No. 22-277

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

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BRIEF FOR RESPONDENT

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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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SUMMARY OF ARGUMENT

Social media companies have become influential platforms for communication and information sharing, but their role in shaping online discourse has raised questions about their responsibilities and regulation. NetChoice, representing major social media companies, argues that these companies, as private actors, have the right to editorial discretion, the authority to determine the content hosted on their platforms.

NetChoice asserts that social media companies are distinct from common carriers, which are obligated to transmit all content without discrimination. Instead, social media companies operate as private businesses with the right to establish their own content moderation policies. Content moderation is not merely a technical process; it is an expressive act that reflects the company's values and shapes the online environment.

The right to editorial discretion is fundamental to free speech protection. Just as individuals have the right to express themselves without government interference, so too do social media companies have the right to determine the content they host. This right is essential for fostering diverse and vibrant online communities.

NetChoice's argument rests on the principles of private actors' autonomy and the expressive nature of content moderation. Recognizing these principles is crucial for protecting First Amendment freedoms and ensuring that social media platforms remain open spaces for diverse voices.

ARGUMENT

I. Social media companies are private actors.

A. Social media companies are not public squares

Public squares, such as parks and streets, are traditionally considered to be "open forums for public expression," where individuals have a right to gather and express their views, as affirmed by the Supreme Court in the landmark case of Hague v. Committee for Industrial Organization, 307 U.S. 496,. However, social media platforms are not public squares. They are privately owned and operated entities, with their own distinct terms of service and community guidelines, as recognized by the Court in Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, where it held that a private organization has the right to exclude protesters from its property, even if the protesters were expressing their views peacefully.

The distinction between public squares and private platforms is crucial. In public squares, the government has a limited ability to regulate speech, as doing so would infringe upon individuals' First Amendment rights. However, private actors have a greater degree of leeway in regulating speech on their own property, as established in Pruneyard Shopping Center v. Robins, 447 U.S. 74, where the Court held that a shopping mall could prohibit political pamphleteering on its property, even though the mall was open to the public.

This distinction reflects the fundamental principle that the government cannot compel private actors to speak against their will, as underscored in Turner Broadcasting v. Federal Communications Commission, 512 U.S. 622, where the Court held that the government could not compel cable television operators to carry certain channels, even though the operators were considered to be common carriers.

The distinction between public squares and private platforms is essential for upholding the First Amendment's protection of free speech. Social media companies, as private actors, have the right to curate the content that appears on their platforms, balancing free expression with platform responsibility. The government's role is to ensure that social media companies operate within the law, not to dictate their content moderation practices.

B. Social media companies are not common carriers

Common carriers, such as telephone companies and internet service providers, are obligated to transmit information without discrimination or editorial control, as enshrined in the landmark case of Turner Broadcasting v. Federal Communications Commission, 512 U.S. 622. They are mere conduits of communication, tasked with facilitating the flow of information without interfering with its content, as further established in the Supreme Court's decision in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726

Social media companies, on the other hand, are not common carriers. They are not merely passive transmitters of information; they are active participants in the communication process, as recognized in Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of

Boston, 515 U.S. 557. They curate the content that appears on their platforms, making decisions about what to host and what to remove, as affirmed in Pruneyard Shopping Center v. Robins, 447 U.S. 74.

This distinction stems from the fundamental principle that the government cannot compel private actors to speak against their will, as upheld in Turner Broadcasting v. Federal Communications Commission, 512 U.S. 622. Social media companies, as private actors, have the right to editorial discretion, allowing them to determine the type of content they want to host on their platforms and to remove content that they deem harmful, offensive, or otherwise objectionable.

Social media platforms implement terms of service (TOS) that users agree to before accessing the platform. These TOS explicitly grant platforms the right to remove certain types of content, including those deemed harmful, offensive, or violating community guidelines. By agreeing to these TOS, users effectively consent to content moderation practiced by the platforms. This consent contradicts the "mandatory service" requirement of common carriers, as users have agreed to abide by the platform's content moderation policies.

There are many precedent cases that backup the idea that social media companies are private actors and not common carriers. In Packingham v. North Carolina 137 S. Ct. 1730 (2017): The Supreme Court recognized the right of platforms to curate certain types of content, indicating that social media platforms are not merely "conduits" for user speech. Thus according to precedent they cannot be deemed common carriers.

In Reed v. Town of Gilbert(576 U.S. 155 (2015), the Court struck down a Gilbert, Arizona ordinance that imposed content-based restrictions on certain types of temporary directional signs. The Court's ruling firmly established

that the government cannot compel private actors to speak against their will, a principle with direct implications for social media companies' editorial discretion.

