

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 PETITIONERS

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[12/15/2023]

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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INTRODUCTION

Over 4.8 billion people, 61% of the world's population, use social media for an average of 2 and a half hours daily, becoming an integral part of modern society. It's an essential tool and channel for the corporate world for commercial success and for the workforce to seek employment and career progression.

Social media is a linkage institution for society by becoming a crucial component of political campaigns and movements, influencing dialogue, and enlisting support. It is a means of community building, which brings like-minded people together through common interests, causes, or pursuits.

The case involves Florida Senate Bill 7072 (SB 7072), which was enacted by Florida to regulate major social media platforms. This case presents a vital question regarding the scope of the constitutional right of Freedom of speech in the digital age, specifically addressing the constitutionality of content-moderation restrictions and individualized explanation requirements imposed on social media platforms by Florida. The case has been subject to differing rulings in the lower courts, creating a conflict that requires resolution by the Supreme Court. The Eleventh Circuit found substantial parts of the Florida law likely in violation of the First Amendment, whereas the Fifth Circuit, reviewing the Texas law, upheld most of its provisions. This discrepancy highlights the importance of the Supreme Court's review to resolve these conflicting interpretations and set a clear legal precedent regarding the application of the First Amendment in the context of state regulation of content moderation

on social media platforms.

It's important to realize and understand its presence in daily life and its potential to influence almost every aspect of modern living, from personal choices to global events.

SUMMARY OF ARGUMENT

Florida Senate Bill 7072 (SB 7072)'s content moderation restrictions and individualized explanation restrictions do not infringe upon the platforms' First Amendment rights but rather uphold and protect the free speech rights of the users, contributing to a diverse and robust marketplace of ideas.

Social media companies have limited regulatory oversight, and content-moderation restrictions are necessary to ensure a balanced and fair digital public forum, free from arbitrary or discriminatory suppression of speech. The individualized explanation requirements enhance transparency and accountability, ensuring that users are informed of the reasons behind content moderation decisions.

ARGUMENT

SB 7072 reflects Florida's commitment to safeguarding and preserving the “free exchange of ideas” that free-speech protections exist to facilitate. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) and the free exchange of ideas in “the modern public square.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). in alignment with the First Amendment's protection of free speech.

The law's content-moderation restrictions and individualized explanation requirements strike an appropriate balance between the free speech rights of the platforms and their social responsibility by imposing prudent measures that ensure transparency and fairness without infringing on the rights of platforms or users and ensuring democratic values are upheld.

i) Compelling Interest

a) First Amendment and Free Speech:

The state wants to preserve the open exchange of ideas on social media platforms, as underscored in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), where the Supreme Court recognized the critical role of digital spaces in exercising First Amendment rights. In *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969), the Supreme Court recognized the

government's role in ensuring an informed public capable of participating in democratic governance. The First Amendment also protects the right of the public to receive information. SB 7072 can be seen as furthering this goal by ensuring that social media platforms operate unbiasedly.

b) Content-Neutrality:

Florida's law is designed to be content-neutral, paralleling the approach of the Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), which upheld regulations that do not target specific viewpoints. SB 7072 imposes equal obligations on all social media platforms to apply their moderation policies consistently, without targeting particular messages or viewpoints, thereby supporting the marketplace of ideas. SB 7072 does not contradict the principles set forth in *Reno v. ACLU*, 521 U.S. 844 (1997), where the Court affirmed the need for free speech in cyberspace; instead, it ensures that platforms cannot arbitrarily restrict lawful speech, echoing the concerns of viewpoint neutrality emphasized in *Matal v. Tam*, 137 S. Ct. 1744 (2017). SB 7072 can be seen as furthering this goal by ensuring that social media platforms operate unbiasedly.

c) Government Interest:

The state has a compelling interest in preventing a concentration of power in "the modern public square." *Packingham v.*

North Carolina, 137 S. Ct. 1730, 1737 (2017) in the hands of a few private actors. SB 7072 can be seen as a legislative response to this concern, ensuring that social media platforms do not control information unilaterally.

ii) **Individualized Explanation Requirement**

a) **Inspiration and need**

This requirement for individualized explanations for content moderation actions was inspired by legal concepts and past court rulings related to the First Amendment and the concept of common carriers.

