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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[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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SUMMARY OF ARGUMENT

S.B 7072 does not violate the First Amendment because social media comapnies can't have it both ways under section 230; they can't get the protection of listed section 230 and *then* practice content moderation through editorial discretion which is against the foundation of the law.

Social media companies are common carriers as the status of social media platforms as common carriers does not conflict with state law. Additionally, social media platforms hold themselves out directly to the public. Therefore, these platforms receive a lower standard of First Amendment protection than other forms of communication.

Even if social media companies were not common carriers. Social media companies are means of hosting expression. As shown by the content moderations of social medias, they do not excercise eitorial judgement, nor do they produce speech themselves. Rather, they act similarily to the shopping centers in *PruneYard* by hosting speech, and thus the regulations on contnet moderation is constitutional as the Court has previosuly found.

Lastly, disclosure requirement is not burdensome for the social media companies. If algorithms are enough to create editorial judgement, then algorithms must be enough to constitute an individualized explanation.

ARGUMENT

I. Social media platforms cannot have it both ways under the Communications Act of 1934 at 47 U.S.C. § 230.

Social media platforms cannot 1) receive the protection of § 230 *and* 2) also accept that protection whilst acting against the foundation of the statute. Specifically, § 230 bases its shield on the basis that social media companies do not practice editorial discretion by dictating that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Therefore, if social media companies don't receive "publisher" or "speaker" recognition and privileges under § 230, then social media companies can't also practice editorial discretion as it would contradict the explicit language found in the section. Essentially, social media companies cannot simply accept the protection outlined for them in § 230 and then claim to be editors or publishers through their "content-moderation practices."

Moreover, while § 230 also dictates that "[n]o provider or user of an interactive computer service shall be held liable on account of… any action voluntarily taken in good faith to *restrict* access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is

constitutionally protected," this provision of the section and the protection it grants social media companies in their restriction of content, only applies to "obscene," or undeniably provocative and indecent content.

II. When looking at the holding-out test, social media companies are common carriers.

Florida law has never established that communication services, such as social media companies, are not common carriers. The State of Florida has explicitly outlined that social media companies should be treated similarly to common carriers.

A. Social media platforms are common carriers.

S.B. 7072 § 1(5), (6), in particular, asserts that private social-media platforms "should be treated similarly to common carriers." Although the Eleventh Circuit contended that social media companies are not common carriers when looking to federal preemption, this Court should find that the *FCC v. Midwest Video Corp. definition* does not directly conflict, nor attempt to conflict with Florida law, and even if it did, federal preemption is not an issue that should persist in this case. 440 U.S. 689, 701 (1979).

B. The status of social media platforms as common carriers does not conflict with state law.

In common law, common carriers have been defined as entities that hold themselves out to provide services or goods to the general public for a fee. Similarly, when looking at Supreme

Court precedent, common carriers, as applied to communication services, have been defined by the Court as entities that "make a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing," per *Midwest Video Corp*. 440 U.S. 689, 701 (1979). Therefore, in keeping with Supreme Court precedent and State legislature, the Court should find that federal 1) preemption is not an issue that has been preserved upon appeal and has been previously denied certiorari in cases concerning preemption, 2) even if it had been preserved, the Florida law is not in conflict with it because of its specific language of how social media companies "should be treated," as common carriers, 3) there is no indication that the *Midwest Video Corp.* definition was meant to "occupy the field," or in other words, that the Federal Government intended to legislate in a field "that traditionally had been occupied by the States," per the Court in *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88 (1992), and 4) the *Midwest Video Corp.* definition can be informative to this Court as social media companies are similar to the common carriers as the *Midwest Video Corp* defines them, and thus should be treated similarly.

C. The holding-out test does not fail in our case. Because of social media platform's common carrier status, these platforms receive a lower standard of First Amendment protection than other forms of communication.

Moreover, common carriers must "hold out" a willingness to serve the entire public. Specifically, when evaluating what constitutes common carriage, the court in *Nat. Ass'n of Reg. Utility Com'rs v. FCC* found that common carriers that offer services "made available to the public" stand at the core of what defines a proper common carrier. 525 F.2d 630 (D.C. Cir. 1976).

