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 action subject to the First Amendment by blocking an individual from the official's personal social-media account.

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SUMMARY OF ARGUMENT

Florida's Senate Bill 7072 imposes an unprecedented burden on the First Amendment rights of social media companies. Among the principal functions of the bill includes restricting social media's ability to censor and regulate content on their private platforms.

S. B. 7072 triggers First Amendment rights as it imposes a burden on the free speech and free press rights of social media companies. Companies have editorial discretion just as newspapers do as they are private businesses and both have limited free speech rights under their respective platforms as employees and users. Companies enjoy freedom of speech as they are not common carriers, and they are protected under the compelled speech doctrine. The bill is content-based so triggers strict scrutiny. under strict scrutiny, S. B. 7072 is unconstitutional as it does not have a compelling interest, and the purported interest is not met through the least restrictive means.

Historically, the First Amendment prohibits this form of censorship as proven by Jefferson's reaction to the Alien and Sedition Act.

Finally, S.B. 7072 is unconstitutional under Zauderer v. Office of Disc. Counsel, which states that government action may not be "unjustified or unduly burdensome." *471 U. S.*, at 651 (1985).

ARGUMENT

I. S.B. 7072 triggers First Amendment rights and should be held under strict scrutiny.

Social Media companies have protected the freedom of the press and freedom of speech. Petitioner's argument that S.B. 7072 does not trigger First Amendment rights has no standings. Since its founding, private platforms have practiced editorial judgment on the content users publish. In contrast, users on these private platforms have the *privilege* of free speech, not rights, as long as they adhere to community standards set by the company.

A. Social Media platforms have editorial discretion as newspapers do.

Although different in operation, social media resembles newspapers in the sense that they can control their editorial content. The court historically refers to this right as "editorial discretion." *Columbia Broadcasting System v. Democratic Nat'l Committee,* 412 U.S. 94 (1973). There is no debate on the validity of this right: multiple courts have upheld the importance of it. See *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 258 (1974), and *Pittsburgh Press Co. v. Human Rel. Comm'n,* 413 U.S. 376 (1973).

The key question is whether this editorial judgment also extends to social media companies, which, while not traditional press, are media outlets. Social media platforms and newspapers are different in the sense that newspapers choose the written

content that goes into the final publication, while social media platforms post-process the content they wish to remove. However, precedents indicate that editorial discretion can extend beyond traditional press. *Miami Herald* characterized newspapers as "big business," recognizing their private nature. Further, it reasoned that "the choice of material to go into a newspaper … and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.*

Like newspapers, social media platforms are private media entities, publishing and disseminating speech. Further, platforms speak for themselves when publishing and adopting standards about unacceptable content. Furthermore, just as journalists under the employment of private newspaper businesses can't post without regulation, users on these private platforms don't have a right to free speech, only a privilege.

When registering or making an account for these platforms, all users agree to a term of conditions to abide by. YouTube, for instance, states that "[i]f any of [the user's] Content (1) is in breach of this Agreement or (2) may cause harm to YouTube, our users, or third parties, we reserve the right to remove or take down some or all of such Content *in our discretion*." (emphasis added) *Terms of Service*, https://www.youtube.com/static?template=terms (emphasis added). Twitter states that "[w]e reserve the right to remove Content that violates the User Agreement, including for example, copyright or

trademark violations, impersonation, unlawful conduct, or harassment." *Terms of Services*, https://twitter.com/en/tos. Indeed, through these types of agreements, social media companies reserve the right to "remove or take down" users' contents as they wish without consequence. In other words, users enjoy the privilege of creating content on their platforms as long as YouTube or other platforms decide it doesn't create "harm." *Ibid.*

Neither YouTube, Twitter, nor other platforms give a definite standard of what defines "harm" or a "violat[ion] of the User Agreement," although many do provide examples. Indeed, harmful content need not be limited to blatantly obscene or violent content. Harm could also originate from content, even political ones, that these companies disagree with, harming their "collective point" that, whether companies intend to or not, represents themselves as a platform. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston,* 515 U.S. 557 (1995).

