Draft Brief in NetChoice et al. v. Paxton as Texas AG

in support of the Texas Bill HB.20. The factual background and much of the argument can be used in other litigation.

This Draft was mainly written before #TwitterFiles hit. #TwitterFiles demonstrated that Google, Facebook, and multiple other Big Tech platforms act as government agents, making their defense of their censorship entirely baseless.

Table of Content

Table of Authorities

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

STATEMENT

Factual background

The market capitalization of the affected Platform companies (as of the date of the original complaint, September 19, 2021) was as follows: Google (Alphabet) – $1,830 billion (yes, almost $2 trillion); Facebook (Meta), including Instagram – $970 billion (nearly $1 trillion); ByteDance (TikTok's owner, private: https://archive.is/MmfXr) – approximately $300 billion; Twitter – $50 billion; and Pinterest – $37 billion. The total was $4.2 trillion.

ByteDance is based in Beijing and incorporated in China. TikTok is an instrumentality of the Government of China and the Chinese Communist Party. Vimeo does not fall under HB 20.[1]

[1] Besides having less than 50 million qualified monthly users (https://tinyurl.com/5r9fsuty), and is properly not included under Sec. 120.001(1)(C): "The term does not include… an online service, application, or

From here, "the Platforms" are Google, Google's subsidiary YouTube, and Facebook.

Platforms' business model

The Platforms' business model is to show advertising alongside content created by communication between their users, transmitted over the Internet at the expense of their users and spiced up by their users' private data. The Platforms' apps run on users' devices, primarily smartphones. The Platforms get these three main ingredients of their business (content, physical reproduction, and private data) from their users, mostly free, to generate revenue and attract new users.

Thus, the Platforms receive all ingredients for their services from their users for free, except that YouTube pays its video creators. YouTube claims, though, that it is not obligated to pay its creators and can demonetize them at will.

Services promised to the users in exchange

The Platforms provide their users (more accurately, customers, most of whom are consumers, but also most federal, state, and local governments) telecommunications services over the Internet. The services are data transmission between the users, data storage, user authentication, and combinations. The specific properties of social media platforms are that a) they enable users to communicate with one another, and b) they facilitate communication not only by sending messages from points A to B but in more complex ways, including multicast, interactive groups, instant repost, and reply. The HB 20 definition of social media platforms excellently captures this property, distinguishing them from most websites, which publish their content and third parties' content, such as newspapers.

Like other service providers, from house cleaning and car repair to health care, the Platforms are expected to exercise professional judgment in their

---

website: (i) that consists primarily of … content that is not user generated but is preselected by the provider; and (ii) for which any chat, comments, or interactive functionality is incidental…."

services. That includes content moderation by the Platforms, such as spam removal. Also, Platforms have some degree of business discretion. For example, they use business discretion to increase user engagement and maximize profit from the ads shown to the users. These activities are subject to contracts between each Platform and each user. Neither of these activities gives any of the Platform's rights to self-expression or "editorial discretion" over the content that the user sends or receives or over the user.

For a few years, the Platforms have been increasingly mistreating their customers with covert and overt restrictions, bans, de-prioritizing, etc., to increase profits and make good on their promises to specific political forces, foreign and domestic. That does not turn this conduct into a right.

The Platforms' telecommunications services, as promised and endorsed by the federal government, made them attractive for real publishers, speakers, and media enterprises. Writers, journalists, and other intellectual property creators have set up accounts on the Platforms and invested in those accounts. When a writer (a journalist, scientist, businessperson, etc.) develops or brings to the Platform his or her audience, the goodwill belongs to the writer. The relationships between the writer and each audience member belong to them. They have reasonably relied on the Platform's promise to maintain data representing these relationships. Some creators spend significant money on advertising on the Platforms to attract the audience to their accounts. Each user's account on a Platform is a thing of value to the user.

In this respect, the Platforms act as banks, and their user accounts are like bank accounts. This distinguishes the Platforms from the Internet access service providers (ISPs). ISP customers do not invest in their accounts and can switch to another ISP anytime.

The Platforms' interference with information transmitted or received by their consumers is worse than censorship or refusal to deal. It is malicious infliction of damage on their consumers.

Government Accounts on the Platforms

The federal government, the government of Texas, and the governments of its counties and cities have hundreds of accounts on the Platforms for communication with Texas residents. Some of them provide emergency information and help.