Additionally, 47 U.S. Code § 153 explicitly defines telecommunication services as services that offer "a fee directly to the public, or to such classes of users as to be effectively available directly to the public." Therefore, both common law and statute definitions have found that "holding out" services to the public stands firmly at the crux of common carriage. Furthermore, this Court should find that the FCC's definition of common carriers in *FCC v. Midwest Video Corp.* as entities that "make a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing" in the "communications context," closely aligns with the general essence and function of social media companies, which serve to provide public platforms to the public. 440 U.S. 689, 701 (1979).

Although, social media platforms require users to agree to abide by their user guidelines, restrictions, or terms of service, this fact alone does not invalidate social media companies' common carrier status. This Court has historically ruled that other forms of communication with

legal agreements between service providers and potential users, such as telephone companies, are still common carriers. For instance, in *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, the Court noted that leased channel cable operators' speech interests are relatively weaker than "common carriers, such as telephone companies." 518 U.S. 727 (1996).

Furthermore, Congress has also enacted laws that suggest the common carrier identity of communication service providers. The Mann-Elkins Act, for example, was passed by Congress and was effective in "classifying telephone companies as common carriers and subjecting them to the regulations of the Interstate Commerce Commission (ICC)." Fred H. Cate, *Telephone Companies, the First Amendment, and Technological Convergence*, 45 DePaul L. Rev. 1035, 1037-39 (1996). Additionally, Title II of the Communications Act of 1934, which repealed the Mann-Elkins Act, dictates explicitly that "[a] telecommunications carrier shall be treated as a common carrier."

Therefore, social media platforms should be upheld to their common carrier identity.

Thus, this Court should find that social media platforms constitute common carriage when considering the most widely accepted common carriage application of holding out. Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1

J.Free Speech L. 463, 473–75 (2021). And consequently, this Court should find that social media companies, concerning their common carrier status, receive a lower level of First Amendment protection than other forms of communication, as the Court has previously put forward and noted that "[u]nlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties],'" in *FCC v. League of Women Voters*, 468 U.S. 364 (1984). Additionally, in *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, the Court found that "in respect to leased channels, their speech interests are relatively weak because they act less like editors, such as newspapers or television broadcasters, than like common carriers, such as telephone companies." 518 U.S. 727 (1996).

Although this Court has not established a precise level of First Amendment protection for which common carriers ought to receive, therefore that standard should not fall under this Court's discretion as it would be more appropriate for the state and federal government to determine a precise standard. And despite there being no precise level of First Amendment protection for common carriers historically established by the Court, this Court should still note that common carriers receive an acceptably lower level of protection, as dictated by case law.

III. Social media companies are means of hosting expressions.

Contrary to the Eleventh Circuit's holding that social media companies are exercising their editorial speech rights as newspapers do under the protection of the First Amendment and, as a result, trigger First Amendment scrutiny, social media companies host rather than produce speech. First, newspaper companies are liable for the materials that are published under their platform, and therefore, they "publish a narrow 'choice of material' that's been reviewed and edited beforehand." *Id*. Contrary to this exercise of "editorial judgment" of newspaper companies, social media companies use algorithms to screen out spam and obscenity, and "virtually everything else is just posted to the Platform with zero editorial control or judgment." *Id*. at *13. Furthermore, the social media companies are not liable for the publications on their platform. The majority of the publications stored in the social media platforms are published by users who posted "speech, photos, and videos" to their own page under their username and have no affiliations with the social media companies. Consequently, while newspapers are liable for the publications, social media are not. Therefore, because the social media companies do not exercise the editorial judgment that the Court has recognized to be protected by the First Amendment, as well as the difference in liability of publications between newspaper and social media companies, the social media companies, as they have told Congress, courts, and the public, are "not editors" and do not exercise "editorial judgment over the content." *Id*.

Furthermore, the Eleventh Circuit concluded that S.B 7072 violated the First Amendment because the action of censorship is inherently expressive and, therefore conveys a speech. However, because the social media companies are not exercising the editorial judgment protected by the Constitution, the regulation over their content moderation does not violate the First Amendment. Furthermore, even if the social media companies were to exercise censorship within the meaning of the First Amendment, some hosts can be denied the "right to decide whether to disseminate or accommodate a" speaker's message. *Id.* (citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 (2006) ("*FAIR*")). Because hosting regulations do not restrict the host's freedom of speech, the conduct of "censorship" can be regulated lawfully under the First Amendment. Therefore, regulation over censorship is constitutional, for social media companies do not exercise editorial judgements, but host the speech of users.

