

WILMERHALE

October 7, 2022

Ari Holtzblatt

Molly C. Dwyer
Clerk of Court
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

+1 202 663 6964 (t)
+1 202 663 6363 (f)
ari.holtzblatt@wilmerhale.com

Re: *Rogan O’Handley v. Twitter, Inc., et al.*, No. 22-15071

Dear Ms. Dwyer:

Pursuant to F.R.A.P. 28(j), I write to explain why *NetChoice, LLC v. Paxton*, 2022 WL 4285917 (5th Cir. 2022) does not support reversal.

First, the divided Fifth Circuit panel addressed a facial, constitutional challenge to a state statute, not an attempt to treat the editorial decisions of a privately-operated Internet platform as constrained by the First Amendment. It thus said nothing about the state-action issues at the heart of this case. Answering Br. 17-37.

Second, the Fifth Circuit’s analysis of social media platforms’ First Amendment rights is fundamentally wrong. As numerous other courts have correctly held, “[w]hen platforms choose to remove users or posts, deprioritize content in viewers’ feeds or search results, or sanction breaches of their community standards, they engage in First-Amendment-protected activity.” *NetChoice, LLC v. Attorney Gen., Fla.*, 34 F.4th 1196, 1213 (11th Cir. 2022); *see also* Answering Br. 45-46 (collecting cases). That is because, as the district court recognized, “a platform’s decision to publish or not publish particular [content] says something about what that platform represents.” 1-ER-27-28. Collectively, these decisions “shape and develop the nature, tone, and substance of the ongoing dialogue that Twitter seeks to foster and present on its platform,” *id.*—just like when newspapers decide which articles to publish or parade organizers decide which groups to let march. The Fifth Circuit erred in breaking from these decisions.

The specific allegations in this case illustrate why the First Amendment protects online platforms’ editorial judgments. Twitter labeled and removed O’Handley’s Tweets for violating its Civic Integrity Policy, which prohibits false and misleading information about elections. Adoption and enforcement of this policy conveyed Twitter’s view that claims about alleged election fraud undermine “the integrity” of “public conversation ... during elections.” 3-ER-379; *see also* Answering Br. 53. The First Amendment does not permit O’Handley to use courts to penalize Twitter for communicating that message. And it forbids a court from enjoining Twitter to carry speech Twitter believes is harmful. Unlike *NetChoice*, this case presents concrete allegations regarding Twitter’s expressive curation of content, which even the Fifth Circuit recognized might alter its analysis. 2022 WL 4285917, at *6.

WILMERHALE

October 7, 2022

Page 2

Respectfully submitted,

/s/ Ari Holtzblatt
Ari Holtzblatt

Counsel for Appellee Twitter, Inc.

cc: Counsel of Record (via ECF)