NetChoice

Understanding Applications for Emergency Stays

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Background on Emergency Actions

Usually, parties unsatisfied with a federal lower court's decision must petition to grant a ***writ of certiorari*** with the United States Supreme Court. Under the Supreme Court's rules, at least four Justices must vote to grant a *writ of certiorari* for the Court to then schedule the case for hearing. Even after four Justices grant cert., it might take close to a year for the Court to render its judgment—it must calendar the case for oral argument, rule on any motions, study the record and briefing materials from parties' and any amici, confer internally; then hear oral arguments, draft (and often re-draft) opinions, announce the decision; and then finally remand the case to the relevant lower court "for further proceedings consistent" with the Court's decision.

Sometimes, however, time is so crucial that parties try to speed up preliminary review by filing ***applications for emergency actions***. This usually comes in the form of a request to the Supreme Court to pause the lower court's decision from taking effect so that the status quo is preserved while the case proceeds in the lower courts.

Unlike a petition to grant a *writ of certiorari*, which is addressed to the entire Supreme Court, an application for an emergency action is addressed to the Justice assigned to the specific circuit court that issued the decision. (In this case, Justice Alito is assigned to the Fifth Circuit and thus the Justice to whom **NetChoice** and **CCIA**'s application is addressed.)

The individual Justice may then: (1) act unilaterally by granting or denying the emergency request; or (2) refer the matter to the full Supreme Court to then issue a *per curiam* decision. The Justices often follow the second approach.
NetChoice and **CCIA**'s application is for an emergency *stay*—requesting Justice Alito (or, through him, the full Supreme Court) to stay the Fifth Circuit's 2-1 order lifting the injunction on HB 20. In other words, the application's proposed remedy is to return to the status quo ex ante (as it existed before the panel issued its order) with HB 20 enjoined while the case makes its way through the lower courts.

While there's no hard-and-fast rule, stays are usually granted when:

- There's a "reasonable probability" that four Justices will grant certiorari;
- There's a "fair prospect" that a majority of Justices will overrule the lower court's decision; and
- Denial of a stay will result in irreparable harm.

[Note that "in a close case, the Circuit Justice may find it appropriate to balance the equities" (*e.g.*, split the difference).[1]]

Our Application for an Emergency Stay

Because the Fifth Circuit issued an unprecedented, unexplained 2-1 order immediately lifting the injunction on HB 20, **NetChoice** and **CCIA** filed an application for an emergency stay that asks Justice Alito (or, through him, the Court) to return things to the status quo ex ante—HB 20 enjoined as the case proceeds.

NetChoice and **CCIA** argue that this case meets the Court's criteria for an emergency stay:

- *First*, there is a reasonable probability that most Justices would grant cert.–the Fifth Circuit's order contravenes clearly established case law without any justification;
- *Second*, there is more than a fair prospect most Justices will vote to overrule the panel's decision–again, it contravenes clearly established case law and upholding the Fifth Circuit's order would require overruling precedents that the Court has recently reaffirmed (*see, e.g.*, *Manhattan Cmty. Access Corp. v. Halleck*[2]);
- *Third*, businesses covered by HB 20, as well as NetChoice, CCIA, and other industry groups, would suffer irreparable

[1] Public Information Office, Supreme Court of the United States, *A Reporter's Guide to Supreme Court Procedure For Applications* 2 (Rev. Nov. 2021), https://www.supremecourt.gov/publicinfo/reportersguide.pdf.
[2] In an opinion authored by Justice Kavanaugh—and joined by Chief Justice Roberts, and Justices Thomas, Alito, and Gorsuch—the Court held "a private entity who provides a forum for speech is not transformed by that fact alone into a state actor," and thus "is not subject to First Amendment constraints on how it exercises its editorial discretion" even when that discretion is used on "public access channels."

harm were the law to take effect–to cite but a few examples: the untold sums of resources needed to comply as best with a law that's impossible to comply with; the untold sums of awful-but-lawful content that will flood platforms forced with the awful choice of either complying with the law and subjecting their users to a degraded, anything-goes website or app, or violating the law and raising First Amendment and federal preemption claims as defenses to any lawsuits; and

- *Fourth*, the equities need no balancing–Texas suffers *no* harm (irreparable or otherwise) by having its never-enforced law take effect, and the requested relief (status quo) is far more equitable than the chaos Texas seeks to unleash as the case winds its way through the courts.

