Draft of Amicus Brief

Leo Goldstein[1] **06/08/2022 (updated)**

The relief sought by the platforms in *NetChoice v. Paxton* should be denied, because:

SUMMARY

- The First Amendment does not even come into play in the platforms' favor, because they claim protection for their conduct on consumers' property
- The First Amendment protects the platforms' consumers, because the platforms are state actors
- The Platforms are Consumer Services Providers, not Speakers
- The Physical Access to Consumers' Speech is NOT Permission to Editorialize
- The Platforms' Terms of Service are Invalid
- The Platforms are NOT Even "Like Media"
- The Platforms' Apps are Physically on Consumers' Smartphones
- The Platforms are NOT Granted Copyright License for Editorializing
- The Platforms are NOT Authorized to Access Consumers' Computers/Smartphones for Editorializing
- The platforms are contractors for the Texas government, which has multiple accounts with them. Texas has the right and obligation to protect its residents, interacting with these accounts, against discrimination by the platforms.

[1] ah@defyccc.com ; defyccc.com

Contents

I. The Platforms cannot Claim First Amendment Protection for Their Conduct on Consumers' Property and Content

The platforms are providers of computer storage, networking, and telecommunications services to consumers. They do not own the consumers' content, computers, or relationships. Users are on the platforms' property only metaphorically; in the reality, the platforms are running their codes on the users' property.

The First Amendment does not protect vandalism, trespassing, copyright infringement, accessing protected computers without authorization, or a breach of contract. *"… it is an untenable position that conduct such as vandalism is protected by the First Amendment merely because those engaged in such conduct "intend[] thereby to express an idea."" -- (Riely v. Reno, 860 F. Supp. 693, 702 - Dist. Court, D. Arizona 1994)*. This decision was in connection with the public property; individual private property was always off limit.

HB20[2] is a consumer protection law.

The Platforms are Consumer Services Providers, not Speakers

Ownership Fallacy – Metaphor vs Reality

The platforms own only their premises, servers, software, and trademarks.

The consumers use platform services in their own homes, on their computers and smartphones, and pay for Internet traffic to and from the platforms. Consumers are the creators and copyright owners of almost all content on the platforms. The consumers own their business and personal relationships, which they bring to or create on the platforms, including *friend*'ing and *follow*'ing on Twitter and Facebook.

Most consumers give the platforms access to these tangible and intangible assets, only for specific purposes, usually to receive defined telecommunications and computing services. Platforms typically say that their compensation for these services is an opportunity to show ads to the consumers and

[2] https://legiscan.com/TX/text/HB20/id/2424328

alongside consumers-created content.[3] However, the platforms also access consumers' computers to obtain consumers' private data.

In this and similar lawsuits, big tech platforms attempt to erase the distinction between their own property and their consumers' property, and to claim the right to "self-express" on both. Of course, they are wrong.

The desire to self-express or editorialize is not enough to bring the First Amendment to bear. Vendors and service providers are not given free reign over the items they service. An auto repair garage cannot scratch slogans on the car it is servicing. A laundry company cannot paint words on the shirts it is cleaning. A private parcel service cannot tear out pages from a book it is shipping. The First Amendment does not protect such conduct.

If the consumer signs a valid release of liability, the vendor is protected under contract laws, not by the First Amendment. An attempt to invoke the First Amendment might have the opposite effect – it would show that the damage was caused intentionally (as in "expressive intent"), which is likely not covered by the release of liability.

Physical Access to Consumers' Speech is NOT Permission to Editorialize

The platforms are commercial service providers, just like garages and shipping services. The platforms receive access to users' speech, computers, and smartphones for certain purposes, such as transmitting or receiving messages or storing information. Without additional permissions, the platforms' "self-expression" actions, which affect consumers' speech or computers, are akin to crimes, such as copyright violations and unauthorized access to protected computers. These actions are the modern equivalent of trespassing and vandalism.

There should be no assumption that consumers are giving those additional permissions to the platforms. Why would anyone give Twitter permission to decide whether to deliver an appointment confirmation, a meeting invitation, or an emergency message to or from family members?

The Platforms' Terms of Service are Invalid

The platforms' Terms of Service (TOS) obviously cannot form a valid contract,[4] so they are void.

---

[3] "*In consideration for Twitter granting you access to and use of the Services, you agree that Twitter and its third-party providers and partners may place advertising on the Services or in connection with the display of Content or information from the Services whether submitted by you or others.*" -- https://twitter.com/en/tos | https://archive.ph/tKzXP

At a minimum, the clauses giving the platforms sweeping powers over the consumers' speech and/or personal data are invalid.

The Platforms are NOT Even "Like Media"

Newspapers, radios, television, other media, and "plain" websites work differently from the platforms. A newspaper publisher creates or purchases its content, prints it on purchased paper, and sells it to willing readers. Radio and TV companies produce their own content and broadcast it to willing listeners and viewers. Plain websites, excluded from the HB20 scope in § 120.001(1)(C), produce their own content, publish it, and the willing visitors read or watch it.