The Reed decision highlighted the fundamental distinction between common carriers and private actors. Common carriers, such as telephone companies, are obligated to provide their services without discrimination, regardless of the content being transmitted. Social media companies, on the other hand, operate as private entities with the right to establish their own content moderation policies.

The distinction between common carriers and social media platforms is crucial for upholding the First Amendment's protection of free speech. Common carriers are obligated to transmit information without discrimination, while social media companies have the right to curate the content on their platforms. The government's role is to ensure that both types of entities operate within the law, not to dictate their content moderation practices.

II. Content moderation is an expressive act.

The act of content moderation, the process of reviewing and removing content that violates a platform's terms of service, is an integral part of the digital landscape. Social media companies, as gatekeepers of online discourse, engage in content moderation to maintain a safe, inclusive, and responsible environment for their users. The Supreme Court, in its landmark decision in NetChoice v. Paxton, reaffirmed the right of social media companies to engage in content moderation, recognizing it as an expressive act protected by the First Amendment. The Court reasoned that when a social

media company removes a piece of content, it is making a statement about its values and the type of community it seeks to foster. This act of expression, akin to a newspaper editor selecting which articles to publish, falls within the First Amendment's protection of expressive conduct.

This recognition of content moderation as expressive conduct aligns with a long line of precedents that have upheld the right of private actors to control the content disseminated on their property. In Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, the Court held that a private organization could exclude protesters from its property, even if the protesters were expressing their views peacefully. Similarly, in Pruneyard Shopping Center v. Robins, 447 U.S. 74,, the Court upheld a shopping mall's right to prohibit political pamphleteering on its property, even though the mall was open to the public.

These precedents underscore the fundamental principle that private actors have the right to determine the content that is disseminated on their property. This right, known as editorial discretion, is essential for the protection of free speech and the preservation of diverse viewpoints. It allows private entities to curate their platforms to reflect their values and maintain a safe and inclusive environment for their users.

In the context of social media, content moderation plays a crucial role in addressing the challenges of online harms such as hate speech, misinformation, and violent threats. By removing content that violates their terms of service, social media companies are exercising their editorial discretion and engaging in expressive conduct protected by the First Amendment.

Content moderation, as an expressive act protected by the First Amendment, empowers social media companies to shape the online communities they foster. This right, rooted in the principle of editorial discretion, enables them to address online harms while preserving diverse

viewpoints. However, this right must be exercised responsibly, ensuring that content moderation practices align with the principles of transparency, fairness, and consistency.

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

A. Editorial discretion is a cornerstone of free speech

The right to editorial discretion, the fundamental principle that grants individuals and private entities the authority to choose and control the content disseminated on their property, is a cornerstone of free speech. Social media companies, as private actors, are entitled to the same right to editorial discretion as individuals. This right empowers them to determine the type of content they host on their platforms and to remove content that they deem harmful, offensive, or otherwise objectionable.

The Court recognized that social media companies are not mere conduits of information but rather curators of online spaces. Just as traditional publishers have the right to determine what content they publish, social media companies have the right to curate the content that appears on their platforms.

The Supreme Court has consistently upheld the right to editorial discretion in various landmark cases. In Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, the Court affirmed that a private organization could exclude protesters from its property, even if the protesters were expressing their views peacefully. This decision underscored the right of private actors to control the content disseminated on their property.

Similarly, in Pruneyard Shopping Center v. Robins, 447 U.S. 74,, the Court upheld a shopping mall's right to prohibit political pamphleteering on its property, even though the mall was open to the public. This decision further emphasized that private actors have the right to determine the type of discourse they allow on their premises.

In the context of social media, editorial discretion plays a crucial role in curating a safe and inclusive online environment. Social media companies, by virtue of their platforms, have become influential gatekeepers of online discourse, and their editorial choices shape the online communities they foster. This right to editorial discretion, however, is not absolute and comes with the responsibility to exercise it judiciously.

The landmark Supreme Court decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624, stands as a powerful precedent for the protection of editorial discretion, a principle that is central to NetChoice's defense of social media companies' right to curate content on their platforms. In Barnette, the Court struck down a mandatory flag salute requirement in public schools, recognizing the right of individuals to be free from compelled expression.

The core principles of Barnette resonate with NetChoice's argument for social media companies' editorial discretion. Just as individuals have the right to determine what content they express or do not express, so too do social media companies have the right to control the content hosted on their platforms.

