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

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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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INTRODUTION

The first Amendment guarantees freedom of speech, the press, assembly, and the right to petition the Government for a redress of grievances. With newly advancing forms of communications and technology, these God given rights are the key to a truly democratic society. With the rise of technology in the 20th century such as telephones, the government has risen to protect the rights of American citizens. §202 "Discriminations and preferences" from Title 47—TELECOMMUNICATIONS ensures that the new technology of the era was not unregulated and did not violate our rights. This law ensures that unjust discriminations against persons are not carried out by common carriers, such as railroads or cell providers. Because of this law, railroads cannot deny a person a ticket because of that person's political viewpoint or opinions. With the rise of social media, a similar action is necessary to regulate social media companies from violating the first amendment rights of American citizens. We ask that in this case, the government recognises social media as a common carrier, a forum for speech for all Americans, regardless of viewpoints.

SUMMARY OF ARGUMENT

Social media companies are forums for speech. These companies facilitate communication between two or more people, even allowing companies and politicians to reach target audiences. The First Amendment is applicable in this situation, because it protects freedom of speech – people and politicians who use social media –, freedom of the press – news organizations that use social media –, and the right to dissent against the government – people who express disagreement with the government. The Free Speech Clause of the First Amendment protects the "freedom to think as you will and to speak as you think." *Boy Scouts of America v. Dale*, 530 U. S. 640, 660–661 (internal quotation marks omitted). In addition,

social media companies are common carriers. This Court held that "Some digital platforms are sufficiently akin to common carriers" in *Biden v. Knight*. This is backed by Section 230 of the Communications Decency Act. Section 230 frees social media companies from bearing responsibility for the posts that are on their platforms. Social media companies are both common carriers and forums for speech, and they do not exercise editorial judgment as a newspaper editor would. When a person posts about their personal opinions on social media, it is not considered to be the companies' opinion. If that opinion were to be in any way discriminatory or foul, the social media company would not be held responsible for this post, because it is not their opinion. Therefore, we ask that this court hold that the State law is constitutional under the First Amendment.

ARGUMENT

I. The laws' content-moderation restrictions comply with the First Amendment

A. Social Media Companies don't exercise editorial discretion, and merely host user-curated content

1. Social Media Companies are not speakers on their platforms

Social media companies are not accountable for the posts that are made on their platforms; the users of these platforms are. This is the basis for Section 230 of the Communications Decency Act. So, if a user or organization makes a post about helping combat child malnutrition, a company like Twitter may agree with the message, yet they are not the speakers in this situation. Similarly if a user or organization were to make a post about something harmful or offensive, a company like Meta might not agree with this speech, and they wouldn't be considered the speakers. Essentially, social media companies are not the speakers of the messages that are on their platforms. A key example is *Gonzalez v. Google LLC*. In *Gonzalez v. Google LLC*, an action was filed against Google in the wake of the 2015 Paris terrorist attacks. Gonzalez claimed that Google aided and abetted international terrorism for allowing these terrorists to use their platforms. In their defense, Google used the regulations and statutes in Section 230 to protect them from liability. As the respondent in *Gonzalez*, Google wrote that "Section 230 flows from Congress's recognition that today's internet could not exist if the law treated every website" "as the publisher or speaker of the third-party content they disseminated." Ironically, Google is included in the trade association that forms Netchoice in *Moody v. Netchoice*. This means that other users or organizations are responsible for the posts they make on said platforms.

2. Social Media Companies do not exercise editorial discretion

Here emerges a critical and clear distinction between newspaper organizations and social media companies. News organizations choose and curate content for their readers, journalists representing their organization write their articles, and editors have the final word on what to place in their editions. Using this logic, social media platforms aren't the publishers or speakers of the posts that are made. So, companies aren't responsible for the content, yet they say that they exercise editorial discretion through choosing to filter and remove content. This is irreconcilable with what Google has presented, and the protections under Section 230. If they truly exercised editorial discretion, then they would be considered responsible for all posts made on their platforms, because through censorship, they would be exercising their right to speech. Yet, they aren't considered responsible for all posts made on these platforms, precisely because they don't truly have full editorial control over their platforms. Social media companies act more as a forum for discussion. Independent users write their own opinions, and these opinions are not official company viewpoints.

3. Social Media Companies are common carriers

Social media platforms act in the same manner as radio stations and other platforms. They host user-curated content, not expressing their own speech. Following this logic, social media companies are common carriers. In *Biden v. Knight* this Court held that "Some digital platforms are sufficiently akin to common carriers". Social media companies are these digital platforms that are common carriers. Common carriers in the technology sector are telecommunications companies that are available for public use and provide communications transmission services. Social media platforms clearly fall under this category, as they publicly host speech. An example of common carriers,

B. Social Media as a public forum

Since social media companies merely host speech, they act as public forums for discourse. Legally, public forums are things like public squares and parks, a place where people can come together or be in regardless of political opinion. Public forums are protected by the government, and social media platforms should be included in this category. This is supported by *Knight Institute v. Trump*, in which this court held that comment threads and the social media account of politician Donald Trump are "public forum[s]". Sidewalks, streets, and parks provide examples of "quintessential public forums" that the government must keep open for use of First Amendment rights. It is commonly thought that "public forums" are exclusive to government owned property or assets, yet in *Marsh v. Alabama*, this Court has held that privately owned assets can be considered a public forum. The Supreme Court held that the First Amendment applies to streets and sidewalks owned by a private company, because the sidewalk "serves as the community shopping center and is freely accessible and open to the people in the area and those passing through". By this logic, any freely accessible location and area – digital or physical – should be protected by the First Amendment. Social media platforms "serve the community" and are "accessible" to American citizens. In *Packingham v. North Carolina*, Justice Kennedy wrote that "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular."