In addition, the action of censoring content on social media platforms is not expressive. The question regarding whether censorship is expressive was considered in *FAIR*, and the Court held that it is not. In *FAIR*, the law school's decision to eject a military recruiter was not expressive for "[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." 547

U.S. at 66. This holding is applicable for social media companies, as the Fifth Circuit found. "An observer who merely sees a post on 'The Democratic Hub,' could not know why the post appeared there. Maybe it's more convenient; maybe it's because Twitter banned the user; maybe it's some other reason." *Paxton*, 2022 WL 4285917, at *38 n.41. Similarly, the decisions of social media companies to censor, deplatform, or shadow ban a candidate of particular political side cannot be considered as an expressive conduct, since without an additional speech explaining the action, a user will not be able to know if the social media company simply disagrees with the candidate's speech, the candidate violated the social media company's community guidelines, the candidate withdrew their publications, or there was an algorithmic error in filtering contents. Thus, the low bar set to determine a speech explained in *Coral Ridge Ministries, Inc. v. Amazon.com, Inc.* ("In determining whether conduct is expressive, we ask whether the reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message") is not even met by the conduct of censorship by social media companies. Therefore, because censorship of social media companies need extra explanations for their actions to indicate that they wish to convey a message, the action of censorship itself cannot constitute a speech. Because censorship is not expressive, the First Amendment is not violated by the statute S.B 7072.

Thus, rather than exercising their right to speech protected by the Constitution, social media

companies are hosting speech published on their platforms. In *PruneYard*, the Court considered the case that dealt with the constitutionality of the State of California requiring owners of shopping centers to allow handbillers to collect signatures and distribute handbills on shopping center property. The Court held that the statute enforced on the shopping center was constitutional under the first Amendment for three reasons. First, the shopping center was "open to the public to come and go as they please," which mattered because "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner." *Id.* at 87. Second, the California law did not "dictate[]" a "specific message. And third, the mall owners could "expressly disavow any connection with the message by simply posting signs." *Id.* The court further solidified that speech - hosting requirements do not violate the First Amendment by holding in *FAIR* hosting regulations govern over "conduct, not speech". 547 U.S. at 60. Because the regulation instead "affect[ed]" only "what law schools must do—afford equal access to military recruiters—not what they may or may not say." *Id.* at 60.

Under this jurisprudence, S.B. 7072 is constitutional. Just as in *PruneYard*, there is an extremely little likelihood that the public will misattribute a user's speech to the platform: The speech posted by each user are published under their identification (username, page, etc). It is for this reason that the social media companies are not the ones liable under the law for the speech published on

their platforms. In addition, the statute does not require any particular message to be hosted by the social media companies, and platforms can—and do—make clear that they do not endorse their users' speech. See *Paxton*, 2022 WL 4285917, at *15. Furthermore, S.B. 7072 regulates the "conduct" of social media companies as they require consistent and equal hosting of speech rather than a particular viewpoint or message. Therefore, because social media companies are hosting, for they are acting similarly to the shopping centers in *PruneYard* and S.B. 7072 is a speech-hosting requirement, First Amendment strict scrutiny is not triggered.

Furthermore, the Eleventh Circuit held that S.B 7072's regulation over content moderation interferes with the message of the social media companies and thus violates the First Amendment by relying on two precedents - *Tornillo* and *Hurley*. This decision is erroneous in two ways. First, the social media companies have no desired message. Second, the First Amendment question presented by two precedents cited by the Court are easily distinguishable from that of this case. In regards to the first error, contrary to the Eleventh Circuit's assertion, the social media companies have no desired message. . See, e.g., Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. at 426. With the absence of the desired message, Court's application of Tornillo and Hurley is erroneous. In these precedents, the speech-hosting regulations "interfere[d] with a speaker's desired message." *FAIR*, 547 U.S. at 64. However, because social media companies have no message, the hosting

regulations do not interfere with the social media companies' message. Thus, as explained in *FAIR*, "compelled speech" cases like *Tornillo* and *Hurley*, which deal with speech-hosting regulations interfering with a speaker's message, are not applicable.