The Government of Texas is interested in citizens' access to these accounts without discrimination by their political and religious views. The Platforms have claimed a right to discriminate against their customers[2] without any restrictions, contrary to the laws and court decisions of the last 60 years. Without HB 20 Section 2 or some equivalent, it is difficult to know the real criteria for discrimination by the Platforms. The Platforms might discriminate by race, religion, ethnicity, language, and place of birth and deny that.

On opening accounts with the Platforms, the government entities had to sign agreements with the Platforms, guaranteeing non-discrimination and non-infringement of other Constitutional rights of citizens, using the Platforms to communicate or transact business with the government. The government accounts provided the Platforms with huge benefits, from endorsement to guarantee of fair treatment. Usually, such contracts are made through open bidding, and winning providers pay concession fees.

Yet, these contracts were not introduced in the 70-days district court trial that led to the preliminary injunction.

The Platforms power

Google (Alphabet) owns multiple other digital services integrated with YouTube: Google Search, Gmail, GDrive, Google Maps, etc.

Today, smartphones are the most numerous networked devices. They are used even by people who do not ordinarily use computers. Google's Android OS powers most smartphones. The second most widespread is Apple's iOS,

---

[2] Quote location

powering Apple iPhones and iPads. Both operating systems use Google Search. About 95% of smartphone internet searches are answered by Google.

Thus, ordinary people are being manipulated by Google without knowing they interact with it. That includes many judges and government prosecutors.

Google demotes websites it does not like, including websites exposing its business model and criticizing its political bias. Most search users are unaware of that because Google has publicly promised the opposite.

Most people under 50 take their information from Google and the Platforms. TV and radio channels take their lead from Google Search, YouTube, Facebook, and Twitter. Thus, even people who do not use the Internet, or social media platforms, receive information from the Platforms without being aware of that. This information favors the Platforms and creates a prejudice against those who attempt to limit their misconduct.

In addition, Google and Facebook openly use their digital services and cash to fund media outlets of their choice.

"Over the past 20 years, we … have provided billions of dollars to support the creation of quality journalism... Each month, people click through Google Search and Google News results on publishers' websites more than 24 billion times... This free traffic helps new publishers increase their readership, build trust with readers, and earn money through advertising and subscriptions…."

(Written Testimony of Sundar Pichai, Alphabet CEO, before House Committee on Energy and Commerce; March 25, 2021. https://tinyurl.com/ybxv69zy)

No surprise that these outlets, including formerly trusted names like The New York Times, promote Google's interests in a range of topics, including HB 20.

Google Android OS comprises an apps store. It is the only recommended method of getting apps (third parties software applications) on Android

smartphones. A great variety of businesses depends on apps, from potentially competing social media networks to public laundries and house appliances manufacturers. All of that gives Google and other Platforms enormous power.

Comparing the Platforms to telegraph at the end of the 19th century is an enormous understatement. Telegraph was used only by some people and only rarely. The Platforms are used for communication, relationships, and business by most Americans below 50. Many of us use them in our daily business and personal lives, sometimes within a household.

ARGUMENT

This "case" is entirely based on the Plaintiffs' invention that the Platforms are websites. The Platforms have websites but are not websites. Banks also have websites and apps allowing their customers to do transactions and show account balances. Nevertheless, courts will laugh at this claim if a bank zeroes a customer's account, pockets the money, and claims that the First Amendment allows it to do whatever it wants on its website.

The consumers' accounts with Platforms are not less valuable, as explained above. In both cases, the website reflects value existing outside of it. The Platforms are also responsible for transmitting emergency and life-and-death information to and from their customers.

Social media platforms in HB 20

A "social media platform" is defined in HB 20 as having at least 50 million monthly users in the US and is "open to the public, allow[ing] a user to create an account, and enabl[ing] users to communicate with other users." It is impossible to imagine that 50 million Americans transferred "editorial rights" to their speech, including ordinary communication with one another, to something like Facebook or Twitter. Under the Plaintiffs' theory, Platforms have the right to change the content of any of their users' communication, including replacing "yes" with "no," labeling cure as poison and poison as a cure, and so on, while the State of Texas is powerless to prevent or remediate this misconduct. Claiming that is absurd and offensive.