C. Social Media Censorship violates the First Amendment

In *Packingham v. North Carolina*, this Court held that "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more". This

clearly applies to social media companies, as forums for discussion. The censorship that social media companies apply violates this "fundamental principle" of the First Amendment when they remove posts or people based on their political viewpoints. Social media companies should not be violating the First Amendment of millions of Americans. Social media sites should be subject to the First Amendment. This is best explained by Benjamin F. Jackson when he writes that "[P]ublic communications by users of social network websites deserve First Amendment protection because they simultaneously invoke three of the interests protected by the First Amendment: freedom of speech, freedom of the press, and freedom of association." (Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. Rev. 121, 134 (2014).) The First Amendment should be protected from violations by non-governmental organizations as well as governmental organizations. The New Jersey state high court wrote: "In New Jersey, an individual's affirmative right to speak freely is protected not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities in certain situations." *Mazdabrook Commons Homeowners Association v. Khan*, 210 N.J. 482, 493 (2012). The First Amendment is applicable here because it "protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply "misguided," *Hurley*, 515 U. S., at 574. Following the logic from the New Jersey case, violations of the First Amendment don't just happen by the government, private companies can violate it as well. When private entities have a monopoly over a certain sector, that can impact the rights that pertain to that sector. Social media companies in this example control the digital world, and they should not be able to violate the rights of Americans. where, meaning that social media platforms violate the First Amendment through censorship of communication on their platforms. What the government cannot do, these social media companies should not be allowed

to do. *Ashcroft v. Free Speech Coalition* says that the government "may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 535 U. S., at 255. Social media companies also should not be allowed to either.

D. Even if these companies exercise editorial discretion, this isn't a dealbreaker for the law

If the court were to rule that companies exercise editorial discretion, they would still be subject to these laws. This is because precedent has shown that editorial discretion can be reconciled with federal law. In *Hausch v. Donrey of Nevada* (a district court case in Nevada), the defendants claimed that "the choice of the leaders who exercise a publisher's editorial discretion ... should be protected from governmental intrusion" and that editorial control is protected by the First Amendment. Here the court ruled that "it is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil statutes of general applicability such as Title VII which serve substantial public interests." When a law does not place an undue burden on these companies, as this law does not, it is constitutional and does not restrict their speech. Further backing this in *CBS, Inc. v. FCC*, in which this Court held that the Carter-Mondale Presidential Committee, after having been rejected multiple times, had a right to broadcast access on the CBS news network. The decision to not broadcast for the Carter-Mondale Presidential Committee to the public is comparable to the decision of social media platforms to prevent certain user-generated content from being viewed by the public. Considering the resemblances between social media platforms and news networks as common carriers of information, a similar line of thought can be applied. Just as how news networks must represent presidential committees, social media platforms must represent all viewpoints on their platforms.

Another precedent is *Turner v. FCC*. In this case, the Cable Television and Competition Act of 1992 was the focus. The Court held that the must-carry provisions were content neutral, therefore the law did not force them to alter their message. This can be applied here because this law is content neutral. The law isn't forcing social media companies to alter their message, it simply promotes fair speech online.

II. The laws' individualized-explanation requirements comply with the First Amendment.

A. Individualized explanation requirements do not impose an unnecessary burden upon the companies in question.

Companies already have similar individualized explanation systems in place and currently survive even with a high volume of censorship. The companies have also failed to prove that individualized explanation requirements would excessively burden their content moderation capabilities.

B. Even if individualized explanations were burdensome to content moderation they would comply with the First Amendment.

Content moderation by social media companies is not speech. The law does not hold online platforms accountable for user-generated content posted on their sites, correctly identifying that user-generated content does not represent company viewpoints as is seen in *Gonzalez v. Google LLC*. Therefore, any burden to content moderation by social media platforms does not burden speech and complies with the First Amendment.

C. Individualized explanations are needed to assure that social media companies do not wrongfully limit the speech of its users.

Social media platforms are obliged to provide reasoning for censorship. Individualized explanation requirements assure

that social media platforms do not wrongfully censor user-generated content based on viewpoint. The unregulated censorship on these platforms violates the First Amendment rights of Americans, and individualized explanation requirements are not mandated for the censorship of anything obscene, meaning these requirements do not inhibit necessary moderation of illegal content, but keep social media platforms accountable for their censorship.

CONCLUSION

The center of this case is the First Amendment rights of Americans. Keeping the laws helps protect these rights that social media and big tech are violating. We strongly urge that the ruling be in favor of the Petitoners.

Respectfully submitted,

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