This approach was influenced by past decisions such as *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) and *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), which establishes that social media platforms may be required to host or disseminate certain speech even if they don't endorse it and not unduly restrict user's speech. If not, then with due process, they need to provide clarity and precision in the enforcement of content-based regulations. By mandating clear explanations, SB 7072 ensures that users are not left in the dark about the reasons for content removal, facilitating a more informed

user base that can engage in self-governance.

b) Consumer Protection and Transparency:

The requirement for individualized explanations can also be justified under the state's interest in consumer protection. The Supreme Court in *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626 (1985) upheld the state's right to require commercial entities to disclose factual and uncontroversial information to prevent consumer deception. SB 7072's transparency requirements align with this precedent, ensuring users understand the rules and practices governing the presentation of content on these platforms. Individualized Explanation requirement under Fla. Stat. § 501.2041 requires social media platforms to provide an individualized explanation to a user if it removes or alters their content in any way if it deplatforms a user's content. According to the statute, the notice must be delivered in a timely manner and include a "thorough rationale" for the action explaining the reason for censoring, altering or deplatforming, as well as an explanation of how the platform became aware of the post in question that prompted the action. When taking action to censor, deplatforming, or shadow ban users or their posts, platforms must notify affected users and provide a basis for the

platform's action. The law requires platforms to categorize "Algorithm" Fla. Stat. § 501.2041 used for content prioritization and shadow banning and allows users to opt out of such algorithms.

c) Non-Discrimination and Equal Access:

SB 7072 can be defended as an anti-discrimination measure ensuring that social media platforms do not engage in viewpoint discrimination. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), the Court upheld the Solomon Amendment, which required law schools to provide military recruiters with access equal to that provided to other employers. By analogy, SB 7072 ensures that political "candidates" as defined in s. 106.011(3)(e)" Fla. Stat. § 501.2041 and other users receive fair treatment from platforms that have become essential venues for speech. *Reed v. Town of Gilbert*," 576 U.S. 155 (2015), impacted First Amendment jurisprudence, content-based restrictions on speech are presumptively unconstitutional and subject to the highest level of scrutiny. Given that the Florida social media law implicates issues of free speech—a fundamental right typically protected by the First Amendment—the Court may apply strict scrutiny, especially if the

law is seen as targeting speech based on its content or affecting the ability of platforms to engage in editorial discretion, which is a form of expressive conduct. To pass the strict scrutiny test, the government must show that the law advances a compelling government interest, that the law is necessary for advancing such interest, and that it is narrowly tailored to achieve that interest.

iii) Content Moderation

a) Editorial Discretion and Public Interest:

Platforms have certain editorial rights, as recognized in *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974), these rights are not absolute. The state has a compelling interest in ensuring that these platforms do not suppress lawful speech without sufficient reason. Social Media platforms identify as Journalistic enterprises as defined in Fla. Stat. § 501.2041 may not be able to conduct editorial services at the same level, however as per *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994) the burden of conducting such editorial discretion does not impose a burden so substantial that the social media platforms are not able to.

b) Democratic Process and Political Speech:

Political speech is at the core of the First Amendment's protection, as established in

Buckley v. Valeo, 424 U.S. 1 (1976) and *Citizens United v. FEC* (2010). SB 7072's prohibition on deplatforming candidates protects the democratic process by ensuring that political speech is not unduly restricted by social media platforms that have become integral to political campaigning. *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022), is a significant U.S. Supreme Court case. moderating content based on the viewpoint expressed. The law was passed in response to concerns that these platforms were censoring conservative viewpoints in ongoing debate. *Biden v. Knight First Amendment Institute at Columbia University*, 141 S. Ct. 1220 (2021) President Trump's Twitter account was indeed a public forum and that blocking users based on their viewpoints constituted viewpoint discrimination, a violation of the First Amendment.

iv) Narrow Tailoring

SB 7072 is narrowly tailored, as required by the First Amendment, to serve the state's compelling interest without unnecessarily restricting speech. This principle is in line with the scrutiny applied in *United States v. O'Brien*, 391 U.S. 367 (1968), which upheld a regulation that incidentally restricted speech because it was no greater than essential to the furtherance of an important government interest.

The law uses the least restrictive means to achieve its goals, in accordance with the

Supreme Court's standard set forth in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), which held that a regulation must not burden substantially more speech than is necessary to further the government's legitimate interests.

SB 7072 requires transparency and accountability from platforms but does not compel them to carry any particular speech. The law is narrowly tailored to affect only large social media platforms as defined in Fla. Stat. § 501.2041 that has significant control over public discourse, addressing the state's interest in preserving free and open debate without unnecessarily burdening smaller entities. There are specific exemptions, such as for obscene content, and the law acknowledges its operation within the bounds of federal law and the U.S. Constitution 47 U.S.C. § 230. Special provisions are included for political candidates, prohibiting platforms from using post-prioritization or shadow banning algorithms for content related to candidates during election periods. Users deplatformed have the opportunity to retrieve their data for a specified period. The statute provides the framework for enforcement by the Department of Legal Affairs and allows for private legal action against social media platforms for specific violations.

CONCLUSION

SB 7072 is consistent with the First Amendment as it is grounded in precedent that respects the need for open forums for speech while allowing for reasonable regulations to ensure that these forums operate fairly and transparently. It upholds the principles established in landmark cases, ensuring that Florida's approach to digital speech regulation will withstand constitutional scrutiny.

In conclusion, the Supreme Court's decision in this case will have significant implications for the legal boundaries of state regulation of social media platforms, the extent of First Amendment protections for these platforms, and the broader discourse on digital communication and public discourse.

Respectfully submitted,

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