No. 21-707

In the
Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL.,
Petitioner,

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 RESPONDENT

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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 has proposed a bill that if passed will set terrible precedents for the future courts. Florida bill SB 7072 strives to restrict and moderate social media platforms through content moderation laws and individualized explanations for why the restrictions were applied. The bill itself is extremely broad to the point that the content moderation laws restrict more speech than before they were created. The content moderation laws are supposed to make sure the only thing social media platforms can restrict is obscenity, which in turn violates the social media platforms first amendment right to freedom of speech. The bill is also broad when it comes to the individualized explanations because the bill and statute do not expressly explain what the bill and statute consider to be wrong or right, leaving room for plenty of lawsuits for the same mistakes. So with that, the respondents argue that the statute is unworkable and will never be able to be applied and that the bill fails strict scrutiny further proving why the bill and statute should not be passed.

ARGUMENT

I. The statute is unworkable

A. The definitions are vague and overbroad

The Florida statute's dicta does not allow for social media platforms to clearly understand how to adhere to the terms listed. The statute uses terms like "censor," "deplatform," and "shadow ban" without clear and specific definitions. The resulting lack of clarity would understandably make the company uncertain as to what actions exactly constitute these terms, leaving room for arbitrary enforcement. For instance, the statute requires platforms to "apply censorship, deplatforming, and shadow banning standards in a consistent manner," but without precise definitions, it's unclear what standards platforms must adhere to. The lack of specific definition in the statute's terms makes it vague, and the broad obligations imposed on social media platforms may extend beyond what is necessary to achieve the intended goals, thus making it overbroad. This dangerous combination causes a chilling effect on the First Amendment freedom of speech and will stifle free expression and inhibit legitimate content moderation efforts. The Court has previously found that the state can not compel private entities to promote government messages. Such as in the case of Wooley v v. Maynard, 430 U.S. 705 (1977) the Court found that the state could not require the display of "live free or die" on citizen's license plates. However, in the case at bar, the law compels social media platforms to

> disclose and adhere to standards for censorship, deplatforming, and shadow banning, but does not define what these standards are. This interferes with the right to control the image of these platforms by compelling them to host content they disagree with or limiting their ability to moderate content according to their own standards.

B. Not a common carrier

Social Media platforms are not common carriers. There are many different definitions for what a common carrier is. But there is one main definition that while it is not the official definition of a common carrier, it is the definition that courts consistently go back to when having cases that deal with common carriers. A common carrier is a person or a commercial enterprise that transports passengers or goods for a fee and establishes that their service is open to the general public. In the case at bar, the bill's definition makes sure that the social media platforms would be considered commercial enterprises. But the social media platforms that would be considered commercial enterprises do not transport people or goods. Some social media platforms may sell stuff but not to the extent of actual commercial enterprises like Amazon and Walmart. Plus the social media platforms still do not transport people. But with this common definition, a social media platform would have to transport people and goods and establish that their service is open to the general public. Social media platforms do not do both of these things like the

definition says to, so the only possible conclusion is that social media platforms can not be treated or considered common carriers.

To expand on the later part of the definition. Common carriers have to hold themselves out to the public. But in Nat. Ass'n of Reg. Utility Com'rs v. F.C.C., it says that social media platforms don't hold themselves out to the public. In National Association of Regulatory Utility Commissioners v. F.C.C., a ruling was made that said that a company is a common carrier when it holds itself out to everyone they can provide your services. That was the only requirement for a company to be a common carrier. So by following the ruling, it will be found that social media platforms can not be common carriers. Any social media platform that would be affected by the bill's definition of social media platforms do not hold themselves out to the public, they simply live in the modern public square. So by living in the modern public square, there would be no way for social media platforms to be considered or treated like common carriers.

Another reason social media platforms are not common carriers is because they are internet companies. By saying that social media platforms are common carriers that leaves room for the argument of preemption. Preemption must be argued because there is already an act in place that is used to distinguish what is a common carrier and what is not. The telecommunications Act of 1996 explicitly differentiates "interactive computer services" , which is what social

media is considered in the modern public square, from "common carriers or telecommunications services." The act itself said that internet companies and common carriers are 2 different things that can not be both at the same time. But Florida still chose to say that social media platforms should be treated like common carriers. They did not say that social media platforms are common carriers. But even with that same change of wording, the act still applies, meaning that social media platforms can not be common carriers because they are internet platforms for interactive computer services. Also the definition social media is given by the act matches with the definition given by the bill meaning that there is no way that social media platforms can even be considered common carriers.

