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

Whether a public official engages in state actionis subject to the First Amendment by blocking an individual from the official's personal social-media account.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

The limitations imposed by the state of Florida on private social media companies regarding their right to content moderation on their platforms is a violation of the First Amendment's protection, freedom of speech.

As private businesses, social media companies have a right to regulate their own business. In addition, social media companies are not common carriers, and therefore should not be held to the same standard as a common carrier would. Furthermore, social media companies are entitled to their own editorial discretion. While editorial discretion in the modern day of social media may differ from the past like in newspapers, social media platforms are able to monitor how their sites should be portrayed in a form of expression.

Strict scrutiny is the adherent test for restrictions which infringes upon a constitutionally protected right. The state interest of Florida is to protect the speech of political officials on social media platforms. However, in meeting their interest, the state has placed restrictions on these private companies' expression of speech. If the governmental interest had been to prevent a monopoly among social media companies as seen in past precedents, then this could have passed the first requirement of strict scrutiny. Furthermore, the respondent has the burden of proving that there exists an alternative which is less restrictive than the current one. Finally, there is a high bar for passing the strict scrutiny test. Several prior cases which were subjected to the same standard of review have failed to meet both requirements of strict scrutiny.

ARGUMENT

I. Private businesses have a right to regulate their own platforms.

The companies a-joined as Net Choice in the case at bar have a right to regulate their own platform as its expressive speech is protected by the First Amendment. As the social media companies have a right to express their company as they wish to do so. Furthermore companies taking down posts or accounts for any reason applies to that expression as an aspect of speech.

Companies present themselves and what they stand for on the basis of what is upon their name or in this instance the post that they decide to not have on their app. The actions taken by social media companies, such as removing posts or suspending accounts, can be considered a form of expression. These actions reflect the platform's values and guidelines, essentially conveying what they deem acceptable or unacceptable within their community. However, there's a complexity in defining where expression ends and regulation begins. While these actions can represent the platform's speech, they also serve to maintain community standards or comply with legal requirements, sometimes conflicting with the concept of free speech.

The Founding Fathers created the First Amendment in the sense of protecting speech of the people from the government. In *New York State Rifle & Pistol Association Inc. V. Bruen* 597 U.S. __ (2022), the Court acknowledged

the deep rooted history of self-defense held within the U.S. in association to the Second Amendment, in such a way that its preceder amendment does for speech. In cases to deal with guns, it is often the refute of a side that the Founding Fathers could never imagine the extent to which a gun has changed from rolling out of a barrel in 1776 to shooting out 2,000 mph in 2023, https://survivalstoic.com/. In such a way that it has been constantly contended that some things the Founding Fathers couldn't have accounted for and in that case as constantly contested that guns had come to a point that could no longer be a highly protected right. In such a way that it could be said that they couldn't have imagined things like social media disallowing it to really be protected by the constitution.

Furthermore, in addressing *Bruen* specifically, the conclusion of the Court found that gun restrictions are constitutional only if there is a tradition of such regulation in U.S. History. In appliance to social media and companies, the only type of restriction that is traditional in history placed on business is that placed on common carriers.

A. Social media is not a common carrier.

*Biden v. Knight First Amendment Institute at Columbia University*593 *U.S. __ (2021),* finds that a common carrier provides a service and holds itself to the public. Common carriers have a history of being regulated by the government due to monopolies, but social media companies are not common carriers as they are not able to form a monopoly. Monopolies are created due to scarcity of a product and the companies' control of the majority of that product allowing them to create more appealing prices and

run other companies in the same trade out of business. Although in the case of social media, there does not exist a platform which can become the biggest platform and run the others out of business. In cases of physical product buying of course, there exists this buying from one takes away from another but not so in social media.

Out of the over 4 billion users on social media the average user accessed 8.4 social media accounts on different apps, https://backlinko.com/social-media-users.

Users are able to have more than one social media platform on their person which does not allow for a certain group to monopolize the social media industry. Since they are unable to monopolize such industry then the monopolizing of speech is also not something that can occur. Whereas monopolizing has occurred in common carriers such as oil companies because that type of monopolizing cannot occur then it is not a common carrier.

A law journal by Ashutosh Bhagwat titled, "Why Social Media Platforms Are Not Common Carriers" claims, https://www.journaloffreespeechlaw.org/bhagwat2.pdf that because social media platforms do not possess the same characteristics as typical common carriers, that these platforms simply shouldn't be held to the same standards as a common carrier would be. A common carrier has been historically determined by Congress to be a necessity and place of utility.