B. Social Media companies are not common carriers and are entitled to First Amendment protections.

Petitioners claim that private social media companies are crucial "in preserving first amendment protections for all Floridians" and, comparing platforms to "public utilities," allege they should be treated like common carriers. A common carrier is a person or company that transports goods or people for any person. In this case, the platforms transport information. *Common Carrier*, https://www.law.cornell.edu/wex/common_carrier.

Hudgens v. NLRB states that property does "not lose its private character merely because the public is generally invited to use it for designated purposes," 424 U.S. 507(1976). In *Pruneyard Shopping Center v. Robins,* PruneYard Shopping Center did not lose its private character from being open to the public as a mall, for "[t]he essentially private character of a store and its privately of owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center," 447 US 74 (1980). Simply being a large host of multiple businesses open to the public did not invalidate PruneYard's private character. Similarly, social media companies do not lose their private character simply because they are widely used and open to the public to disseminate and exchange information. Therefore, the platforms are protected by the First Amendment and carry the right of expression to exclude as they see fit.

Apart from the holding in *PruneYard* and *Hurley*, *Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C.,* 525 F.2d 630 (1976), also supports the notion that social media companies do not constitute common carriers. Under that case, "one may be a common carrier by holding oneself out as such." A carrier holds itself out when it represents itself as willing to facilitate communications within the limits of its services to any person who wants it. *Id.* However, that is not how social media companies are operated. As stated before, social media companies make you agree to terms of service upon creating an account, which indicates that they are going to limit and remove

certain users' abilities to convey their beliefs if they violate such terms or community standards.

The compelled speech doctrine also protects the rights of social media companies. The compelled speech doctrine establishes the principle that the First Amendment does not only bar the government from punishing a group or individual for saying something, but it also bars the government from forcing a group or individual to advocate or present their preferred messages. David L. Hudson Jr., *Compelled Speech*, https://firstamendment.mtsu.edu/article/compelled-speech/#:~:text=The%20Supreme%20Court's%20decision%20in,recite%20the%20Pledge%20of%20Allegiance.

In *Hurley, Id.*, the government could not force the private parade organizers to include a message they did not wish to include in their expressive activity, the St. Patrick's Day-Evacuation Day parade, as that would be breaching their freedom of speech. The Court ruled that, although non-verbal, their refusal itself was an expressive conduct, for the nature of parades requires that "they include marchers who are making some sort of collective point, not just to each other but to bystanders along the way." Id. See also *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) ("PG&E"); *Miami Herald Publishing Co. v. Tornillo, Id.*

Similarly, due to social media's private character and expressive editorial discretion, social media companies are like the parade organizers: they express themselves through the collective points

expressed on their platforms, and not just to members or subscribers of certain channels but to everyone on the web to disseminate easily. This grants them the protections of the compelled speech doctrine. Under this protection, social media has the right to make editorial discretion over what they wish to include on their private platforms without interference from the government.

C. The bill is content-based and triggers strict scrutiny.

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994)., ruled that content-based restrictions that "compel speakers to utter or distribute speech bearing a particular" are subject to strict scrutiny. See *Riley v. National Federation for Blind of N. C. Inc.,* 487 U.S. 781 (1988), and *West Virginia Bd. of Ed. v. Barnette*, 319 US 624 (1943). In contrast, content-neutral regulations unrelated to the content of the speech are subject to intermediate scrutiny. See *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984).

Reed v. Town of Gilbert defined content-based regulations as ones that "target speech based on its communicative content," 576 U.S. 155 (2015). Turner further "[o]ur cases have recognized that even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys. *United States v. Eichman,* 496 U. S. 310, 315 (1990) ("Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that Government's *asserted*

interest is related to the suppression of free expression")" (emphasis added).