The platforms, however, produce little or no content of their own, but exploit the content created by their consumers. In addition to the massive value of consumer generated content, the second most important ingredient for the platforms' business model is the private data of their consumers. Platforms obtain private data from consumers' computers and smartphones. Thus, the platforms' business model is based entirely on consumer generated content, consumer private data, and the use of consumers' devices. Such use of private content, data, and devices requires permissions and authorizations from the consumers. The additional exploitation, which the platforms claim as "self-expression", requires additional permissions. Without permission, those actions are likely illegal, much like scratching slogans on a client's car, and cannot bring the First Amendment to bear. In this lawsuit, the platforms did not even attempt to show that they had received necessary permissions.

The Platforms' Apps are Physically on Consumers' Smartphones

Most people use social media platforms on their smartphones through platforms' apps – software programs installed on the consumer's smartphone. This eliminates any doubt that the platform is on the consumer's property. There is no impression that the consumer is on the platform's website. This said, the website and the app are two ways to access the platform's services. Also, even if accessed through the website interface, in a browser, the platform loads and runs its software (JavaScript) on the consumer's computer.

The Platforms are NOT Authorized to Access Consumers' Computers for Editorializing

The platforms access consumers' computers and smartphones to obtain private information. These computers and smartphones are protected computers, as defined in the Computer *Fraud and Abuse Act*

[4] https://defyccc.com/wp-content/uploads/TOS-Void.pdf

, which prohibits "*intentionally access[ing] a computer without authorization or exceed[ing] authorized access, thereby obtain[ing] information from any protected computer*" *– 18 U.S. Code § 1030(a)(2)(C)*.

In most cases, consumers do not even know the extent to which the platforms access their private devices. Google's YouTube, for example, has its beacons on most of the web, including on almost all US and Texas government websites[5]. YouTube collects information about its consumers as they browse the web, even if they do not use YouTube for months. Smartphone apps frequently collect data from the sensors, such as GPS, accelerometer, microphone etc.

The Platforms are NOT Granted Copyright License for Editorializing

Platform consumers own all rights to their speech, in accordance with *17 U.S. Code § 106*. At a minimum, this applies to creative content, which is sufficient here. One of the rights is selection of the initial audience for the content. If the platform wants to exercise editorial discretion over who receives that content, it needs a license from the copyright owner. To create derivative works, the platform needs another license.

In the lawsuit, the platforms failed to introduce any evidence showing that they received the required licenses from anybody. The text of Twitter TOS or "rules" is simply a text written by Twitter, not an agreement accepted by consumers.

There should be a strong presumption against the existence of such copyright licenses because no reasonable person would give something for nothing. Such licenses would also expose the consumers to legal liability and other hazards. Section 230 protects platforms from liability, which would normally fall on publishers. But on the platforms, any content liability falls entirely on the consumer, the content creator. Even worse, the platforms have almost no practical restrictions on how to distribute consumer-generated content. For example, a consumer tweeting "*It's a wonderful day*" can be sued for reckless infliction of emotional distress, if Twitter routes this tweet to a person who has just suffered a devastating loss.

Reno v. ACLU

Reno v. ACLU is not helpful to the platforms. The case affirms that content on the Internet is protected under the First Amendment without qualification. It does not give platforms ownership, control, or

[5] https://defyccc.com/google-spies-on-us-on-gov-sites/

editorial discretion over the speech of their consumers. The First Amendment protects the speakers, not the platforms interfering with their speech.

The Platforms' Consumers Have Rights, Too

The platforms' First Amendment rights to their own speech, including user interface, is not questioned by HB20. Platforms wrongly attempt to self-express or to have editorial discretion over consumers' speech, consumers' access to content created by third parties, and consumers' computers and smartphones.

The platforms' consumers are not freeloaders. They pay for the platforms' services by generating content, some of which is highly creative and professional and therefore highly profitable for the platforms, by having their private data harvested by the platforms, and by viewing ads. The platforms owe their consumers the promised services.

The First Amendment is not a "get out of contract free" card and has not been successfully used against consumer protection laws. If a district judge issued a preliminary injunction against a commonsense law, passed by the largest state in the country, what hope does an individual consumer have against any of the platforms in court?

HB20 is a consumer protection law. It allows the consumers of these platforms to protect their rights in court. It also allows the State of Texas to protect Texas consumers against platforms – certainly nothing unusual.

Consumers do not necessarily need HB20 protection against smaller social media companies because those companies: A) do not claim unrestricted control of consumers' speech (like the platforms appearing in this lawsuit do); B) might have been selected by their users because of their political, religious, or moral views; C) do not have anywhere near the economic and political power of the big platforms; D) have many viable alternatives, including the big platforms.

