No. 22-393

In the
Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL.,
Petitioners,

v.

NETCHOICE, LLC, DBA NETCHOICE, ET AL,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER/RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the laws' content-moderation restrictions comply with the First Amendment.

2. Whether the laws' individualized-explanation requirements comply with the First Amendment.

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SUMMARY OF ARGUMENT

Over half of the American public uses social media to get the news. Over 240 million Americans use social media regularly. Social media giants such as Facebook, twitter, and YouTube are now undoubtedly some of the most important if not the most prominent sites on the internet and are often a meeting pace of opinions that can shape public discourse around critical issues facing the country.

The central question of this case revolves around whether content moderation falls under free speech and if the state has a vested interest in moderating such practices. If the Court were to answer affirmatively, that content moderation is free speech then this would open the door to censorship not only being acceptable but constitutionally protected, undermining the First Amendment itself. However, this Court has never understood that censorship fell under first amendment protections. Some may argue that social media companies have a right to moderate their content, just like newspapers or store owners displaying leaflet. The comparison between newspapers and social media is disingenuous as while newspapers are private enterprises that can moderate what content it displays it does not act as a "public forum" or have a "common value" in the way social media does.

By silencing voices in the forum this Court would be actively silencing voices and affecting public opinion. This silencing gives the state a vested interest because in the first amendments it prevents "abridgment" of first amendment protections. This

gives states the license to try to facilitate and strengthen free speech.

ARGUMENT

I. Part I: The State has a vested interest in creating robust free speech.

A key question in this case is whether content moderation falls underneath First Amendment protection. Net Choice is arguing that the moderation social media companies are doing falls under the category of a presentation of a compilation of speech generated by others which this Court ruled was protected by the first amendment. *See Hurley v Irish-American Gay, Lesbian & bisexual Grp of Boston, Inc., 514 U.S 557,570 (1995).* However, this case does not fall under this ruling because censorship is not part of the concept of "abridgement" in the First Amendment. In the United States Constitution, it states that, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press" (U.S Constitution) The word "abridgement" isn't explicitly just taking about government policy or action. Instead, it is referring to an obstacle to free speech. This means it is within a state's responsibility to guard free speech from threats This has been especially relevant with evidence in recent cases like *Missouri v Biden*, that the government has been involved in suppressing contrary

opinions online, using big companies as a proxy. Net choice also argues that the State must have a vested interest in moderating these companies. However, under the definition of "abridgement" the state has a very clear interest in making sure speech is not being suppressed. In addition, the moderation and censorship of speech on these large social media sites actively impact public opinion by limiting the number of opinions in circulation. This is often done under the guise of reducing "Misinformation". A parallel can be drawn to *Reed v. Town of Gilbert, 576 U.S. 155 (2015)* where this Court ruled that while the city of Gilbert could put regulations to prevent the obscuration of road signs it could not prevent the posting of political or ideological signs on their roadways. This precedent is relevant to this case because social media companies like the city of Gilbert can regulate things that are against the law, they can't regulate discourse itself. Furthermore, in a truly democratic society is it not better to let the people decide what to believe, instead of having it thrust from above?

A. Subpart A: Speech is being suppressed on social media.

The concept that freedom of speech is being "abridged" has a strong foundation when looking at the content moderations practices put in place by these companies. These sites often deplatform political candidates, censor several "journalistic enterprises, and just suppress more conservative viewpoints in general. *State of Florida, et al, petitioner's, V.*

Netchoice LLC, D.B.A Netchoice, et al, USCA11 Case: 21-12355 (2023). The suppression of speech is not only detrimental to the existence of democracy as ultimately the whole point of democracy is for everyone to have say. Moreover, the silencing of a certain political party illustrates the present interests of states like Florida to put restrictions on what companies can remove or add. *See Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994).* As Judge Thomas states, "But if the aim is to ensure that speech is not smothered, then the more glaring concern must perforce be the dominant digital platforms themselves." *Biden v. Knight First Amendment Institute at Columbia Univ. 593 U. S. ____ (2021)* Under this framework it is constitutional for Florida to make such a law, in essence to safeguard the people from having their rights stripped away from them.