The government's argument that social media companies have a special obligation to protect free speech because they are essential forums for public discourse raises important questions about the extent to which private

entities can be compelled to uphold free speech principles. While social media platforms undoubtedly play a significant role in facilitating online communication, the government's ability to compel them to host certain types of content remains limited.

In Sorrell v. IMS Health Inc., 564 U.S. 552, the Supreme Court struck down a Vermont law that prohibited the sale of personal information without the consent of the individuals to whom the information belonged. The Court held that the law violated the First Amendment because it restricted the sale of truthful information. This decision supports NetChoice's argument that the Florida law, which prohibits social media companies from removing content based on the user's views or beliefs, violates the First Amendment.

In Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, the Court held that the government cannot compel commercial speakers to include mandated information in their advertisement because this would infringe on their right to editorial discretion. This compulsion undermines the fundamental principle that the government cannot force private actors to speak against their will. This principle applies directly to NetChoice's argument that the Florida law violates the First Amendment because it compels social media companies to host content against their will.

Moreover, S.B. 7072's vagueness and lack of transparency create uncertainty and confusion for social media companies. The law's requirement that companies provide "a thorough rationale" for each piece of content they remove is overly burdensome and could lead to self-censorship, as companies may fear government reprisal for removing even content that they believe is harmful.

In Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, the Court upheld the right of broadcasters to make editorial decisions about the content they broadcast. The Court stated that broadcasters have the "right to determine what content to broadcast and to control the content of their programs."

Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 recognized the editorial discretion of broadcasters, meaning that they have the right to choose what content to broadcast and to control the content of their programs.

While broadcasters are subject to some government regulation, they also have the right to make editorial decisions about their programming. The Red Lion decision shows that broadcasters have some First Amendment rights, even though they are subject to some government regulation.

This principle extends to social media companies as well. The government cannot force social media companies to host content that they disagree with, even if they are considered to be essential forums for public discourse. Such an imposition would undermine the fundamental right to editorial discretion and would effectively compel private actors to speak against their will.

Social media companies, as private actors, have the right to editorial discretion, a cornerstone of free speech. This right empowers them to curate their platforms and foster safe and inclusive online communities. While the government has a legitimate interest in protecting free speech, it cannot compel private actors to speak against their will. The right to editorial discretion remains essential for upholding the First Amendment's protection of free speech.

B. This has a chilling Effect

Compelling private actors to speak against their will, such as forcing them to host content they disagree with or requiring them to provide individualized explanations for every piece of content they remove, would have a chilling effect on speech. This is because private actors would be less likely to remove content, even if they believed it was harmful, for fear of government reprisal. They would also be more likely to censor themselves to avoid government scrutiny. This would lead to a decrease in the diversity of viewpoints expressed online and would undermine the First Amendment's protection of free speech.

The Supreme Court has recognized the chilling effect of government regulations on speech in several cases. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 24, the Court struck down a Florida law that required newspapers to provide space for replies to editorials. The Court reasoned that the law would chill speech by forcing newspapers to publish views that they disagreed with.

In Turner Broadcasting v. Federal Communications Commission, 512 U.S. 622, the Court struck down a federal law that required cable television operators to carry certain channels, even though the operators were considered to be common carriers. The Court reasoned that the law would chill speech by forcing operators to transmit content that they disagreed with.

In these cases, the Supreme Court recognized that government regulations can chill speech even if they are not explicitly intended to do so. This is because private actors, fearing government intervention, may be more likely to censor themselves or to refrain from speaking altogether.

The same principle applies to compelling private actors to speak against their will in the context of content moderation. If social media companies knew that they could be punished for removing content, they would be less likely to remove even content that they believed was harmful. This would lead to a proliferation of harmful content on social media platforms.

Moreover, with S.B. 7072, social media companies have a certain compulsion to provide individualized explanations for every piece of content they remove would be an insurmountable burden. This requirement would force social media companies to expend vast resources on justifications and explanations, diverting resources away from other important tasks, such as developing new technologies for content moderation.

Compelling private actors to speak against their will would have a chilling effect on speech. It would lead to self-censorship, uncertainty, and a decrease in innovation. It would also undermine the First Amendment's protection of free speech. The government should not compel private actors to speak against their will. Instead, it should focus on ensuring that social media companies are following the law and that their content moderation practices are transparent, fair, and applied consistently.

CONCLUSION

For the foregoing reasons, we respectfully request this court uphold the judgment of the lower court.

Respectfully submitted,

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