HB20 targets the platforms' misconduct against consumers. Politically motivated misconduct is the key and the hardest aspect to handle because A) it directly impacts only a minority of consumers; B) the indirectly impacted majority is often unaware of this misconduct; C) it benefits powerful political forces, which encourage and protect this misconduct; D) it is protected and even demanded by government officials, acting in their official capacity, under the color of the law.

The Platforms Claim First Amendment Protection for Extraordinarily Broad Conduct

"*From the moment users access a social media platform, everything they see is subject to editorial discretion by the platform in accordance with the platforms' unique policies.*"[6] This describes a user's experience in a computer game, not what a consumer expects from YouTube, Facebook, Twitter etc.

Let us imagine that platforms' conduct, which they claim as an exercise of "editorial discretion", is indeed protected by the First Amendment. The platforms say that they currently make editorial decisions against "*Russia's propaganda claiming that its invasion of Ukraine is justified, ISIS propaganda claiming that extremism is warranted, neo-Nazi or KKK screeds …*",[7], However, as with any editorial decision, the platforms can change their minds and support the opposite views, at any moment and without notice.

Under this theory, the platforms can make editorial decisions for every message that their consumers send to each other. Platforms could delete messages from a distressed child to his parents, block crime reports to the police, or selectively hide a government storm warning from persons they dislike. The platforms would be able to prohibit the speech of political candidates who oppose the platforms' power grab.

Such abuses have already been committed. For example, Facebook deleted a private group "COVID19 Vaccine Victims and Families" in which individuals exchanged information about some adverse side effects they experienced from the COVID-19 vaccines.[8] [9] The group had 120,000 members.

Comparing the platforms to newspapers or other media is incorrect for other reasons. Before the rise of the platforms, readers who did not like a newspaper canceled the subscription and subscribed to another one. TV viewers can switch channels by the press of a button. However, a person, who has

---

[6] EMERGENCY APPLICATION FOR IMMEDIATE ADMINISTRATIVE RELIEF AND TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, p. 17 http://www.supremecourt.gov/DocketPDF/21/21A720/225388/20220513192559757_Supreme%20Court%20Vacatur%20Application.pdf

[7] The platforms do not tell the truth. Speaking of the "*Russia's propaganda*", here are the YouTube channels of the Russia's Department of Defense https://www.youtube.com/channel/UCQGqX5Ndpm4snE0NTjyOJnA, and Russia's Department of State https://www.youtube.com/c/midrftube

[8] https://reclaimthenet.org/facebook-removes-covid-19-vaccine-victims-group/

[9] https://www.mediamatters.org/facebook/despite-facebooks-covid-19-promises-anti-vaccine-groups-are-thriving, https://www.mediamatters.org/facebook/anti-vaccine-groups-thrive-facebook-dont-be-fooled-platforms-latest-takedown

spent years on Facebook, has a network of friends / associates / connections on Facebook, and cannot simply switch to an alternative platform (even if one existed).

The platforms might "*provide a forum for speech*", but this is a rather small part of their services. In this lawsuit, each platform claims "editorial discretion" over consumers' communications and data on the platform even outside the forum for speech.

Monopoly Carte Blanche

The evidence introduced by the platforms shows that each platform is a single "editorial" decision maker.

Around 2010, it was frequently said that six media conglomerates hold 90% of the US media market. Frequently forgotten is the fact that there were hundreds or thousands of independent editorial boards within each of those conglomerates. When TV channels were similarly concentrated, they were regulated under the doctrine of fairness, even though there were radio stations, newspapers, magazines, and book publishers more influential than TV.

YouTube is part of Google, which is owned by Alphabet. YouTube accounts are shared by other Google services. LinkedIn is part of Microsoft. Just Alphabet, Microsoft, and Meta (Facebook) have a combined market cap of more than $4 Trillion (end of the day of May 22, 2022). Moreover, the corporations who own or are affiliated with the platforms control most of the Internet infrastructure and related industries, such as internet advertising.

A ruling that this enormously powerful group also has editorial discretion, without any liability, would allow them to legally prevent the rise of any competitors, including other social media platforms with other views.

II. The Platforms are State Actors

Federal and state government agencies have opened thousands of government accounts on the platforms.[10] By operating these government communications channels, the platforms perform traditional government functions – communication with the public. Public forums are naturally formed

[10] https://defyccc.com/obama-administration-has-sold-the-united-states-to-big-tech/

around these government accounts and the platforms are not allowed to discriminate against the users on those forums, based on their political views.

III. The Platforms are Contractors for the State of Texas

The State of Texas has multiple accounts with the platforms and uses them for communication with its residents and for other governmental purposes.[11]

The First Amendment not only permits, but requires Texas to protect its residents, who use those governmental accounts, from political discrimination by the platforms.

[11] The federal government was involved; https://digital.gov/resources/federal-compatible-terms-of-service-agreements/#for-state-and-local-governments