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US Supreme Court Decision on social media regulation, uncertainty remains!

In 2021 both Florida[1] and Texas[2] adopted laws to regulate social media platforms content moderation policies and practices. Social media platforms challenged the laws' constitutionality invoking their First Amendment protections. The US Supreme Court rendered its decision on July 1, 2024, referring the cases back to the lower courts.

What is the issue?

As governors of Florida[3] and Texas considered that social media companies silence conservative viewpoints and ideas[4] social media laws were adopted in both states restricting the platforms' abilities to do so.

Both laws provide regulations on content moderation practices and policies. Florida's law restricts in particular platforms ability to "censor"[5] election candidates content and accounts and that of journalistic enterprises. Texas' law restricts to "censor"[6] based on the viewpoint of the user. However content can be moderated, if it is prohibited by federal law, is unlawful expression, incitement for criminal activity or targeted threats of violence. Both laws also require user notifications and explanations for content moderation decisions. Some organizations such as Article 19 argue that these laws open doors for politicized government intervention.[7]

Social media companies[8] went to challenge these laws evoking their right to protection of speech under the First Amendment, thus their constitutional right. Lower courts (the

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[1] The Florida Senate, SB 7072 — Social Media Platforms, www.flsenate.gov/Committees/billsummaries/2021/html/2345

[2] Civil Practice and Remedies Code- Chapter 143A. Discourse on social media platforms

[3] Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech, May 24, 2021

[4] US Supreme Court Judgement - Moody Attorney General of Florida, et al. v. Netchoice, LLC, DBA Netchoice, et al. - 1 July 2024

[5] ""Censor" includes any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. The term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform"- 501.2041(1b)

[6] "Censor" means to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression- Section 143A.001

[7] Article 19 (2023), US Supreme Court: Important precedent for free speech in Texas and Florida social media laws, www.article19.org/resources/us-supreme-court-important-precedent-for-free-speech-in-texas-and-florida-social-media-laws/

[8] represented by NetChoice and the Computer & Communications Industry Association

Eleventh Circuit in Florida and Fifth Circuit in Texas) came to different conclusions regarding the constitutionality of the social media laws, leading to a US Supreme Court referral and decision on July 1, 2024.

The judgment evokes that social media should have First Amendment protection and thus the decisions of the lower courts need to be revisited from this angle. Yet the decision focuses mainly on a procedural aspect, notably that the courts did not conduct a proper facial analysis[9]. The lack of a proper facial analysis is the only aspect all judges agree upon.

In addition, the court examined if the requirements to provide explanations and appeal mechanisms for content moderation decisions to users are too burdensome.[10]

Why is this important and what are the potential consequences?

One of the key questions is if social media content moderation policies and practices are protected as free speech under the First Amendment. The judgment of this issue will have important consequences on (potential) social media regulation in the US overall.

The Supreme Court's decision explains that the First Amendment protects speech which is an actor's own expressive activity. An expressive activity can include “compiling and curating others’ speech into an expressive product of its own is directed to accommodate messages it would prefer to exclude”. In this sense, editorial choices by news organizations are for example protected under the First Amendment.

Can social media content moderation practices which compile, include and exclude certain speech be considered as an expressive activity that receives First Amendment protection?

The Texas’ court argues no. The Florida court argues yes. The opinion of the Supreme Court also argues yes, yet some judges disagree on being able to provide a final judgment on this question. The final decision largely influences how and on what grounds governments could regulate social media.

Even if social media moderation was to be considered an expressive activity which is protected, could States intervene to impose their values?

The Texas court argued that even if it was speech,”the State could regulate them to advance its interest in protecting a diversity of ideas”.[11] Whereas Florida's court contests that view stating “*a State has no legitimate interest in counteracting private censorship by tilting public debate in a preferred direction*.”[12] This view was reiterated by the Supreme Court saying the

[9] NetChoice chose to litigate as a facial challenge, which means that no interpretation of the law can be interpreted as constitutional. To determine the constitutionality of the law, the court therefore has to conduct a facial analysis. This includes analyzing the law's scope and which of the law’s applications violate the constitution, assessing them against those applications that do not violate the constitution.
[10] US Supreme Court Judgement
[11] US Supreme Court Judgement
[12] US Supreme Court Judgement

government cannot regulate by "*asserting an interest in better balancing the marketplace of ideas.*"[13]

The lower courts will have to do an in-depth analysis of the laws and their constitutionality. The final judgment might also have implications for Section 230 of the Communications Decency Act which states that platforms may not be regarded as publishers of information provided or shared by another person. In the future, American lawmakers will thus have to carefully consider on which grounds they regulate social media, which liability regimes they impose on social media and which rights they offer in line with constitutional protections.

Opinion:

As Reporters without Borders argues and as the Partnership for Information and Democracy, of which the US is a member, declares, the global communication space shall neither be left solely to private or self-regulation as it is a public space nor be used to restrict the exercise of human rights and access to reliable information.

[13] US Supreme Court Judgement