Lastly, social media platforms can not be considered common carriers because the bill violates stare decisis. In Hurley v. Irish American Gay Lexbian Bisexual Group of Boston, the court made a decision significant to the case presented. The court ruled that it was constitutional for a parade organization, or any other group with a message, to exclude groups from their parade that do not have the same ideas. This can be applied to the case presented. A social media platform should be able to exclude groups with differing ideas because both parade organizations and social media platforms are private companies and have a reputation and image to uphold. Take twitter, or now called X, for an example. One of Twitter's ideas is inclusivity, whether it is online or with a community. But everybody is

allowed to use twitter, so if a group of people that are being openly racist to others on twitter, Twitter should have the power to remove the group so that it doesn't mess with their image and views nor the company's right to freedom of speech. The exact same thing happened in Hurley, so to consider social media platforms as common carriers would completely ignore Hurley. Since Hurley has not been overturned, the court can not exclude its arguments making it so the only reasonable thing to say is that social media platforms can not be considered or treated like common carriers because the bill vilates stare decisis.

C. Modern public square

II. The bill violates strict scrutiny

First it must be established that all social media platforms have the right to the first amendment under the court case Coral Ridge v. Amazon.com. But with that, it is important to note that restricting speech is also speech and requires first amendment protections. With this, social media platforms have to be granted first amendment rights. Strict scrutiny comes along with the first amendment and is applied to cases that deal with the first amendment and its fundamental rights. Strict scrutiny is the highest level of scrutiny that the court can use to look at cases. In the case presented before the court, strict scrutiny must be applied. Under the First Amendment, all cases that deal with

content-based and viewpoint-based laws and restrictions must have strict scrutiny applied. In the case presented, Florida's bill SB 7072 has created content-based laws through its content moderation restrictions. The purpose of content moderation requirements is to introduce the legal framework that regulates how online platforms moderate the content posted by their users. But content-based laws discriminate against the speech of online platforms based on the substance of what it communicates. The bill itself is extremely broad, which leaves plenty of room for discrimination between speech, such as through the bill's definition of social media. The bill only affects bigger social media companies so any social media platforms under the requirements will not be penalized for their speech but platforms that exceed the requirements will immediately be pushed into a new set of laws that are not specific enough to be applied properly. This means that the content-based laws listed in the bill discriminate and suppress a larger social media's speech because of how the bill defines social media. Therefore strict scrutiny must be applied. But with that, it must be known that in several past Supreme Court precedents, the court has applied strict scrutiny to cases that deal with fundamental rights such as the First Amendment. This is seen in the court cases Gonzales v. O Centro Espírita Beneficente União do Vegetal, where they applied strict scrutiny to find the compelling governmental interest for the religious usage of a tea called hoasca that contained a kind of

drug in it, and in Williams-Yulee v. Florida Bar, 115 S.Ct. 1656 (2015), where strict scrutiny was applied in order to acknowledge that the Florida anti-solicitation rule presented in the case discriminated against speech based on content. Both cases deal with fundamental rights that are found under the first amendment. This means that both of these cases can serve as examples of why the court should apply strict scrutiny to the case presented before the court. Therefore, it means that the case presented must be looked at under strict scrutiny because the bill suppresses speech and it deals with the fundamental right of speech for social media platforms.

But with that, the bill must have strict scrutiny applied but it will not pass through strict scrutiny. In the court case, United States v. Carolene Products Co. presents the levels of judicial scrutiny, or more commonly known strict scrutiny. These levels are the same ones being mentioned and argued for in the case at bar. The case presents 3 requirements for the highest level of judicial scrutiny, strict scrutiny. There must be a compelling governmental interest, it must be narrowly tailored to another law or bill that is constitutional, and it must pass the least restrictive means test. But Florida's bill does not do any of these things. The bill does not create a compelling governmental interest, it is not narrowly tailored to any other constitutional bill or law, and it does not pass the least restrictive means test.

a. There is no compelling government interest

Firstly, there is no compelling governmental interest within the bill. For a governmental interest to be compelling, it must be essential or necessary rather than a matter of choice, preference, or discretion. This simply isn't the case for Florida's bill. Throughout the bill there are many instances where the bill is found to be targeting, meaning that the governmental interest is not compelling. An example where the bill is seen to be targeting is through the definition the bill gives for social media platforms. The bill targets bigger social media platforms that have opinions that differ from the state's opinions.

