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 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.

TABLE OF CONTENTS

I. The laws' content-moderation restrictions are unconstitutional.

- **A. Social media companies have the right to editorial discretion.**
- **B. Despite differences between newspapers and social media, the laws' are still unconstitutional because they fail even an intermediate scrutiny review.**

II. The laws' individualized-explanation requirements are unconstitutional.

- **A. Zauderer provides an appropriate framework for evaluating the individualized-explanation requirements.**
- **B. The laws' individualized-explanation requirements are unconstitutional under Zauderer because they are unduly burdensome.**
- **C. The laws' individualized-explanation requirements are unconstitutional under Zauderer because they do not serve a legitimate purpose.**

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. Const. amend. I, § 1

Cases

Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998)

Associated Press v. NLRB, 301 U.S. 103 (1937)

Brown v. Entertainment Merchants Association, 564 U.S. 786 (2011)

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980)

Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557 (1995)

NIFLA v. Becerra, 585 U.S. ___ (2018)

Leathers v. Medlock, 499 US 439 (1991)

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Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of California, 475 U.S. 1 (1986)

Turner Broad. Sys., Inc. v. FCC 512 U.S. 622 (1994)

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SUMMARY OF ARGUMENT

The constitutional challenge against Florida's content-moderation restrictions on social media platforms is rooted in the First Amendment's protection of the essential right to free speech. "Congress shall make no law…abridging the freedom of speech." U.S. Const. amend. I, § 1. The argument herein is constituted by two key claims. First, social media companies possess the right to editorial discretion, akin to protections extended to newspapers by this court. Though the balance between public wellbeing and private rights may be struck differently for social media companies by this court because of the inherent differences between newspapers and social media, Florida's legislation fails even intermediate scrutiny review, the lesser standard that may be applied in this case. Second, the individualized-explanation requirements imposed by the Florida law, evaluated under the *Zauderer* framework, are unconstitutional given Florida's unduly burdensome requirements. For these reasons, this court should affirm the Eleventh Circuit's ruling.

ARGUMENT

I. The laws' content-moderation restrictions are unconstitutional.

Social media companies engage in editorial judgment protected by the First Amendment, much like newspapers. This court's precedents, from *Tornillo* to *Forbes*, highlight the significance of safeguarding editorial independence to maintain the diversity of public discourse.

Social media platforms, exercising editorial judgment through community standards and warning labels, deserve analogous protection. Moreover, the distinctions between newspapers and social media must be acknowledged, but Florida's must-carry provisions violate editorial discretion even under intermediate scrutiny. The state fails to demonstrate a specific harm addressed by the law, rendering it unconstitutional.

A. Social media companies have the right to editorial discretion.

The First Amendment's protects a principle known as editorial judgment, as evidenced by the Supreme Court's jurisprudence. In *Miami Herald Publishing Company v. Tornillo* 418 U.S. 241 (1974), the Supreme Court invalidated a statute compelling newspapers to provide free reply space to political candidates they criticized. The Court emphasized that such a law interfered with editorial control, violating the First Amendment by compelling editors to publish content against their judgment. Justice White's concurrence highlighted the centrality of editorial decisions, stating that "the very nerve center of a newspaper" lies in determining what content to include. Subsequent cases reinforced the protection of editorial judgment in various contexts. In *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of California* 475 U.S. 1 (1986), the Court held that forcing a utility to include opposing views in its newsletter undermined its editorial judgment. *Turner Broad. Sys., Inc. v. FCC* 512 U.S. 622 (1994) and *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston* 515 U.S. 557 (1995) further affirmed the protection of editorial discretion against interference in selecting

