Equal Justice under Law: Cato in the Courts

Amicus briefs bring the principles of liberty to the judiciary

Cato has long been a prolific filer of amicus curiae, or friend of the court, briefs, tackling a vast range of issues from civil liberties to economic freedom. That work continues today as part of Cato's Robert A. Levy Center for Constitutional Studies.

The *Empirical SCOTUS* blog conducted a study of amicus briefs in major policy-shifting cases at the Supreme Court from 2000 to 2016, to see which groups most often filed briefs in support of the prevailing party. Cato was at the top of the list, tied with only the American Civil Liberties Union. As the authors of the study put it, "the Cato Institute and ACLU were far away the winningest of these groups." In the years since, that track record has continued unabated.

So far in 2022, Cato has filed amicus briefs in several high-profile cases to defend the principles of limited government and individual freedom. Recent wins at the Supreme Court include *Carson v. Makin*, in which the Court ruled that Maine's school choice program cannot discriminate against religious schools, and *New York State Rifle & Pistol Association Inc. v. Bruen*, striking down New York's notoriously restrictive and corrupt "may issue" scheme for concealed carry permits as a violation of the Second Amendment.

One of the most notable has been *NetChoice v. Paxton*, concerning an intrusive and politically motivated law that Texas adopted to heavily regulate the content moderation decisions of social media platforms. Allegedly grounded in a desire to fight liberal bias from these tech giants, H.B. 20 is both wildly impractical and strikes at core First Amendment freedoms. Under this statute, alleged "viewpoint discrimination" would be illegal, and platforms could face ruinous liability for violating that vague, unconstitutional standard.

When the Fifth Circuit Court of Appeals unexpectedly allowed the Texas law to go into effect while the litigation is pending, these businesses were placed in an impossible situation, facing a potential flood of frivolous lawsuits challenging their every decision about what should or should not be permitted on their privately owned websites. The plaintiffs appealed to the Supreme Court to reverse the Fifth Circuit's panel decision and permit the district court's stay to stand, to ensure the law does not go into effect while the challenge to it is ongoing.

In support of this request, Cato filed an amicus brief authored by Clark Neily, Trevor Burrus, Thomas A. Berry, and Nicole Saad Bembridge. "This Court has long acknowledged that the First Amendment

protects private platforms' right to decide what content they host," they explained. "Under HB20's viewpoint neutrality mandate, platforms will face liability for removing even horrific and harassing content—like animal torture, pro-terrorism material, and racial epithets—because doing so would qualify as illegal viewpoint discrimination."

The Court agreed, and in a 6–3 ruling ordered that the Texas law would remain unenforceable until a decision is reached. Cato has also filed an amicus brief on the merits of the case in the Fifth Circuit, explaining in more detail why H.B. 20 is patently unconstitutional.

In another recent case, *United States v. Olsen*, Cato filed a brief to defend the Sixth Amendment right to a speedy trial. Jeffrey Olsen was indicted on drug charges in 2017 and was finally ready to go to trial in 2020. However, at the time, the use of jury trials was suspended in the Central District of California due to the pandemic. The government sought yet another continuance, but Olsen invoked his rights under the Speedy Trial Act. The district court agreed and dismissed the indictment, but the Ninth Circuit overturned that decision. In Cato's amicus brief, Jay Schweikert and Laura Bondank urge the Supreme Court to overturn that decision and vindicate one of the Constitution's most fundamental guarantees for criminal defendants.

Not all Cato amicus briefs are filed with the Supreme Court. Important questions are often decided on the circuit courts of appeals, where precedents are shaped and crucial issues are teed up for possible later review by the justices. Sometimes that means reminding states and courts of the need to follow Supreme Court precedents on questions that have already been decided.

In *Ostrewich v. Scott*, plaintiffs are challenging a nebulous Texas law prohibiting clothing and displays within 100 feet of a polling place that are "political" or are "relating to" an issue, candidate, or political party on the ballot. If that sounds familiar, it's because the Supreme Court struck down a practically identical law in Minnesota in 2018's *Minnesota Voters Alliance v. Mansky*. In the oral arguments in that case, in which Cato also filed an amicus brief, Justice Alito memorably excoriated the state's lawyer with a litany of examples ranging from the text of the Second Amendment to a hypothetical "I Miss Bill [Clinton]" T-shirt, demonstrating the inherent subjectiveness of defining what is or isn't "political." In *Ostrewich*, Thomas A. Berry and Gregory Mill urge the Fifth Circuit to follow that precedent and hold that the Texas law suffers the same First Amendment defect.

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Cato is unique among major filers of amicus briefs in the breadth of topics addressed, including economic regulations, criminal justice, free speech, separation of powers, and many more. Both on the Supreme Court and lower courts, Cato is known for bringing a principled, independent, and nonpartisan perspective and for often highlighting legal principles and precedents that might otherwise go neglected. While litigants on both sides of a case seek victory for their claims, Cato makes sure that the Constitution and the principles of liberty are also taken into consideration. ■