The Interstate Commerce Act of 1847 designated railroads, a means of transportation, as being a common carrier. Decades later when the first telephone was invented, it was widely disputed whether this emerging industry should qualify as a common carrier. Congress resolved the issue by classifying telephone companies as

common carriers, a designation which it confirmed with the Federal Communications Act of 1934, a foundational statute for the future framework of telecommunications and broadcasting industries.

Furthermore common carriers are as they sound, carriers in which social media itself is not. Social media is a business that promotes the design of their app and its accessibility instead of just being a messaging system. Whereas some message apps are just that of message delivery, social media platforms are so much more, in which even products are being sold on social media platforms today specifically set up by the social media app.

Different from common carriers such as telephone companies who don't sell anything on their platform themselves. Where some telemarketers may call people to attempt business this isn't specifically a set up by the telephone company itself. At least to say that Social Media companies have a product that is the app themselves.

Social media is not selling an app to just carry messages, instead it is selling an app's design and features. Since the majority of persons have more than one social media app then they do not choose their favorite based on simply wanting to carry a message for they could do that on their phone or any app. Instead a person chooses what social media app to use based on design, which is what social media is really selling. Common carriers move a product but social media makes a product, their app. Making it accessible, aesthetic, and functional software that they sell.

If a person goes into an arcade with some friends and they speak in that setting, it is not that the business has become a common carrier of speech, but instead a place that

attracts people based on design and opportunity to indulge in mental stimulus. Social media is a business relying heavily on design techniques, not on the words being traveled between users to run as a business.

B. Social media redefines editorial discretion.

Editorial discretion as applied to social media companies, while similar to that of newspapers, is different in a few ways because of how posts are distributed. Newspapers are allowed to determine what is and isn't on their articles (posts) and even edit them after they are posted. In such a way that social media can as well by being able to determine what they wish to portray on their app.

The point in which they differ does lie upon liability. In which newspapers do have liability in what they write which both can lie upon the company and the employee who writes the material at issue, but that is not the same for social media. Social media and its employees don't write their posts, and therefore don't have the same liability, but they do have a right to editorial discretion in the same way Newspapers do. *47 USC Section 230* embodies the principle that we should all be responsible for our own actions and statements online, which holds social media not liable for those of others. Social Media does not edit their own platform to stop liability, but instead to further how they present themselves and how their product (app) is presented. Social media is a business which has to make a profit, and one of the ways they're able to do this is by showing advertisements. Furthermore, these social media apps are trying to cater to audiences which makes it necessary for them to maintain an image.

Part II

I. Strict scrutiny is the adherent test.

General applicability is the standard of review to be used in most cases, unless of course, it is found that a law infringes upon a constitutional right. Such as it does in the case at bar, thus we should look to strict scrutiny. Specifically in the pending case, it is infringing upon the freedom of speech, a right protected by the First Amendment. *Sorrell v. IMS Health Inc.* 597 U.S. __ (2022) specifically highlights the necessity of heightened scrutiny when dealing with the First Amendment furthering the use of strict scrutiny for the case at bar. The difference between infringement and violation lies upon a first glance. Often, laws may have to infringe on rights to serve an interest, but depending on the extent of the infringement, then that itself determines whether the law is in violation.

For the interest itself, it must be valid to even allow an infringement and an inspection onto its means of action. For the state to meet strict scrutiny, it must prove that there is a sufficient compelling governmental interest in allowing themselves to regulate privately owned businesses, and that it is done by the least restrictive means. The formula for a strict scrutiny analysis first emerged around the mid-twentieth century following *United States v. Carolene Products Footnote Four 304 U.S.*

144 (1938), with the intent to shift focus onto individual rights. *Moody* has failed to identify a compelling governmental interest, as the need to regulate social media platforms is substantially outweighed by the freedom of speech. Finally, the state has not pursued the least restrictive means in order to attain their governmental interest either, leaving the strict scrutiny test incomplete.

A. Moody does not have a compelling governmental interest.

A compelling governmental interest that would justify limiting restrictions on social media companies would have to prevent a monopoly. As found in *Turner Broadcasting System Inc. v. FCC* 512 U.S. 622 (1994), interfering restrictions by the government are constitutional as long as it is to prevent a monopoly. The existence of monopolies can affect similar service providers. It is possible for a monopoly to take away consumers from another service provider. A prime example of this would be cellphone service companies. A person can only have a single cell phone service provider. However, for social media, people are able to have multiple accounts across platforms. Someone owning an account on one platform is not going to affect another platform's consumerism/user base.

