NSR Tech Policy: Supreme Court Overturns Texas Law: Social Media Wins Day But Troubling Signs for Future Battles Ahead

By Blair Levin and Matt Perault | June 1, 2022

What's New: The Supreme Court reversed a lower court decision on the Texas social media law, blocking that law from taking effect. The Texas law that would have subjected social media platforms to a "must carry" rule that would have wreaked havoc on existing content moderation practices and business models. While the decision was expected, the margin was narrower than anticipated and the decision and dissent opened the door to other expected legislative and legal actions that could challenge the ability of social media platforms to optimize their platforms for audience reach and advertising revenues. In this note, we describe the decision and some of the ways it opened the door to the next chapters of the "techlash."

What Happened: The Supreme Court reversed a lower court decision that allowed the Texas law to go into effect. By reversing the lower court's decision, the Court reinstates an injunction against the law — called HB 20 — that would have subjected social media platforms to a "must carry" rule. By prohibiting social media platforms from "censoring" speech, the law would have wreaked havoc on existing content moderation practices and business models[1] The constitutionality of the law will now be evaluated by a district court in Texas, and the law will be stayed in the interim.

Why It Matters: As we explained in a note published last week (LINK), had the law been allowed to go into effect, it would have forced social media platforms meeting the threshold of more than 50 million monthly users in the U.S. to change their content moderation policies in ways that would have likely made their platforms less attractive for users and advertisers. The Supreme Court decision effectively upholds the status quo, leaving content moderation decisions in the hands of the platform themselves.

What Happens Next: While the decision is a clear victory for social media platforms in the current battle, it is not a decisive victory that will end the war. Rather, we think it sets the stage for further legislative and legal

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actions. This is true for several reasons.

- ***A narrow margin of victory leaves the door open to future legislation that regulates speech on private platforms.*** The social media platforms won by the narrowest of margins — 5-4. Legislators in states throughout the country may look at those four votes as an opportunity to continue introducing similar legislation. Before the 5th Circuit and Supreme Court decisions on this law, the consensus amongst First Amendment scholars was that the laws had little chance of surviving in court. In the wake of those decisions, the legal theories underpinning those laws now seem more plausible. Thus, we would not be surprised to see other state and federal legislators push legislation that restricts social media platforms' ability to moderate content, as the sentiment behind the techlash continues to drive political action.
- ***Three conservative justices call social media platforms "dominant."*** Three of the four justices dissenting signed on to an opinion that described that law as addressing "the power of dominant social media corporations to shape public discussion of the important issues of the day." Further, they appeared to agree with the Texas' argument that because the law is limited to companies with "50 million active users in the United States," it only "applies to only those entities that possess some measure of common carrier-like market power and that this power gives them an 'opportunity to shut out [disfavored] speakers.'" Justice Alito's opinion also cites a 1932 dissent by Justice Brandeis, who has been the intellectual foundation of the new movement in antitrust that is often referred to as "Neo-Brandeisian." That movement, which counts Federal Trade Commission chair Lina Khan as one of its leaders, has been the driving force behind the antitrust arguments against Big Tech. These statements in Justice Alito's dissent suggest to us that several Justices will be open to novel antitrust arguments in the future.[2]
- ***This decision is unlikely to be the Court's last word on this issue.*** The split decision suggests the Court may be interested in hearing a case on the merits in the years ahead, particularly since lower courts have reached different conclusions on the constitutionality of these types of state laws. However, as the majority did not write an opinion but reinstated the injunction against the law, we cannot gauge the strength of the convictions of those in the majority.

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[1] The law banned platforms with more than 50 million monthly users in the U.S. from removing a user over a “viewpoint,” and makes the platform potentially liable for a number of actions, including content removal, content demonetization, content deprioritization, the addition of an assessment to content; and account suspension. Effectively, the law creates a “must carry” condition. It also has some transparency requirements.

[2] Contrast that to the District Court that threw out the initial FTC complaint against Facebook for failing to allege facts sufficient to prove that Facebook was a monopoly. While the dissent here is far from a victory, we have no doubt that champagne bottles were being popped at the law firm of Wu, Khan and Kanter.

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