B. Subpart B: Social media censorship, impacts public opinion

Now, one can then argue that the burden placed on the companies with the individualized-explanation requirements don't comply with the First Amendment. The main thrust of the argument is that it puts too much of a strain on the sites as well as taking away their freedom of speech by taking away their curatorial power. However, the Florida law is not asking for social media giants to create a site that suits the state's needs but rather that they publish standards for its practices so that it can be applied equally and without bias. *State of Florida, et al, petitioner's, V.*

Netchoice LLC, D.B.A Netchoice, et al, USCA11 Case: 21-12355 (2023). In addition, the explanations required by the law will be based on these standards and therefore would just make the process more transparent. The concept of transparency gets rid of a free speech burden on the consumer of the site as it gets rid of the fear of getting censured without knowing why. See S*orrell v. IMS Health, Inc., 564 U.S. 552 (2011).* The action of deplatforming or censuring counts as "conduct" and therefore according to this Court's previous decision in *CF. Lorain Journal Co V. United States (1951)* Which allows content to be regulated if counts as conduct.

II. Part II: Content moderation is not speech.

The eleventh circuit has argued that major technology giants like Facebook, Twitter, and YouTube have the constitutional right to free speech. See *Application For An Extension of Time Within Which To File A Petition For A Write Of Certiorari To The United States Court Of Appeals For the Eleventh Circuit No. 22A__*. As a result, they argue that they have the right to regulate and evict anyone they think are bad actors in the site. In addition, they also asserted that like a newspaper, social media can use their expressive powers to organize and censor media that they see unfit, which the eleventh circuit argued that it constituted speech. See *Brief Of Amici Curiae States Of Ohio, Alabama, Alaska, Arizona, Arkansas, Idaho, Iowa, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, Tennessee, Texas, And Utah In Support Of Petitioners* No. 22-227.

This is erroneous as the supreme Court on numerous occasions found it at times necessary for the private corporations to provide space for third party elements. See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006).* In addition, social media differs from other corporations by the way they regulate content and secondly by the services they provide.

Subpart A: Social media counts as a common carrier

1. Common Carriers are an essential service meaning they must provide equal service without discrimination.

Social media companies such as Facebook, Twitter, and YouTube ought not be considered merely as companies. Rather, they should be viewed as Common Carriers. See *Brief Of Amici Curiae States Of Ohio, Alabama, Alaska, Arizona, Arkansas, Idaho, Iowa, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, Tennessee, Texas, And Utah In Support Of Petitioners No. 22-227.*The definition of a Common Carrier is an essential private enterprise with "a general requirement to serve all comers" without any "individualized bargaining". See *Knight, 141 S. Ct. at 122 (Thomas, J, Concurring).* Historically, essential industries included transportation like trains and critically in communications as well. See *Petition For a Writ Of Certiorari No. ____.* A quick in history shows that congressmen have placed regulations on telegraphs as well as phone companies in order to ensure that free communication would not be impeded. See *Petition*

For a Writ Of Certiorari No. ____. Although there was the possibility for these companies to disagree with the speech that was being transmitted using their services, they had not right to interfere with the affairs of private citizens.

The question to ask now is whether or not social media companies can be considered common carriers. In short, yes. The massive enterprises of Facebook, Twitter, and YouTube make up the vast majority of the market share of their fields. See *Brief Of Amici Curiae States Of Ohio, Alabama, Alaska, Arizona, Arkansas, Idaho, Iowa, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, Tennessee, Texas, And Utah In Support Of Petitioners No. 22-227.* Each of these businesses in addition have occupied different niches on the internet, creating near monopolistic conditions making it nearly impossible for competition to rise. *See NetChoice, LLc V. Paxton, 142 S.CT. 1715 (2022).* The rivals that do rise are too small to be of any serious threat. Over 240 million Americans, as mentioned above use social media services in their day to day lives and over half use it to get the news. These companies provide an essential service for all individuals to use, and it is considered unlawful for some groups of individuals to be censored because of who they are or what ideas they share. *see Packingham V. North Carolina, 137 S. Ct. 1730 (2017)*

It does not count as compelled speech.

Now because this service is a common carrier, the restrictions applied by the state Florida is

constitutional and is line with the first Amendment. What this means is that the doctrine of compelled speech ought not be implicated in this ruling. Compelled speech is when the government forces a person to say comments or give opinions that individual disagrees with. See *Brief Of Amici Curiae States Of Ohio, Alabama, Alaska, Arizona, Arkansas, Idaho, Iowa, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, Tennessee, Texas, And Utah In Support Of Petitioners No. 22-227.* Opponents to S.B 7072 can argue that forcing social media companies to host speech that they would otherwise not maintain in their site as compelled speech. See See *Petition For a Writ Of Certiorari No. ____.* However, this scrutiny only works if the Court views these corporations as simply private entities. If this were the case, then it can be argued that private entities have the right to curate and say what they please because it is how these organizations express speech. This is supported with such Court rulings like *Miami Herald Pub. V Tornillo* which stated that the content that is published in their newspaper is "the newspaper's own speech." *Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).* This can be deconstructed if the Courts rule that social media companies are common carriers and secondly agree that this case is line with other instances where this Court ruled in favor of hosted speech in private property.

