changed News*, U.S. PRIG (Aug. 14, 2023), <https://pirg.org/edfund/articles/misinformation-on-social-media/>.

⁵ *Pope Warns About Fake News – From Experience*, ASSOCC. PRESS (Dec. 7, 2016), <https://apnews.com/general-news-86073aedf0c245eaa8fbbeecd8ffff791> (fake news that Pope Francis endorsed then-presidential candidate Donald Trump); Amanda Robb, *Anatomy of a Fake News Scandal*, ROLLING STONE (Nov. 16, 2017), <https://www.rollingstone.com/feature/anatomy-of-a-fake-news-scandal-125877/> (fake news scandal known as “Pizzagate” that claimed Hillary Clinton was a pedophile); Grayce Mores, *Misinformation and COVID-19*, LSU FIGHT FAKE NEWS (Aug. 2021), https://faculty.lsu.edu/fakenews/protect_yourself/covid-19.php (“Fake news related to this virus spread rampantly in 2020 through social media platforms . . .”).

⁶ *Fake News: Consequence of Fake News*, UNIV. OF EXETER LIBR. <https://libguides.exeter.ac.uk/fakenews/consequences> (last updated Mar. 7, 2024).

⁷ Ilana Coolidge, *Unfriendly Content: The Rise of Hate Speech on Social Media*, YW BOSTON BLOG (Jul. 12, 2023), <https://www.ywboston.org/unfriendly-content-the-rise-of-hate-speech-on-social-media/>.

⁸ *Facebook Community Standards*, META <https://transparency.fb.com/policies/community-standards/> (last visited Mar. 15, 2024).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

sites' ability to monitor content on their platforms.¹² Florida SB 7072, put into effect in July of 2021, restricts social media sites from “deplatforming . . . a political candidate or journalistic enterprise.”¹³ Similarly, Texas HB 20 prohibits these sites from censoring a user, their expression, or their ability to receive the expression of another based on the viewpoint of the user, the viewpoint represented in their expression, or their location in Texas or any part of Texas.¹⁴ It has been reported that these laws were specifically passed in response to former President Trump being banned from Facebook and Twitter following the insurrection on January 6, 2021.¹⁵

In quick retort to these two bills, NetChoice, a trade group that represents a variety of internet enterprises, including Meta and TikTok, to protect the internet as a place for free enterprise and free expression,¹⁶ brought suit questioning the constitutional validity of these laws.¹⁷ Facially, these laws pose First Amendment challenges in that it limits private parties' right to make “editorial choices in [their] selection and presentation of speech.”¹⁸ In deciding these cases, two separate circuits came down with two opposite interpretations. In the Florida case, the Eleventh Circuit upheld a preliminary injunction against the law.¹⁹ However, in Texas, the Fifth Circuit did not believe that corporations had a “freewheeling” First Amendment right to censor what people say.²⁰

Both these decisions were appealed to the Supreme Court, and cert was granted to hear the issues together.²¹ Coming out of a February 26, 2024 oral argument, the justices appeared to be skeptical that states could be able to regulate social media in such a fashion.²² A major hang-up was the constitutionality of the statutes.²³ Preventing platforms from making editorial judgements violates these companies' free speech rights, as the Court established in 1974.²⁴ The court held in *Miami Herald v. Tornillo* that newspapers cannot be required to publish certain content.²⁵ Some justices' questions also hinted at making a final decision that would hinge on whether or not content moderation was “editorial control” or “censorship.”²⁶

¹² TEX. CIV. PAC. & REM. CODE ANN. § 143A.002 (West 2021) [hereinafter Texas Statute]; FLA. STAT. § 501.2041 (West 2022) [hereinafter Florida Statute].

¹³ Florida Statute *supra* note 12.

¹⁴ Texas Statute *supra* note 12.

¹⁵ David Ingram & Ben Kamisar, *In Nod to Trump, Florida Is Set to Ban 'Deplatforming' by Tech Companies*, NBC NEWS (Apr. 20, 2021), <https://www.nbcnews.com/politics/politics-news/nod-donald-trump-florida-set-ban-big-tech-deplatforming-rca784>.

¹⁶ *About Us*, NETCHOICE, <https://netchoice.org/about/> (last visited Mar. 15, 2024).

¹⁷ *See* NetChoice, LLC v. Paxton, 573 F.Supp.3d 1092 (W.D.Tex. 2021); *see also* NetChoice, LLC v. Moody, 546 F.Supp.3d 1082 (S.D.Fla 2021).

¹⁸ Brief for Petitioner at iii, NetChoice, LLC v. Paxton, 144 S.Ct 477 (2023) (Mem) (No. 22-555), 2023 WL 8437869, at *iii.

¹⁹ *See* NetChoice, LLC v. Attorney General, Florida, 34 F.4th 1196 (11th Cir. 2022).

²⁰ *See* NetChoice, LLC v. Paxton, 49 F.4th 430 (5th Cir. 2022).

²¹ Adam Liptak, *Supreme Court to Hear Challenges to State Laws on Social Media*, NY TIMES (Sept. 23, 2023), <https://www.nytimes.com/2023/09/29/us/supreme-court-social-media-first-amendment.html>.

²² Amy Howe, *Supreme Court Skeptical of Texas, Florida Regulation of Social Media Moderation*, SCOTUS BLOG (Feb 26, 2024), <https://www.scotusblog.com/2024/02/supreme-court-skeptical-of-texas-florida-regulation-of-social-media-moderation/>

²³ *Id.*

²⁴ *Miami Herald v. Tornillo*, 418 U.S. 241 (1974).

²⁵ *Id.*

²⁶ Howe, *supra* note 22.

While it appears clear that the majority of the justices have some issues with constitutionality of Texas' and Florida's laws, there is less certainty on the remedy they will award.²⁷ Because NetChoice brought these cases as "facial challenges," meaning that the entire law cannot be applied to any person, there is debate on whether this law would not be violating free speech for all social media companies.²⁸ One hypothetical focused on in oral argument was whether or not these statutes would apply to Uber and would violate Uber's free speech rights.²⁹ If it would apply, and it does not affect the company's right, perhaps a facial challenge is not appropriate.³⁰ Representatives of the social media sites urged the Court in oral argument to take a narrow approach and save remaining issues for another case.³¹

Because of these issues in determining a remedy, it is not entirely clear how the Court will decide these cases. One consideration is that even though oral arguments were conducted on the same day, the content of the two bills are different, and thus different holdings may come down. Of course, if the Court upholds these laws, then there is a possibility that other states will implement similar laws. If that is the case, then instead of facial challenges, surely social media sites will bring as-applied challenges, which would require an entire new series of litigation.³² Unfortunately, all there is to do now is wait for a decision, which is expected this summer.

²⁷ *Id.*

²⁸ Ian Millhiser, *The Supreme Court Appeared Lost In a Massive Case About Free Speech Online*, VOX (Feb. 26, 2024), <https://www.vox.com/scotus/2024/2/26/24083652/supreme-court-netchoice-paxton-moody-texas-florida-first-amendment-social-media-facebook-youtube>

²⁹ Howe, *supra* note 22.

³⁰ *Id.*

³¹ *Id.*

³² Millhiser, *supra* note 29.