If one company provides a service that is in high demand, and it is also the only one doing so, then the company is considered a monopoly. There are many social media platforms with different audiences, but it can also be consumed by anyone. In *Turner*, a law on the regulation of radio stations was passed as to limit the development of a monopoly. The interest in *Turner* was not for the

altercation of speech, but the survival of speakers. If the government hadn't stepped in, then local radio stations would have been forced to shut down without an appropriate set of listeners.

The introduction of Antitrust laws has already shown the U.S. Government's indifference regarding monopolies. The Antitrust laws ensure that no company is immune to competition. Furthermore, the ruling in *Standard Oil Co. of New Jersey v. United States 221 U.S. 1 (1911)* demonstrates the initiative that the Court had previously undertaken in order to diminish monopolies. In *Standard Oil*, John D. Rockfeller had an overwhelming control over the oil trade industry, and had extended beyond a business, becoming instead an infrastructural corporation.

As an infrastructural corporation, they served as a dominant part of trade, one which trampled on others. The U.S. could not allow for a business to monopolize and become immune to competition, so here the state had the right to implement laws regulating these dominant companies. If this Court were to rule that there is indeed a compelling governmental interest on part of Florida, then it would be implying that there is a monopoly within speech on social media. However, there is not one, and it is different here than in previous cases. Unlike in *Standard Oil* and *Turner*, there is more evidence here of widespread opportunity for users and companies.

The question of whether social media companies' taking down of posts made by political officials, or the banning of accounts is an issue of power abuse as a central platform. While radio stations are played locally by zip-code, social media apps can be utilized and enjoyed by

anyone from across the globe. For cases such as *Standard Oil*, there wasn't a limited amount of land that could be bought, and oil to be traded for. Instead, the social media market offers users dozens of different platforms in which they can speak to an audience. Often, these audiences are tailored to be in agreement with the speaker.

This is how Truth Social, a popular conservative social media app operates. In October of 2022, the Pew Research Center did a study on Truth Social and compared it to other apps. Truth Social has earned more users within the first two years of launching compared to Twitter's first two years of its launching. There was a report in an article titled "End of Speculation: The Real Twitter Numbers" by Tech Company in 2008, explaining that Twitter had 1.3 million users at the time, following its founding in 2006. A website by the name of SocialPilot compiled statistics from Statista of users across multiple digital platforms. The opportunity that platforms have seen for popularity growth is most notable with one of the most famous social media platforms, TikTok, which has grown to 1.53 billion users in only eight years nearing Instagram's 2 billion users that was accumulated over a period of 14 years. https://socialpilot.co

Users constantly have the opportunity to spread their speech on multiple platforms, as there are thousands of them in existence and continually on the rise. Social media cannot be treated as being monopolies because it is simply impossible to compare a digital platform which enables users to have multiple accounts across different platforms, to say a dominant trading magnate or radio stations. While *Standard Oil* and *Turner* demonstrated a

compelling governmental interest, the state in the case at bar has not been able to accomplish the same.

In the mentioned cases, the regulations were to prevent companies from becoming monopolies, and there had to be laws passed in order to limit that possibility. While *Moody* has a valid concern for leveling out the playing field, these social media apps have not been immune to competition. Therefore, the private social media companies have not had the possibility of potentially becoming an infrastructural corporation, so the state has been unable to identify a compelling interest that would call for a government restriction on private companies.

B. The proposed limitations are not the least restrictive means of achieving the governmental interest.

In achieving the governmental interest, the law must also be least restrictive under the strict scrutiny analysis. The proposed methods are not in the least restrictive means of achieving that interest as there are other means (options) of achieving the argued interest. The state's laws regarding content moderation on social media apps are limiting these private companies' rights as to how they portray their platform. In order for Florida to meet its interest, it is important to review other methods that also protect the speech of politicians without imposing restrictions on private businesses.

There are still alternative options to look at when considering how this interest can be met. One of which includes developing an app specifically dedicated to be a space for politicians voicing and promoting their

campaigns. This could actually end up being more beneficial because there would no longer be the routine of certain political ads reaching more viewers than other ads. Social media apps are paid to display these advertisements to its users, and it is possible for this to result in some campaigns receiving more recognition than others. If there were to be an app regulated by the government and for the purpose of allowing political officials to freely speak out, then private companies won't have to meet limitations from the state.

In which the government already regulates websites for themselves to ensure that they can present what they want. As such is the case with thewhitehouse.gov, a website that contains president joe biden's political platform. Beyond a federal example there also exists fl.gov which in itself is specific to florida.