Considering that these social media companies should be considered common carriers, it means that firstly, they have to allow equal access to their network regardless of political or social leanings, and secondly,

it means that the doctrine of compelled speech does not apply here . See *Petition For a Writ Of Certiorari No. ____.* It is important to also highlight that just because speech that the owners of a platform do not like is on their platform, it does not necessarily mean that it is compelled speech. As shown with *PruneYard Shopping Ctr. V. Robins*, a ruling which upheld a person's right to use their freedoms of speech and petition on private property where the public was welcomed. See *Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).* In line with this ruling, the state of Florida does not ask to change the way in which companies regulate their users, only that they do so fairly. This is why in S.B 7072, the state specifically asks for social media companies to "not willfully deplatform a candidate a candidate for office" and "apply or use post-prioritization or shadow or banning algorithms for content s and material posted by … a candidate." See *Application For An Extension of Time Within Which To File A Petition For A Write Of Certiorari To The United States Court Of Appeals For the Eleventh Circuit No. 22A_* . In addition they ask for journalistic enterprises not be deplatformed or censored. See *Application For An Extension of Time Within Which To File A Petition For A Write Of Certiorari To The United States Court Of Appeals For the Eleventh Circuit No. 22A_.* The state is not looking to limit the speech of social media companies but rather protect the speech of those who use it. These private enterprises are more related to the private shopping center than the newspaper or the parade. The key difference between these is that the subjects of the newspaper and the parade are explicitly *curated* as the order, way, and themes they show represent what they want to

present. This is in comparison to a shopping mall where the visitors are not selected for any preference nor are they necessarily in agreement with the personal views of the shop owners. Likewise, politicians, reporters, and news agencies are free to say, do, or promote whatever they like on those grounds in accordance with the ruling *PruneYard Shopping Ctr. V. Robins*, as long as it is in good faith. See *Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).* Another case, *Rumsfeld v. Forum for Academic and Institutional Rights* comes to a similar conclusion. When various law schools attempted to forbid army recruiters to come to their schools in protest of anti-LGBTQ policies in the armed forces, this Court sided with the army, as the institutions involved were not forced to side with or endorse the military, only allow them to be in the campus. See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006).*

Subpart B: Social media differs from traditional media

1.They do not censor media with the same rigor as traditional media.

As discussed briefly above the way in which social media companies "curate" or censor themselves is quite different from the way traditional media companies do. Traditional media as held under *Miami Herald Pub. V Tornillo* use their editor power to express their speech. See *Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).* Everything they publish is deliberate, written by professional authors or intellectuals and the selection process is rigorous.

What they publish is directly linked to how the public view them. Social media in contrast, does almost the exact opposite. They give power of speech to anyone that joins their site, allowing any individual to post whatever pleases them so long as it does not violate their terms of service. The vast majority of the content found in these sites are only monitored for lewd or otherwise vulgar content while the rest of the censorship is done on a case-by-case basis. See *Brief Of Amici Curiae States Of Ohio, Alabama, Alaska, Arizona, Arkansas, Idaho, Iowa, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, Tennessee, Texas, And Utah In Support Of Petitioners No. 22-227*. It is therefore safe to say that the comparison often made between traditional media and such enterprises like Twitter, Facebook, or YouTube to be unfounded. Social media companies do not claim to be news agencies, rather it is a service open to the public. It is for this reason that cases in where media companies do censor politicians, activists, or users that post things that are contrary to the values or opinions of the site is problematic. As mentioned earlier, these public forums are just that, public. If a company claims that they offer a service that it is open for all to use but then goes back on that promise, then it becomes unlawful. It is for this reason that the content moderation restrictions discussed in the Florida law is of importance, as it ensures the protection of every person's speech in the site.

CONCLUSION

This Court should rule that Florida Senate Bill 7072 to be constitutional and comply with the First Amendment.

Respectfully submitted,

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