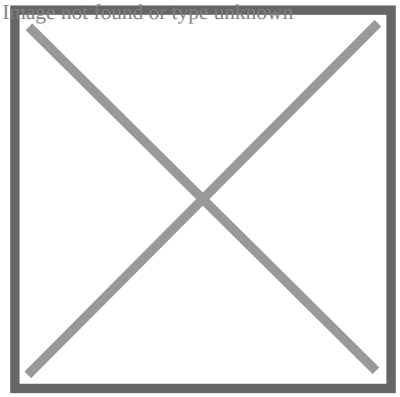

Boom! Texas Slams Social Media, Allows Lawsuits Over Censorship

Description

“While HB 20 is in effect, Texas users can sue platforms like Facebook and Twitter if they get “censored” for their viewpoints — a vague premise, designed by conservatives who claim that Big Tech unfairly silences them and down-ranks their content.” ? TN Editor

The surprise Wednesday ruling by a panel of three federal appeals court judges allows Texas’ social media law to go into effect — and has led to panicked befuddlement among tech policy experts wondering how platforms could possibly comply, even if they wanted to, and what options the services have for challenging the ruling.

The judges ruled 2-1 that the law should be effective while they hear an appeal by two Big Tech trade groups of a district court injunction that initially put the measure on hold. The judges did not immediately publish their reasoning, but the move will force social media companies to face a legal environment that could threaten the core content bans, moderation practices and ranking algorithms that have allowed them to flourish since the 1990s.

While HB 20 is in effect, Texas users can sue platforms like Facebook and Twitter if they get “censored” for their viewpoints — a vague premise, designed by conservatives who claim that Big Tech unfairly silences them and down-ranks their content.

Until this week, industry observers widely expected the court to uphold a block on the law. In addition to the lower court’s injunction, a different federal court also paused a similar Florida law, finding that it violated the First Amendment in seeking to punish private companies for their views and treatment of content. Those decisions also echoed extensive Supreme Court precedent.

But instead, the Fifth Circuit judges appeared to struggle with basic tech concepts during a Monday hearing — including whether Twitter counts as a website — before issuing Wednesday’s startling decision.

Matt Schruers, the president of Computer & Communications Industry Association, one of the two groups that challenged the law, said in a statement that “no option is off the table” as far as challenging the ruling and the statute. A lawyer for NetChoice, the other plaintiff, tweeted that it would “absolutely

be appealing."

One option for the groups is to seek an en banc appeal — basically, a rehearing by a larger panel of judges in the same court, which is often viewed as the most conservative circuit in the U.S. But the decision on Wednesday may signal that even that larger group would come to a similar conclusion, said David Greene, civil liberties director at the Electronic Frontier Foundation.

The EFF supported the platforms' suit in a brief. The law is unconstitutional, Greene said. "My hope is that at some point, a court will agree with that, and strike [the law] down," Greene told Protocol. "But I think that's only going to happen at the Supreme Court level."

There are two ways the companies could end up in the Supreme Court: They could skip the en banc hearing and start by appealing to the Supreme Court directly, or they could try to bring the case there after another loss in the appeals court. But the majority of the nine justices might not see a reason to jump in at this stage, and could instead hold for a time when the companies are actually facing lawsuits permitted by the Texas statute.

Alternatively, experts said, the high court would be more likely to get involved if the 11th Circuit court upholds the existing block on the Florida law and the Supreme Court can resolve the differences between the two approaches.

Any decision the Supreme Court makes would depend greatly on the appeals courts' framing of the issues, Greene said. If the court's conservative majority wants to approve Texas' law, however, it would likely have to contend with precedent that five conservative justices signed on to as recently as 2019, which affirmed the First Amendment rights of private actors to control content they carry as they see fit.

In the meantime, lawsuits could kick off any minute now as aggrieved users — or the state, which can act on their behalf — claim they've been targeted for their viewpoints and seek to force services restore their content and accounts, or even win some sort of prime placement on social media feeds. Such lawsuits were already common, despite failing repeatedly due to sites' Section 230 protections, but if those suits become successful, even the most basic content moderation models could become untenable. Platforms have worried that would, in turn, force a spike of hate speech and dangerous misinformation on services that host user posts, or prompt the return of chronological feeds, which tend to be spammy and unpopular.

Medium-sized sites and services that don't have Meta-sized budgets to handle litigation — but still have the 50 million monthly active users that make them qualify under Texas' law — would likely struggle in particular with the new legal regime.

"It's so hard to know what the law means and … whether you can change your entire product to try [to] comply with the law," Greene said. "That's really hard."

In addition, an early suggestion — that companies could simply pull out of Texas — might be impractical and politically disastrous, said Corbin Barthold, director of Appellate Litigation at the libertarian group TechFreedom, which also supported the challenge to the law.

“Can you imagine the loudmouths on Capitol Hill, the hell they would raise?” Barthold said. Companies will probably feel that “the nuclear option is too much.”

Barthold pointed out that such a move may even fall afoul of the law, which stops companies from complying by isolating users in Texas. Instead, companies might try to have suits moved to other venues, or wait for the issue to get back down to the federal trial court level and argue that Texas’ law impermissibly gets in the way of other states’ commerce.

The Texas law contains yet another provision that could throw off companies’ planning: There’s a section that says Texas courts can’t impose any action that federal law prohibits. Sec. 230 currently protects internet content companies from exactly those actions when they pertain to content moderation, which may leave in place only Texas’ disclosure requirements. The law also requires platforms to maintain public policies that delineate what kinds of content are banned — i.e., the terms of service that most apps and platforms already publish — though in practice, would-be plaintiffs could easily claim that even moderation decisions arising from such clear policies are actually viewpoint-based and forbidden under the law.

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