As the respondent, we need only to show that there exists an alternative which is less restrictive than the current one in which because there is then they have not met the least restrictive means.

In the case of *Sorrell v. IMS Health Inc.* 597 U.S. __ (2022), the state required that pharmacies must keep track of medications being prescribed. However, the pharmacies then began distributing the data for profit to drug manufacturers to be used for marketing techniques. This resulted in the enactment of Act 80 which prohibited the selling of prescriber-identifying information unless consented by the prescriber themselves. It was held that the Vermont statute was in violation of the First Amendment because it burdened the speech of pharmaceutical marketers and data miners without an adequate justification. The state's argument was that the

law was intended for protecting medical privacy and to diminish the likelihood that the data would have been used for prescription decisions that were not going to align with the best interests of the patient. While the concerns brought up by the state were significant, the Court found that the speech which assisted in pharmaceutical marketing is considered a form of expression, therefore it is protected by the Free Speech Clause under the First Amendment.

Despite a compelling governmental interest in *Sorrell*, the statute that was passed with the purpose of achieving that interest was not to the least restrictive means possible. For our case, even if there was a compelling interest in preventing a monopoly, it would still be required to be in the least restrictive means for meeting such an interest. However, the interest at bar deals with the rights of social media companies to regulate speech on their own platforms. In *Packingham v. North Carolina 582 U.S. 98 (2017)*, a law was passed that made it a felony for a registered sex offender to have an account on social media sites which also allowed for minors to be users of. It was argued that the sex offender could potentially contact a minor or use the website to gather information regarding a child. The compelling state interest lies in the protection of children. Although the state had an interest in enacting this law, the Court found that the restriction was not narrowly tailored to meeting North Carolina's interest. While there is a valid governmental interest, this "cannot, in every context, be insulated from all constitutional practices." cited by *Stanley v. Georgia 394 U.S. 557 (1969)a,*. North Carolina's enactment of this prohibition had the potential to restrict the right of a person to keep up with current events, listen in on the modern public square, and

check ads for employment. It was found that the state has not met its burden in showing that the law was legitimate and necessary in the purpose of keeping convicted sex offenders away from vulnerable victims. Despite North Carolina having a sufficient governmental interest, the methods that were implemented for the goal of achieving such an interest were not narrowly tailored to being the least restrictive means possible.

C. There is a high bar for passing strict scrutiny.

Most cases dealing with an infringement upon a constitutional right are required to look to the standard of strict scrutiny. This is the highest standard of review, as opposed to rational basis and intermediate scrutiny. Such as when discussing the right of free speech, it is a constitutional right. To meet and pass this standard, the petitioner must prove that there is a compelling state interest at hand, and that to achieve this particular interest, there is a process which is in the least restrictive means possible in attaining the state interest.

There have been several precedents which failed strict scrutiny with regards to the right of free speech. One being *Ashcroft v. American Civil Liberties Union (ACLU) 542 U.S. 656 (2004)*, Congress passed the Child Online Protection Act (COPA) to meet a governmental interest of protecting minors from harm. However, the Court would find that there were alternative ways which could have met the same interest intended from the passing of the COPA Act. Therefore, this law was not enacted in the least restrictive means of meeting their goal by placing restrictions on free speech.

To look at a more recent example, *Students for Fair Admissions v. University of North Carolina __(2023)*, dealt with affirmative action within university admissions using the factor of an applicant's race. As the case involved racial classification, it was held to the highest standard of review, strict scrutiny. The compelling interest was to increase diversity on a campus to promote cultural benefits in future employment after graduation. However, the methods employed by these higher education institutions were determined by the Court to not be to the least restrictive means that they could've gone about increasing diversity on their campuses. Despite a prominently valid interest in promoting educational benefits, the Court still retained that to meet the interest, there must be a process which is the least restrictive.

Strict scrutiny is considered to be the highest standard of review, especially used in laws that infringes upon constitutionally protected rights. There is a high bar for passing strict scrutiny as it must be proven that there is a compelling governmental interest in pursuing the law. This, along with the duty to ensure that the interest is met with the least restrictive process, is what makes strict scrutiny so difficult to pass.

CONCLUSION

There is no compelling governmental interest on Florida's part that would be enough to justify an infringement upon free speech. An expression can be considered speech, in which free speech is a constitutionally

protected right under the First Amendment of the U.S. Constitution. Therefore, the laws which restrict a private company's right as to how their app is being presented, has to be subjected to a strict scrutiny analysis. Furthermore, there is at least one alternative option in achieving Florida's state interest.

Respectfully submitted,

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