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

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

Technology continues to innovate and this court continues on that progression by modernizing its standards. Balance must be achieved in updating the law to reflect the changes around it but managing to keep the intent. Social media platforms are technological advancements that need to be regulated with this concept in mind. For this reason, social media platforms should be treated as common carriers. Common carriers have histories of being both transportation and communication modes. Social media platforms are common carriers that uphold the traditional intent of being managed for the sake of furthering a public interest.

Taking into consideration social media's common carrier status, S.B. 7072 should be reviewed under intermediate scrutiny and not strict scrutiny. Due to the bill's interest in providing different viewpoints across social media platforms, it has an important government interest that would allow the bill to pass intermediate scrutiny.

ARGUMENT

I. Social media platforms are common carriers of information

A. Social media platforms have substantial market power

Social media platforms are the evolution of communications platforms like telephone companies or messenger companies. The idea of "common carrier" is that they "carry information from one user to another" *Biden v. Knight First Amendment Institute At Columbia Univ.* 593 U.S. ____ (2021).

In *Biden v. Knight*, Justice Clarence outlines the historical way common carriers have been determined. One of the debates on what determines a common carrier is whether substantial market power is necessary. "Some scholars have argued that common-carrier regulations are justified only when a carrier possesses substantial market power. Others have said that no substantial market power is needed so long as the company holds itself out as open to the public." Social media holds substantial market power and is open to the public. Major social media platforms are used by billions of users. Facebook is used by 2.9 billion users, YouTube is used by 2.5 billion users, and Twitter is used by 372 million users as of April 2023, https://datareportal.com/social-media-users.

Substantial market power is often used interchangeably with monopoly power. Social media can be said to not have a product so there is no price to manipulate but in an ever-changing world where even amendments have to be analyzed carefully when translating them to modern terms, such as the case at bar is attempting to do, terms cannot be defined too literally. The definition can lose its meaning if we nitpick the wording. The product of social media is the content made by other users. The flow of communication and information on its platform and how it is even used by political candidates as a means of communicating with the public demonstrate the hold social media has on the public's access to information. Through social media algorithms that prioritize some posts over others or de-platform candidates, they limit access to information spread and received by users. Essentially, a social media platform's product is information and communication which is a more dangerous monopoly than any other product.

In *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622 (1994),"such differential treatment is justified by the special characteristics of the cable medium-namely, the cable operators' bottleneck monopoly." In *Turner,* a must-carry law enacted by *Congress' Cable Television Consumer Protection and Competition Act of 1992* was passed to protect local broadcasters from the threat of cable controlling what was streamed to audiences.

B. Social media platforms can become common carriers

Even if social media is not considered a common carrier, for all intents and purposes it would still be able to become a common carrier. In *German Alliance Ins. Co. v. Lewis,* 233 U.S. 389 (1914) a fire insurance bill was passed in Kansas that regulated the rates of fire insurance. The complaint argued in that case that the government could not regulate fire insurance rates because fire insurance companies are private. It was ruled however that "a business, by circumstances and its nature, may rise from private to public concern, and be subject, in consequence, to governmental regulation." Social media platforms cater to billions of people and among those users are our world leaders. World leaders can communicate with their citizens directly and easily which was not possible before, it is to the point that a public figure speaking on a social media platform where people can comment on the post is considered a public forum. *Biden v. Knight.* The influence social media platforms have, leading to them becoming information fountains that are used by billions of users, affects the public at large so it should be considered a public concern. The government is already involved just by its presence on these platforms as well and its growing influence should raise to the level of a public concern.

This is further supported by *Munn v. Illinois,* 94 U.S. 113 (1876), where the Supreme

Court ruled that "when private property is affected with the public interest, it ceases to be *juris privati* only and, in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable." In that case, the Supreme Court ruled that it was constitutional for the government to set a maximum limit on private companies' grain warehouse and elevator rates because the significant increase in price for grain storage concerned a public interest. If it is for a public good, private companies can be regulated. Furthermore, "common carriers exercise a sort of public office, and have duties to perform in which the public is interested." In either case. Social media platforms are common carriers that are relegated to having to consider the public interest in their enterprises.

C. The Fairness Law applies to social media

The Fairness law was only applied to the broadcast company under the name of Fairness Doctrine due to *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969), but it should also apply to the common carriers. Social media should not discriminate against users since it should be considered as a common carrier. According to the fairness law used in *Red Lion v. FCC*, "The First Amendment is relevant to public broadcasting, but it is the right of the viewing and listening public, and not the right of the broadcasters, which is paramount." Social media users should have

the protection of their speech because, in *Red Lion v. FCC,* "*The* First Amendment does not protect private censorship by broadcasters who are licensed by the Government to use a scarce resource that is denied to others. According to the *Cable Television Consumer Protection and Competition Act*, "the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such a system shall not be subject to regulation by the Commission…." In the interest of promoting the widespread dissemination of information from multiple sources, social media companies should not discriminate and allow customers to choose what content to use.