content for cable programming and parade participation, respectively. *Ark. Educ. Television Comm'n v. Forbes* 523 U.S. 666 (1998) rejected a First Amendment challenge to a broadcaster's exclusion of a political candidate from a debate, recognizing it as part of the broadcaster's editorial discretion. These precedents safeguarding editorial judgment demonstrate its dual purpose: upholding the "principle of autonomy to control one's own speech" and protecting public discourse from government intervention that could distort democratic self-governance. *Hurley,* 515 U.S. 574. This protection is crucial not only for safeguarding editorial independence but also for preserving the diversity of public debate. The danger highlighted in *Tornillo* specifically is that government intervention in editorial decisions may distort, dampen, or limit the variety of public discourse. *Tornillo,* 418 U.S. 241. Social media platforms engage in editorial judgment that prevents this through the enforcement of such things as community standards and the attachment of warning labels to users' content. See e.g. Meta, "Transparency Center." Comparable to editorial decisions protected by the Supreme Court in cases like *Tornillo*, *Pacific Gas*, *Turner*, and *Hurley*, these platforms make choices about what content is allowed or flagged, shaping the expressive character of their product. The attachment of warning labels, generated by the platforms themselves, can be likened to newspaper editorials, falling within the realm of editorial judgment as recognized by the Court. Though acknowledging that social media companies exercise editorial judgment does not necessarily subject all their business practices to First Amendment scrutiny, *Associated Press v. NLRB,* 301 U.S. 103 (1937) determined

that the crucial factor is whether a regulated entity exercises editorial judgment in the specific context addressed by the regulation. In this case, the Florida law regulates editorial judgment, subjecting the regulation to the same constitutional scrutiny as similar regulations on newspapers, and rendering it unconstitutional under the First Amendment.

B. **Despite differences between newspapers and social media, the laws' are still unconstitutional because they fail even an intermediate scrutiny review.**

Social media platforms differ from traditional newspapers in ways that impact the exercise of editorial judgment and the imposition of regulations, the phenomena analogized above. While both newspapers and social media involve editorial judgment, social media platforms and newspapers vary significantly in their content generation and curation. Unlike newspapers, which are highly selective in what they publish, social media platforms publish almost everything within broad community standards.See e.g. Meta, "Transparency Center." The scale is another differentiator, with platforms facilitating the sharing of billions of stories and messages, surpassing the output of even influential newspapers. See, Domo, Inc. "Data Never Sleeps 5.0," 2017. Thus, the coherence of speech products differs between newspapers and social media platforms. Newspapers, by selecting and editing content, convey a specific message, while platforms, focused on facilitating user speech, lack the same curated

coherence. As the responding counsel, we must concede that this court may consider the above reasons sufficient for a different balance between public wellbeing and private rights in the case of social media platforms, resulting in a different constitutional evaluation. Florida's must-carry provisions, however, are unconstitutional by even the lesser standard of intermediate scrutiny. These provisions violate platforms' editorial discretion, compelling them to publish content inconsistent with their expressive communities. The law prohibits platforms from attaching labels to user content, restricting their ability to editorialize about posts. FLA. STAT. § 501.2041 In order for these restrictions to be permissible under intermediate scrutiny they must be "narrowly drawn" to serve a "substantial" government interest. *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980).

In *Turner v. FCC* 512 U.S. 622 (1994), the court ruled that the states must demonstrate a substantial interest and show that the law is narrowly tailored to that interest. While we must acknowledge the substantial interest Florida's government has in ensuring public access to diverse information sources, this interest alone is insufficient to justify the must-carry provisions under *Turner*. In *Turner*, the Supreme Court emphasized that when defending a regulation on speech, the government must show more than the existence of a problem; it must prove that the law redresses a specific harm. Florida has failed to make a comparable showing, because the state has no reason to bar platforms' from the use of certain editorial actions like the ues of warning labels.. This restriction serves no legitimate governmental interest and

results in the silencing of social media platforms, ultimately harming public discourse because the platforms are unable to facilitate both a speech environment that they deem appropriate for their platforms and one that is conducive to public discourse.

II. The laws' individualized-explanation requirements are unconstitutional.

The *Zauderer* framework has a foundational role in evaluating compelled commercial disclosures and must be employed in this case. *Zauderer*, which extends beyond its original context, permits the state to mandate disclosure of factual and uncontroversial information under certain circumstances. Florida's individualized-explanation requirements, however, prove unconstitutional. The stringent regulations impose unjustified and burdensome obligations on platforms, lacking the requisite justification for their sweeping scope.

A. Zauderer provides an appropriate framework for evaluating the individualized-explanation requirements.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), is the key case in the evaluation of compelled commercial disclosures. The case, which upheld a rule requiring lawyers to disclose specific information about their services, laid down a framework that deems constitutional laws compelling the disclosure of "purely factual and uncontroversial information." Because

Zauderer places emphasis on the value of such disclosures to public discourse in the commercial context, *Zauderer'*s framework extends beyond the specific consumer deception context it originally addressed. Notably, in *NIFLA v. Becerra* 585 U.S. ___ (2018), the Supreme Court expressed that *Zauderer*'s principles encompass health and safety warnings, as well as disclosures about commercial products. In the recent case of *303 Creative LLC v. Elenis* 600 U.S. 570 (2023), the court further affirmed that the government may require the dissemination of "purely factual and uncontroversial information" in the realm of online commercial operations, aligning modern technologies and practices with the foundational principles set forth in *Zauderer*.