As stated by Lieutenant Governor Jeanette Nunez in commentary on the signing: S.B. 7072 was enacted to counter "an effort to silence, intimidate, and wipe out dissenting voices by the leftist media and big corporations." Governor DeSantis states this bill "fights against big tech oligarchs that contrive, manipulate, and censor if you voice views that run contrary to their radical leftist narrative." *News Release: Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech (*May 24, 2021). *https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/#:~:text=Signs%20Two%20Bills-,Governor%20Ron%20DeSantis%20Signs%20Bill%20to%20Stop,of%20Floridians%20by%20Big%20Tech&text=MIAMI%20%E2%80%93%20Today%2C%20Governor%20Ron%20DeSantis,and%20participate%20in%20online%20platforms*.

This emphasis on "counter[ing] leftist" narratives in itself proves that this bill intends to compel these social media corporations to represent all types of political ideology against their will. Even if the bill doesn't blatantly target that certain narrative by forcing social media companies to censor posts or upload posts, by prohibiting companies from regulating content they disagree with because of this "asserted interest," the bill makes a content-based regulation. *Eickman, supra*. Further, if this court rules that it is content-neutral, then the bill has no

legitimate government interest in "leveling the expressive playing field." Pet.App.59a.

D. S. B. 7072 does not have a compelling interest and is not narrowly tailored.

Petitioner's stated interest in "leveling the expressive playing field" is invalid. *Ibid.* Such interest has never been upheld before in Court. In fact, in *Miami Herald Pub. Co.,* the court rejected a state action to compel newspapers that criticized certain political candidates to allow the publication of political candidates' responses to the criticisms published. It ruled that "press responsibility is not mandated by the Constitution and…cannot be legislated." *supra.*

Further, even if this court rules that the petitioner does have a valid interest, the state's means to meet that interest are not least restrictive. It is overbroad in that their purported interest in "leveling the playing field" is not met by requiring social media companies to provide a "thorough explanation" for deplatforming users. Fla. Stat. § 501.2041(4). Also, it is underinclusive in that it only applies to a very small subset of social media companies with "annual gross revenues in excess of $100 million" and has "at least 100 million monthly individual platform participants globally." Fla. Stat. § 501.2041(1)(g). Such "underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Entertainment Merchants Assn. v. Brown*, 564 U. S. 786 (2011). If the bill truly was concerned with leveling the expressive

playing field for all users, then it would regulate all or small social media platforms, not simply such a small portion of the largest ones that politicians tend to use.

II. The First Amendment historically prohibits governmental intervention of private enterprises.

In the words of Jefferson, "[w]here press is free, and every man able to read, all is safe." *Letters to Col. Charles Yancey in 14 Writings of Thomas Jefferson 384* (Lipscomd ed. 1904). Indeed, the foundation of the First Amendment lies in the principle of a free press without government intrusion, even if it may include self-censorship of certain content on its platform.

Jefferson's reaction to the "Alien and Sedition Act" reflects his intent for the First Amendment. "The Sedition Act made it a crime for American citizens to "print, utter, or publish...any false, scandalous, and malicious writing" about the government." *Alien and Sedition Acts (1798),* National Archives. Indeed, Jefferson fought vehemently against these violations of freedom of speech and free press, famously referring to the government as governing with "a rod of iron:" "...let the honest advocate of confidence read the Alien and Sedition acts, and say if the Constitution has not been wise in fixing limits to the government it created, and whether we should be wise in destroying those limits, Let him say what the government is, if it be not a tyranny," *Thomas Jefferson, Resolutions Relative to the Alien and*

Sedition Acts, https://press-pubs.uchicago.edu/founders/documents/v1ch8s41.html.