In the bill's definition, it states that social media platforms must provide or enable computer access by multiple users to a computer server, which means that, by the bill's definition, only applies to social media platforms with a presence online and not in apps. That means any social media platform that use an app as its platform, would not be affected by the bill. The bill also states that a platform must satisfy at least one of the following thresholds: it must have an annual gross revenues in excess of $100 million or it must have at least 100 million monthly individual platform participants globally. With this requirement, it targets the bigger social media platforms and not the smaller social media platforms. Targeting is not a valid governmental interest, meaning that the bill does not create a compelling governmental interest.

It must be known that there is a Supreme Court precedent that is very similar in the way strict scrutiny was applied and how the court ruled on the case presented, except that it looks at religion rather than speech. This court case is called Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993). In Lukumi, Florida created a law that indirectly targets a religious faith and affected an entire group of people, which violated their first amendment right. In tat case, the court ruled that the bill did not have a compelling governmental interest because of how it targeted the church.

This reasoning can be applied to the case presented. While there is now law that targets religious faith there is a bill that is targeting a group of people, mainly the social media platforms. By using the logic found in Lukumi, the court can say that the bill targets the social media platforms because while they are companies, they are still entitled to their first amendment rights, just like the church in Lukumi. Therefore meaning that if the case presented is looked at the same lens as Lukumi, then the bill would not have a compelling governmental interest because that is what the court ruled in Lukumi. Historically the court has never allowed targeting whether it's in speech or in religious faith. So there is no reason the court should rule in favor of targeting just to say that Florida's bill has a compelling governmental interest.

In the court case, Reed v. Town of Gilbert, the court made the ruling that any content-based regulations, such as the ones found in Florida's bill, must not discriminate against specific viewpoints or favor certain types of speech over others in order to have a compelling governmental interest. But with the bill's definition of what is classified as a social media platform, it clearly presents targeting, which means that the bill is discriminating against specific viewpoints and favoring some types of speech over others in order to spread the message the bill chooses to spread. This means that through the lens of reed, that the bill does not have a compelling governmental interest.

Lastly, in the court case United States v. O'brien, it presents a test that requires the government to demonstrate that it has a substantial or important interest unrelated to suppressing speech. This test is called the O'Brien test. The government can demonstrate interest through statistics or actual data that would support their cause. Without it, it would be hard to prove that this is an actual governmental interest, not even a compelling one. In the case presented before the court, no data or reason would go along with the bill that would establish a reason for a governmental interest. In fact, the interest the bill identified has never been recognized as having an actual governmental interest. That governmental interest is fairness, and there is no precedent to back up that fairness is a legitimate interest that the court

can use. This means that the case presented fails the O'Brien test and does not have a real governmental interest.

b. The bill is not narrowly tailored

Moving to the second requirement, the bill is not narrowly tailored to achieve the interest. For something to be narrowly tailored a law, bill, or act must be specifically designed to assert its intended purpose without being restrictive or overly broad. That means in the case presented, the bill can not restrict social media platforms, whether it's the people or the platform itself, and the bill can not be overly broad with its requirements. However, the bill does both of these things. Firstly, the bill itself is overly broad with its definition, how it must be executed, who it is executed towards, and overall is extremely vague. The bill suggests that it is only meant to be applied to large social media platforms. The court could infer that the bill is supposed to be applied to social media platforms such as tik tok, facebook, instagram,etc, but the bill itself doesn't actually list what social media platforms should the bill be applied to. The bill only lists its definition of the bill, not what social media platforms the bill should be applied to, making the bill itself extremely broad. Also what if there is a social media platform that has over 100 million monthly individual platform participants globally but is an app. There is no definite answer for how the bill would be applied since the social media platform could still deplatform

presidential candidates or other governmental officials. Take SnapChat for an example. Snapchat has over 750 million monthly individual platform participants which means it would fall under the bill's definition of a social media platform. Except that Snapchat is an app. While it does have a website, the app is used more commonly over the website. So Snapchat, at the same time, fits and does not fit under the bill's definition. The only option is for the court to remain indecisive about it since the bill is too vague to give an answer to what would happen to Snapchat if the bill got passed. In other words, the answer is that they wouldn't be able to do anything because the bill is too broad and is not able to give the court a specific answer, therefore making it not narrowly tailored. With the bill not being allowed to be overly broad, the bill must also not restrict anybody. Whether it's the people using the platform or the social media platform itself, the bill can not restrict them.

