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

KAYLEE MATAS
16773
Key West High School
2100 Flagler Avenue
Key West, FL 33040
(480) 282-7690
kayleematas@gmail.com

NESLO ATILLA
Counsel of Record
16773
Key West High School
2100 Flagler Avenue
Key West, FL 33040
(305) 504-3020
hnesloatilla@gmail.com

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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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

JURISDICTION

This case comes to the Court on writ of certiorari from the Eleventh Circuit. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment. U.S. Const. amend I, provides:

> 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; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

FACTS OF THE CASE

In May of 2021, the state of Florida, under leadership of Governor Ron Desantis, signed into law S.B. 7072:

> Social Media Platforms; Prohibiting a social media platform from willfully deplatforming a candidate; providing requirements for public contracts and economic incentives related to

> entities that have been convicted or held civilly liable for antitrust violations; providing that social media platforms that fail to comply with specified requirements and prohibitions commit an unfair or deceptive act or practice; authorizing the Department of Legal Affairs to investigate suspected violations under the Deceptive and Unfair Trade Practices Act and bring specified actions for such violations, etc.

Soc. Med. Platforms § SB 7072 (2021). Social media exists as a significant part of contemporary society. The law concerns:

> [A]ny information service, system, Internet search engine, or access software provider that:
>
> 1. Provides or enables computer access by multiple users onto a server;
>
> 2. Operates as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity;
>
> 3. Does business in the state; and
>
> 4. Satisfies at least one of the following thresholds:
>
> a. Has annual gross revenues in excess of $100 million . . .

> b. Has at least 100 million monthly individual platform participants globally.

(Fla. Stat. § 501.2041(1)(g)

NetChoice, LLC v. Attorney Gen., 34 F.4th 1196, 9 (11th Cir. 2022)**.** These platforms include, among others, Facebook, Instagram, and X (formerly Twitter). This law can be broken into several parts: Content-moderation restrictions, disclosure obligations, and a user-data requirement.

Under content-moderation restrictions, select social media platforms may not willfully deplatform [1] candidates for office. Nor may they selectively promote or hide posts by or regarding these candidates for office. "Journalistic enterprises"[2] may not be censored, deplatformed, or shadowbanned.

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[1] The action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days. *§ SB 7072* (2021).)

[2] An entity doing business in Florida that:

> 1. Publishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active 430 users;

Disclosure obligations mandate disclosure of standards (of censorship, deplatforming, and shadowbans); rule changes; view counts; candidate free advertising; and explanations[3] of any actions taken by the social media platforms.

Shortly after the passage of S.B. 7072, the Attorney General of Florida was sued by NetChoice under an

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> 2. Publishes 100 hours of audio or video available online with at least 100 million viewers annually;
>
> 3. Operates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable television subscribers; or
>
> 4. Operates under a broadcast license issued by the Federal Communications Commission.
>
> Fla. Stat. § 501.2041(1)(g)

[3] Explanations are regarding any action meant to censor, deplatform, or shadowban any user. Users must be notified prior to action and provided a written notice including a "thorough rationale explaining the reason" for the "censor[ship]" and a "precise and thorough explanation of how the social media platform became aware" of the content that triggered its decision. *Id.* § 501.2041(3)

argument that S.B. 7072 was in violation of First Amendment rights of private companies. An appeal under the Eleventh Circuit Court ruled in favor of NetChoice. A petition for writ of certiorari was written and certiorari granted by the United States Supreme Court in September 2023.

SUMMARY OF ARGUMENT

This Court's past precedents and common law definition of common carriers lead to the determination that the laws' individualized-explanation requirements also comply with the First Amendment. This Court's past precedents regarding First Amendment rights and the past provisions of "common carriers" in common law lead to the determination that the laws' content-moderation restrictions do comply with the First Amendment. A common carrier is defined as: "1.a company offering services to the public over wires or satelite *[sic]* systems. 2. a transporter that serves all public, follows a schedule, carries specified cargo, and is the carrier of the contract or carriage." Black's Law Dictionary, 2nd Ed. *COMMON CARRIER Definition & Legal Meaning*, The Law Dictionary (Dec. 8, 2023, 7:22 PM) https://thelawdictionary.org/common-carrier/. Past precedents establish internet platforms as akin to common carriers by common law. Ruling for Petitioner follows precedent while upholding the values of the First Amendment and setting a future precedent to prevent a slippery slope toward censorship.