The First Amendment rights of the Platforms' users (also their customers, unpaid laborers, data donors, and subjects of experiments) belong to them, not to the Platforms. The Platforms gained so many customers because they had promised to act as common carriers for them. HB 20 is a consumer protection law.

The district court's order has apparently re-assigned the First Amendment and other customers' rights to the Platforms: "Social media platforms have a First Amendment right to moderate content disseminated on their platforms"[3] and "… social media platforms... exercise editorial discretion over their platform's content".[4] It goes far beyond the injunction against the State of Texas. It casts the Platforms' (mis)conduct toward their consumers as speech and paints consumers attempting to vindicate their rights and Platforms' whistleblowers with the default suspicion of an attempt to chill the Platforms' speech.

The Platforms have no rights to users' speech.

Before everything else, the district court had to ask how the users' content and private data get onto the Platforms' websites (most customers are used by the Platforms through apps, not websites). The most valuable content displayed is protected by copyright, which belongs to the users or third parties and is posted by the users under fair use. Among Platforms' users are bestselling authors who made millions by selling their work before the rise of Platforms. On the other hand, a large part of the user-generated content is not intended by the users for publication, but the Platforms publish it anyway without the users being aware. Most customers expect the Platforms to deliver their speech to specific recipients rather than to publish it. The data that the Platforms exfiltrate from users' devices is protected under *18 US Code § 1030(a)(2)(c),(a)(4)*.

For the Platforms to operate legally, there must be contracts between the Platforms and individual users, providing the users with adequate benefits.

---

[3] Quote location
[4] Quote location

The Plaintiffs did not even allege the existence of such contracts, and no single contract text was in the record.[5]

If there were valid contracts between the Platforms and their users, they would be contracts of common carriage and subject to states' regulations as consumer services.

Covert Manipulation of Users Communication

Shadowbans, de-ranking and similar manipulations by the Platforms is covert. It is invisible to the users affected by it.

"To determine whether an actor's conduct possesses "sufficient communicative elements to bring the First Amendment into play," the Supreme Court has asked whether "[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.""

Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (per curiam)).

Covert behavior cannot be noticed, so it does not convey any particularized message to the users. Thus, the Platforms' conduct regulated by HB 20 does not even bring the First Amendment into play.

Vicious circle

The preliminary injunction is currently in effect. The odd opinion that the Platforms are First Amendment speakers for their users' speech does not only block state enforcement but also chills private litigation.

The district court issued a preliminary injunction on very thin and inaccurate evidence, most of which came from the Plaintiffs and/or Platforms.

In private litigation, lower courts regularly throw out meritorious cases against the Platforms in the early stages through an overbroad interpretation

---

[5] Going outside of the record, the purported Platforms' Terms of Service have been illegal in the US for more than a hundred years.

of CDA 230. Consequently, very little evidence enters courts and public records, and the evidence is biased in the Platforms' favor. That creates a vicious circle.

Notable Quotes from the 5th Circuit Decision

The mandate for which has not been issued.

"[First,] HB 20 applies to all speakers equally, instead of singling out political candidates and journalists for favored treatment…"

"Second, several of SB 7072's provisions arguably interfere with covered platforms' own speech, instead of merely regulating how they transmit the speech of others… HB 20, by contrast, does not interfere with the Platforms' own speech in any way…."

"Third, federalism. Invalidate-the-law-now, discover-how-it-works-later judging is particularly troublesome when reviewing state laws, as it deprives "state courts [of] the opportunity to construe a law to avoid constitutional infirmities." *Ferber*, 458 U.S. at 768. And "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange*, 552 U.S. at 451."[6]

"[The Platforms have] told their users: "We try to explicitly view ourselves as not editors. . . . We don't want to have editorial judgment over the content that's in your feed." They've told the public that they "may not monitor," "do not endorse," and "cannot take responsibility for" the content on their Platforms. They've told Congress that their "goal is to offer a platform for all ideas." And they've told courts—over and over again—that they simply "serv[e] as conduits for other parties' speech.""[7]

"…it's bizarre to posit that the Platforms provide much of the key communications infrastructure on which the social and economic life of this

[6] Quote location
[7] Quote location

Nation depends, and yet conclude each and every communication transmitted through that infrastructure still somehow implicates the Platforms' own speech for First Amendment purposes."[8]

Leo Goldstein[9]

January 2023, updated on April 27, 2023

[8] Quote location
[9] contact@defyccc.com