Next Steps

Like most matters, applications for emergency action are within the Supreme Court's discretion. There's no definitive timeline for what happens next. But applications are usually handled on "paper" alone—rather than go through the time-consuming process of receiving a full briefing, complete with oral arguments, the Justice or Court will instead issue a "temporary" decision based on the papers filed with the Court related to the application. This decision will sometimes include an explanation for the ruling, and will sometimes be issued soon after an application's filing.

But not always. In the rare case, the Court might order expedited briefing to help it sort through a case's complexities.

Consider these recent examples:

- The State of Texas requested a stay of a Fifth Circuit injunction requiring it to enforce a recently paused federal immigration program on August 20, 2021; Justice Alito granted a stay that day, and the full Court left the stay in place on August 24, 2021.

- The United States Department of Justice requested the U.S. Supreme Court vacate a Fifth Circuit stay of an injunction against Texas S.B. 8 (the abortion bill) on October 18, 2021; Justice Alito referred the matter to the Court on October 22, 2021, the full Court ordered expedited briefing (treating the application "as a petition for a *writ of certiorari*"), and then denied the United States' application on December 10, 2021.

If **NetChoice** and **CCIA**'s application is granted, the 5th Circuit's 2-1 order will be vacated, the district court's injunction will restart, and the case will proceed to the merits in the lower courts; if the application is denied, the order will stand, HB 20 will remain in effect, and the case will proceed to the merits in the lower courts.

NetChoice, LLC & CCIA v. *Paxton* Case Materials

Case Highlights & Core Documents.

Sept. 9, 2021	Governor Greg Abott signs HB 20 into law. HB 20 is set to take effect on December 2, 2021. • HB 20's text
Sept. 22, 2021	NetChoice and CCIA sue the State of Texas in the Western District of Texas, alleging HB 20 violates the U.S. Constitution and will inflict irreparable harm on plaintiffs and covered platforms, and requesting HB 20 be enjoined. • NetChoice & CCIA's Complaint
Dec. 1, 2021	U.S. District Judge Robert Pitman, of the Western District of Texas, agrees with NetChoice & CCIA's arguments–holding that HB 20 is so constitutionally flawed under the First Amendment that it will likely be struck down in its entirety–and enjoins HB 20. • District Court's Order Enjoining HB 20
Dec. 15, 2021	The State of Texas files its appeal in the Fifth Circuit, arguing that (1) HB 20 was constitutional and that the district court's analysis to the contrary is wrong, and (2) the court should vacate the district court's injunction pending resolution of the former to avoid inflicting irreparable harm on Texas.
Mar. 2, 2022	The State of Texas files its opening brief on the merits in the Fifth Circuit. • Texas's Opening Brief
Apr. 1, 2022	NetChoice and CCIA file their opening brief on the merits in the Fifth Circuit. • NetChoice & CCIA's Opening Brief

May 9, 2022	Fifth Circuit Judges Edith Jones, Andrew Oldham, and Leslie Southwick hear oral arguments in *NetChoice & CCIA v. Paxton*. Former Texas Solicitor General Scott Keller argues on behalf of NetChoice and CCIA. • Fifth Circuit's Audio Recording of Oral Arguments
May 11, 2022	In an unprecedented order, a split 2-1 panel voted to grant Texas's motion to stay the district court's injunction before issuing an opinion on the merits. • Split 5th Circuit Panel Order
May 13, 2022	NetChoice and CCIA file an application for an emergency stay with Justice Alito of the U.S. Supreme Court, requesting that the Court vacate the 5th Circuit's order.