ARGUMENT

III. This Court's precedents support Petitioner.

In the process of analysis by the Court, this Court will find that under a modern view of social media platforms as public forums and "common carriers," its past precedents support a ruling that the laws' content moderation restrictions comply with the First Amendment.

a. The Court has recognized in the past that freedom of speech extends to everyone in a public forum.

Past precedent is clear in determining what constitutes a "public forum." The concept of the "public forum," a place in which all may gather and discuss individual opinions, was enforced by *Hague v. Committee for Industrial Organization.* "It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment." *Hague v. Committee for Industrial Organization*, 101 F.2d 774 (3d Cir. 1939). It is a violation of First Amendment rights for an organization or individual to be denied freedom of speech in a public forum such as a hall, town square, or other public place. By the very definition of social media platforms, they are categorized as public forums. These public forums exist to allow individuals

to state their own opinions and create or post speech in various forms online. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 198 L. Ed. 2d 1737 (2017),

> Social media allows users to gain access to information and communicate with one another on any subject that might come to mind. With one broad stroke, North Carolina bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. Foreclosing access to social media altogether thus prevents users from engaging in the legitimate exercise of First Amendment rights.

Moreover, in *Cornelius,* the Court recognized that forum analysis applies "to *private property* dedicated to public use." *Cornelius,* 473 U.S. at 801, 105 S.Ct. 3439 (emphasis added); *see also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez,* 561 U.S. 661, 679, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010). Past precedents of the Court would determine that "A public access channel is the electronic version of the public square." *Halleck v. Manhattan Community Access Corp., 882 F. 3d 300, 304 2d Cir. 2018.* Social media platforms, as large carriers of public access channels, exist in this realm as public forums.

b. The past precedent laid out by the Court recognizes common carriers as companies which cater to the full population and thus are required by

law to serve all public; the Court makes a potential restriction of these carriers' First Amendment rights for the greater good of them serving the public.

Telegraphs, in their existence as common carriers, must offer everyone a platform. *See Primrose v. Western Union Telegraph Co., 154 U. S. 1, 14 (1894).* To prevent censorship is to enforce these common carrier laws and allow for the platforms to serve the full public.

> "Second, governments have limited a company's right to exclude when that company is a public accommodation. This concept—related to common-carrier law—applies to companies that hold themselves out to the public but do not "carry" freight, passengers, or communications. See, e.g., Civil Rights Cases, 109 U. S. 3, 41–43 (1883) (Harlan, J., dissenting) (discussing places of public amusement). It also applies regardless of the company's market power. See, e.g., 78 Stat. 243, 42 U. S. C. §2000a(a)."

Biden v. Knight, 593 U. S. 6 (2021). As common carriers, companies are compelled by law to serve the full public so as not to limit users' freedom of speech. Users exist as the majority provider of content and options for discussion and speech online; there is a precedent for limiting censorship in all common carriers *Id.* These digital platforms exist analogous to physical platforms such as telephone lines, trains, or telegraphs.

c. The past precedent laid out by the Court leads to the determination that social media forums exist as common carriers by common law. The Court should follow past precedents and determine that social media platforms, as common carriers, must allow usage by all citizens.

The power possessed by social media platforms can influence users' employment, social standing, and more. As ubiquitous platforms in modern society, social media platforms are, by past precedent, a new form of common carrier: a platform compelled to serve the full public due to its necessity in modern society.