Therefore, because the statute S.B 7072 does not violate the First Amendment for it does not regulate editorial judgment and speech, but rather the conduct of censorship and hosting, the question of applying intermediate or strict scrutiny should not even be considered. Instead, rational basis scrutiny, considering the statute, is the appropriate level of scrutiny - which it surely passes. However, if the legislation of Florida is triggering First Amendment scrutiny, it should—as the Eleventh Circuit found—be reviewed under intermediate scrutiny. However, strict scrutiny should not apply. As the Court explained in *FLFNB II*, "[a] content-neutral regulation of expressive conduct is subject to intermediate scrutiny, while a regulation based on the while a regulation based on the content of the expression must withstand the additional rigors of strict scrutiny." *FLFNB II*, 11 F.4th at 1291. The Eleventh Circuit held that the journalistic and candidate provisions in S.B. 7072 are content-based because they prohibit a platform from censoring certain kinds of content or speakers. App.55a. However, as the Court in *Turner* found, a law is content based if the regulation targets a "particular message spoken by " the regulated speaker. *Turner*, 512 U.S. at 655. However, because the law is

prohibiting social-media companies from censoring the speech of others, the law is not content based.

To survive intermediate scrutiny, a law must be "narrowly drawn to further a substantial governmental interest . . . unrelated to the suppression of free speech." *FLFNB II*, 11 F.4th at 1291. In regards to the substantial governmental interest, ensuring that "public has access to a multiplicity of information sources is a government purpose of the highest order," which "promotes values central to the First Amendment." *Turner*, 512 U.S. at 663. The Eleventh Circuit recognized *Turner*'s holding but reasoned that it did not apply because "political candidates and large journalistic enterprises have numerous ways to communicate with the public besides any particular social-media platform." App.60a. The evidence shows the opposite. About half of Americans are getting their news from the largest social-media sites. *Supra Part I*. And thus, cutting off certain speakers from those key platforms definitionally will ensure that the public does not have access to "a multiplicity of information sources." *Turner*, 512 U.S. at 663. In regards to the narrow tailoring requirement, the Eleventh Circuit held that any candidates or journalistic enterprises will be able to post obscenity, hate speech, and terrorist propaganda without the fear of getting deplatformed, deprioritized, or shadow banned. However, the Act expressly permits any content moderation allowed under federal law, see Fla. Stat. § 501.2041(9), and under federal law, platforms can generally remove "obscene, lewd, lascivious, [or] filthy" material, as long as they do so in "good faith." 47 U.S.C. §

230(c)(2). Therefore, the law is narrowly tailored. Thus, even if S.B. 7072 were to regulate an expressive conduct and trigger First Amendment scrutiny, the law will surely pass intermediate scrutiny.

IV. The individualized-explanation requirement does not violate the First Amendment.

Although the Eleventh Circuit correctly recognized that S.B. 7072's disclosure provisions should be tested under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), it erred in concluding that notifying users when they are censored is too burdensome. App.64a– 65a. The platforms themselves, after all, have called for notice to "each user whose content is removed [or] whose or account is suspended" "about the reason for the removal [or] suspension" and to offer "detailed guidance and examples of permissible and impermissible content." See *The Santa Clara Principles on Transparency and Accountability in Content Moderation*, https://tinyurl.com/mtd3u49n; Gennie Gebhart, Who Has Your Back? Censorship Edition 2019, Electronic Frontier Foundation (June 12, 2019), https://tinyurl.com/t27vv89m.

Furthermore, the Eleventh Circuit also held that this provision chills "protected speech," which is the editorial judgment of social media companies. However, as previously described, the editorial judgment of newspaper editors and the content moderation of social media companies differ significantly. Unlike the newspaper editors, social media companies simply use

an algorithm to filter out any content that is prohibited by the federal law and is against their community guidelines, and virtually host any other speech. If this "individualized" editing by algorithm is enough to be considered as an editorial judgment, then an "individualized explanation" using an algorithm developed by social media companies must be enough to meet the requirement of S.B. 7072, which is extremely likely to be not burdensome for social media companies.

CONCLUSION

We pray that this Court will reverse the decision of the lower court.

Respectfully submitted,

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