In the court case Packingham v. North Carolina, the court made the statement that "a law must nit burden substantially more speech than is necessary to further the government legitimate interests." For a law to burden substantially more speech than necessary, it must impose significant restrictions on an individual's freedom of speech, beyond what is needed to achieve the government's interest. In the case presented, rather than there being a law, there is a bill that burdens substantially

more speech than necessary. Florida's bill creates restrictions that not only affect the people who use social media but mainly the social media platforms themselves. The bill restricts social media platforms first amendment right freedom of speech by creating content moderation laws that make it so social media platforms can not have a say in how it gets banned or restricted which destroys their outlook. The bill did not need to create the content moderation laws to limit speech, in fact the bill should not have been created at all due to how restricting it is, therefore making it the furthest thing from being narrowly tailored. In conclusion, there is no possible way that the bill could be even considered narrowly tailored because of how overly broad and restricting the bill is.

c. The bill does not pass the least restrictive means test

For the last requirement, the bill does not pass the least restrictive means test. In the case presented before the court, the bill establishes that the least restrictive means is to punish social media platforms for deplatforming political candidates in order to fulfill the government interest of fairness. Firstly, if fairness was an actual governmental interest, which it is not, punishing social media platforms for using their speech to decide what can and can not be said on their privately owned companies is not the least restrictive means and would not back up the governmental interest. In the court case Miami

Herald v. Tornillo, the court said that the government had to prove that it had pursued the least intrusive means possible to achieve its goal. In order to prove that, there must be evidence provided, whether its through studies or past experiences and precedent that dealt with similar things. But in all of the lower court arguments, Florida had not brought up any evidence to prove that they had the least restrictive means. Especially with how broad and vague the bill is, it is extremely important to establish that it was actually the least restrictive means possible. Therefore, the bill fails the least restrictive means test and would fail strict scrutiny.

To follow through with the original least restrictive means presented by the petitioner Florida, the bill would infringe on a social media platform's First Amendment right to freedom of speech. Social media platforms are private companies meaning that they are entitled to the same rights as a regular American citizen, including the right to freedom of speech and the freedom to regulate speech. If the case at bar was dealing with a group of people rather than a social media platform, the court would have ruled that everyone had a first amendment right to freedom of speech. But because this focuses on social media platforms, Florida argued that social media platforms don't have absolute first amendment rights. But in reality they do because the social media companies are run by people that want to use the freedom of speech to spread the messages they want

to spread and because social media platforms are private companies so they can not be regulated as harshly as public companies. Therefore, restricting social media platforms for deplatforming political candidates is not the least restrictive means possible.

Also in the court case Ward v. Rock of Racism, the court made a ruling that as long as the means chosen are not substantially broader than necessary to achieve the government's interest, then it would pass the least restrictive means test. However, in the case presented, the means are broader than necessary. The means in the case is to prevent political candidates from being deplatformed on social media, which is way too broad to be applied. In order to fix that issue, both the people that use social media and the platforms themselves get restricted. The platforms because of the content moderation laws and the people because even though they have more freedom than social media platforms, because they are active on it, they have to follow the same laws and restrictions that the social platforms do since they are private companies. That is 2 groups of people being restricted by one bill. Therefore there is a means that is less restrictive because the current means is too broad, thereby failing the least restrictive means test through the lens of Ward.

In the court case United States v. Playboy entertainment group, the court made a ruling that ifa less restrictive alternative would serve the government's purpose, the legislature must use that

alternative. While the court has not provided an alternative, as respondent it is crucial to purpose a least restrictive means. Because of how the bill restricts more people than necessary, the bill could have been handled differently to pass the least restrictive means test, but it wasn't. That means that if there are any other lesser restrictive means, which there are, the current least restrictive means would be debunked and fail the least restrictive means test. Therefore the least restrictive means fails the test and the bill would fail strict scrutiny.

CONCLUSION

In conclusion, the bill and statute today should not be passed nor should any idea similar to it. Both the bill and statute are over broad, group groups incorrectly, and violate first amendment rights. The first amendment is guaranteed to citizens, so the only logical thing to say is that it should also be guaranteed to social media platforms since they are run by people. Social media platforms also are private companies meaning that all the ideology spread throughout the bill, is wrongfully applied to social media platforms. In the end, the statute and bill should be considered unconstitutional because the statute is unworkable in any environment it is put into and because the bill would fail strict scrutiny.

Prayer

It is for these reasons that the respondents pray that the court sustains the lower court decision and rule in favor of the respondent.

Respectfully submitted,

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