> These representations suggest that the covered social media platforms—like the cable operators in Turner—do not generally "'convey ideas or messages [that they have] endorsed.'" Hurley, 515 U. S., at 576. Third, since HB20 is limited to companies with "50 million active users in the United States," App. 41a, Texas argues that the law 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." 515 U. S., at 577; see also Biden v. Knight First Amendment Institute at Columbia Univ., 593 U. S. (2021)

NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 4 (2022). *See Manhattan Community Access Corp. v. Halleck,*

587 U. S. 592 (2019) (slip op., at 9) (a "private entity is not ordinarily constrained by the First Amendment"). However, it is established that social media companies are not private entities in an ordinary situation; rather, from a modern perspective, social media platforms exist as public forums which provide services to the population. Private entities are not defined as state actors except in several extenuating circumstances. Due to their status as public companies, social media platforms thus may be "constrained by the First Amendment" and exist as common carriers for use by the public.

> The difference is that the government controls the space in the first scenario, the hotel, in the latter. Where, as here, private parties control the avenues for speech, our law has typically addressed concerns about stifled speech through other legal doctrines, which may have a secondary effect on the application of the First Amendment.

Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220 (2021). Private parties' control over the avenues of speech ensures that they exist as entirely separate entities from social media platforms, and their existence as separate entities makes them subject separately to the doctrine of the First Amendment. Social media platforms' rights as private companies and their previous privileges in separation from the actual content dispersed by their users means that it is constitutional to mandate that they be open about any policies and that they moderate less content. These private companies exist as massive platforms,

and, as in any town square or public forum, they serve the full public; as in the case of common carriers, users' individual circumstances determine responses to any of their actions on a social media forum, and all should be allowed to voice their own opinions without censorship.

d. A ruling for Petitioner would set an important precedent regarding censorship of public forums.

The initial explosive growth of the internet led to laws established which suspended legal responsibility the platforms would typically assume for users' statements. Unlike newspapers or magazines, which were considered under the First Amendment to be statements by the publisher alongside the initial author, it was understood that internet forums did not personally review each individual statement made by a user. Users assumed sole responsibility for their speech online. Similarly, precedent determines that a public forum is separate and not associated with the speech of individuals in said public forum. *See Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 87 (1980), in which it was ruled that individuals exercising their freedom of speech in a public mall was constitutional as it was in a public forum and as mallgoers would automatically differentiate their intentions from those of the mall's:

> Most important, the shopping center, by choice of its owner, is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by mem-

> bers of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.

Pruneyard establishes a precedent that individual speech within a public forum is automatically understood to be separate from the message of the public forum. Hence, statements made on public forums such as internet platforms have historically been separate from the platforms themselves to allow for platforms' growth and freedom. This separation between the speech of the platform and the speech of the individual means that to prevent content moderation prevents unfair censorship of individual speech without recourse or explanation. To rule in favor of the Respondents to declare prevention of such moderation unconstitutional would create a "slippery slope" of permissible, unregulated censorship in online platforms.

Pursuant to the past precedents of the Court, the determination is made that social media forums exist in conjunction with public forums such as railroads, airlines, taxi services, and more. These public forums are compelled under common law to allow for the full population to partake in their services, and to limit this constitutes a violation of First Amendment rights of citizens; thus, the laws' requirement of open explanations of content moderation choices and restrictions of content moderation complies with the First Amendment due to the establishment of social media forums as public forums and modern common carriers.

II. The Court has recognized in the past that forced speech is constitutional in certain circumstances.

Disclosure requirements have been ruled constitutional in various precedents of this Court. Mandatory disclosure of nutritional content of food sold is compelled speech but complies with First Amendment regulations: "Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests." *See N.Y. St. Rest. v. N.Y. City Bd.*, 556 F.3d 114, 132 (2d Cir. 2009). Compelled speech is constitutional in circumstances in which it does not interfere with "individual liberty interests," the very interests which users of social media platforms exercise in participation in such public forums. Similarly, compelled speech which protects health is acceptable. *Id.* at 135.

Compelled speech which mandates disclosure of censorship or interference with users' exercise of their freedom of speech is constitutional by this precedent; the determination is made that compelled speech is constitutional in the event of exercising individual rights.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals, and the case should be remanded for further proceedings.

Respectfully submitted,

KAYLEE MATAS

16773

Key West High School

2100 Flagler Avenue

Key West, FL 33040

(480) 282-7690

kayleematas@gmail.com

NESLO ATILLA

Counsel of Record

16773

Key West High School

2100 Flagler Avenue

Key West, FL 33040

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