B. The laws' individualized-explanation requirements are unconstitutional under Zauderer because they are unduly burdensome.

Despite the fact that *Zauderer*'s jurisprudence has permitted government the ability to establish disclosure requirements, the individualized-explanation provisions in the Florida law are unconstitutional under the *Zauderer* framework. *Zauderer*'s criteria for constitutionality hinges on the nature of the compelled disclosure, requiring it to be "purely factual and uncontroversial information." *Zauderer*, 471 U.S. 626 (1985). While *Zauderer* acknowledges that disclosure requirements may be constitutionally permissible if they abide by this rule, the government's burden of justification must increase with the burden on expression. The more substantial the

burden, the greater the government's responsibility to demonstrate that it is not "unjustified or unduly burdensome." *Zauderer*, 471 U.S. 626 (1985). Florida has not properly justified the need for its sweeping regulation that is evidently burdensome in that it requires disclosure for "any action taken" and requires that disclosure to include "a thorough explanation of how the social media platform became aware of the censored content or material," FLA. STAT. § 501.2041. a practice that would be highly impractical for these platforms to undertake. The sheer amount of data disseminated on the platforms affected by Florida's law is unimaginable. For example, there are more than 400,000 Youtube videos watched every minute. In the same time period, users post more than 40,000 photos on Instagram and send more than 450,000 tweets on Twitter. See, Domo, Inc. "Data Never Sleeps 5.0," 2017. Under these conditions, Florida's stringent requirements are unlikely to have any effect other than "chilling" the platforms' moderating speech, just as the Zauderer court originally cautioned. Moreover, the law's added requirement of "a thorough explanation" inhibits the platforms' right to only disclose "factual and uncontroversial information." *Zauderer*, 471 U.S. 626 (1985); FLA. STAT. § 501.2041. This section requires social media companies to make private judgements public ones, compelling their speech.

C. The laws' individualized-explanation requirements are unconstitutional under Zauderer because they do not serve a legitimate purpose.

Under *Zauderer*, a law must also be "reasonably related to the state's interest." *Zauderer*, 471 U.S. 626 (1985). That means that it must be designed in a way that can reasonably be interpreted as serving the government specific interest, and serving *only* that interest. *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980). The way Florida's law is written suggests otherwise. Florida's law may appear to be "narrowly drawn" in that it is limited to apply only to "journalistic enterprises" of a certain size, specifically those institutions which meet certain requirements such as providing content to at leat "100,000 monthly active viewers." FLA. STAT. § 501.2041. However, there is no reason that these larger institutions should be the target of regulation anymore than small institutions. Florida's specifications are designed with a specific purported bias in mind: they believe larger social media companies are likely to be biased against conservative voices, and have thus have designed the law as to specifically protect certain viewpoints, as emphasized by comments by politicians such as this one from Florida Governor Ron DeSantis: "we took action to ensure protection against the Silicon Valley elites." See, Gov. Ron DeSantis, "Signs Censorship Bill." Unfortunately, in the process of doing this, the law tramples on the First Amendment rights of a specific group of institutions which "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011). This would automatically subject the law to strict scrutiny, a higher standard than *Zauderer's* typical intermediate scrutiny. *Leathers v.*

Medlock, 499 US 439 (1991). A law that is "unduly burdensome" would certainly not survive strict scrutiny.

CONCLUSION

Florida's content-moderation restrictions falter in the face of constitutional precedent. Section I establishes the parallel between social media and editorially protected newspapers and the relevance of this connection to constitutional evaluation, while section II uses the Zauderer framework to explain the unconstitutionality of Florida's individualized-explanation requirements. Florida's legislation, despite its intentions, falters under constitutional scrutiny. The state's failure to demonstrate specific harm, coupled with burdensome individualized-explanation mandates, renders the laws incompatible with the First Amendment. For the above the reasons, we request that this court affirm the circuit court's ruling.

Respectfully submitted,

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