S.B. 7072 is similar to the Act as it forbids censorship of government speech. It may be considered even more egregious under Jefferson's definition. As established before, censorship of content post-publication is a form of speech that suggests a message from the moderator. However, they aren't actively producing any form of "false, scandalous, and malicious writing" against these government officials. *Ibid*. The extent of these companies' actions is far more passive than that described in the Alien and Sedition Act, although they certainly convey a certain message. Social media companies are free to regulate what political leaders do by removing them from their platforms.

I. The bill is unconstitutional under the *Zauderer* rule.

Under *Zauderer v. Office of Disc. Counsel,* a disclosure requirement cannot be "unjustified or unduly burdensome." S. B. 7072 is both unjustified and unduly burdensome.

A. S. B. 7072 is unjustified.

The rhetoric by Florida proves that it's unjustified. Establishing a statute to fight a viewpoint is in itself a violation of the First Amendment.

Further, disclosures must remedy a harm that is "potentially real not purely hypothetical," *Ibanez v.*

Florida Dept. of Business and Professional Regulation, Bd. of Accountancy, 512 U. S. 136, 146. As stated before, the whole reasoning behind this bill is that they are targeting right-wingers, which the legislative does not provide sufficient evidence to prove.

B. S. B. 7072 is unduly burdensome.

S.B. 7072 unduly burdens social media companies, both financially and speech-wise. The following subsets of the bill are as follows:

"Before a social-media platform deplatforms, censors, or shadow-bans any user, it must provide the user with a detailed notice." Id. 501.2041 (2)(d). specifically, "the notice must be in writing and be delivered within seven days, and must include both a "thorough rationale explaining the reason for the "censorship" and a "precise and thorough explanation of how the social media platform became aware" of the content that triggered its decision. The bill furthers that "the notice requirement doesn't apply 'if the censored content or material is obscene.' " According to the Florida Statutes, "Obscene" means the status of material which:

(a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;

(b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and

(c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

The 2023 Florida Statutes (including Special Session C) http://www.leg.state.fl.us/statutes. With this bill, before deleting egregiously "obscene" materials from their platforms, they'll have to undergo for *each* post an additional step to determine whether they must notify the users, otherwise risk being fined. This is even more egregious when considering the state-provided definition of "obscene" doesn't include comments classified as direct "harassment," "bullying" or "hateful," which are inappropriate content already prohibited by many social media companies, such as Twitter. Social media companies have an interest in keeping their platforms safe for a wide audience, and this "individualized explanation" requirement is overly burdensome to the companies and unreasonable to expect. This will have a chilling effect, deterring free speech due to government action as it happened in cases like *Dombrowski v. Pfister,* 380 U.S. 479 (1965).

Further, the act requires that "which is empowered to impose fines of up to $250,000 per day for violations involving candidates for statewide office and $25,000 per day for those involving candidates for other offices." Id. 106.072(3). "Private actors under this section can yield up to $100,000 in statutory damages per claim, actual damages, punitive damages, equitable relief, and, in some instances, attorney's fees. Id. 501.2041(6).

This is wholly unrealistic to expect of social media platforms. YouTube, for instance, deletes billions of comments each year. *Number of YouTube video comments removed worldwide from 3rd quarter 2018 to 2nd quarter 2023,* https://www.statista.com/statistics/1132989/number-removed-youtube-video-comments-worldwide/. Out of those billions of comments by private parties, those fines are easily enough to bankrupt all these social media companies over a few years. As ruled in *Pruneyard*, the federal protections on private parties take precedents over the business rights of private property owners until those "government-imposed" First Amendment protections started limiting or harming businesses as to constitute a "taking," where the government actively restricts a company without just compensation or contravene any other federal constitutional provision, as established in *Euclid v. Ambler Realty,* 272 U.S. 365 (1926). *Supra.* Although the taking clause is under the Fifth Amendment, because this bill significantly harms businesses without just compensation, it is unduly burdensome.

CONCLUSION

The Court should rule in favor of NetChoice and affirm the ruling of the lower court.

Respectfully submitted,

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