In the case of *CBS v. Democratic Nat'l Committee,* 412 U.S. 94 (1973), Congress has consistently rejected efforts to impose on broadcasters a "common carrier" right of access for all persons wishing to speak out on public issues. Instead, it reposed in the FCC regulatory authority by which the Fairness Doctrine was evolved to require that the broadcaster's coverage of important public issues must be adequate and must fairly reflect differing viewpoints; thus, no private individual or group has a right to command the use of broadcast facilities. The Act was created to decrease discrimination and allow more companies to use a platform, with a similar concept, social media should not stop anyone from using the platform because it violates the whole purpose of the Fairness Doctrine.

Because social media should be considered a common carrier, this court should apply the fairness law. *Brown v. Board of Education* states, "finding that a segregated law school could not provide them equal educational opportunities." The Fairness law applies to this because everyone on social media is not receiving equal protection under the fairness doctrine and loses their right to speak if a company censors a user's post without any guidelines. *20 U.S. Code § 4071- Denial of equal access prohibited*, "It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." Companies should not censor a post based on the user's belief, but instead, they should have a guideline so the platform users can freely express themselves.

II. The level of scrutiny is intermediate scrutiny

A. S.B. 7072 should not be analyzed under strict scrutiny

There is a historical precedent of common carriers being attributed a lower First Amendment right compared to non-common carriers. "Unlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties]." FCC v.

League of Women Voters. 468 U.S. 364 (1984), Common carriers do not have the broad freedom of the First Amendment that newspapers or broadcasters do. The lower First Amendment right indicates that common carriers are not held to the same standard as newspapers or broadcasters so they should be reviewed differently. This is not to say that common carriers do not have a 1st amendment right but that it is not heightened to the level of strict scrutiny. Common carriers are "bound to treat all shippers alike and can be compelled to perform this common law duty by mandamus or other proper writ." *Missouri Pacific Railway Co. v. Larabee Flour Mills Co*. 211 U.S. 612 (1909). Common carriers have to be opened to the public indiscriminately so it is only natural that their First Amendment is lower as their inability to discriminate against who can and cannot use its services is a form of expression.

In the United *States v. O'Brien,* the intermediate scrutiny standard was outlined for speech that was content-neutral and furthered an important government interest. It was applied in *Turner v. FCC* and ruled the 1992 Cable Television Consumer Protection and Competition Act constitutional. "The must-carry rules are content-neutral, and thus are not subject to strict scrutiny. They are neutral on their face because they distinguish between speakers in the television programming market based only upon the manner in which programmers transmit their messages to viewers, not the messages they carry." *Turner Broadcasting System, Inc. v. FCC.* 512 U.S. 622

(1994). Similar to *Turner,* S.B 7072 is content neutral. The intent of Florida is not to limit certain content but to broaden the content found on social media platforms. In *Turner,* the must-carry content of local broadcasters was put in place to protect local broadcasters and disseminate more information which is similar to S.B 7072, which seeks to protect users from being deplatformed unfairly and wants to facilitate the flow of communication and the variety of it on social media platforms. The consistency clause in S.B 7072 is content neutral as its purpose is to ensure that there is a valid reason to de-platform a user and that there is not a variety of ways to get de-platform which can increase the amount of users that are removed unfairly. S.B 7072 content-based argument should be reviewed not under strict scrutiny but intermediate scrutiny.

B. S.B 7072 passes intermediate scrutiny

To pass intermediate scrutiny the government has to be furthering an important government interest. Respondent argues that "leveling the playing field" is not a legitimate state interest but the interest is not just equalizing the opportunities for candidates and people alike to express themselves but to "promo[te] the widespread dissemination of information from a multiplicity of sources" *Turner Broadcasting Systems, Inc v. FCC*. 512 U.S. 622 (1994), The government has an important government interest in social media platforms, that have a large grasp of the distribution of information

and communication, and provide an array of opinions from multiple sources including political candidates that offer varying views of the same subject.

As discussed previously social media platforms have what is growing to be a monopoly on information and communication. "It changes nothing that these platforms are not the sole means for distributing speech or information" *Biden v. Knight First Amendment Institute At Columbia Univ.* 593 U.S. ____ (2021), Social media may not be the only form of obtaining information and many do still obtain information from television however, it is growing in prevalence due to the influence it has on the younger generation. As technology continues to evolve, less and less people watch cable every year. 47.6 million American households are now cord-cutters. By the end of 2023, 54.4% of all Americans will no longer pay for a traditional cable TV service. cordcutternew.com According to Statista, 47% of Americans aged 18-34 get their daily news from social media compared to 10% that get their news from cable. Even if social media platforms are not the only means of receiving information they still have a drastic influence on younger Americans compared to other sources of information. While the majority of older people still receive their news from cable the fact that the leading form the younger generation receives their information is social media is a monopoly within itself. Social media platforms have a monopoly on an entire generation.

CONCLUSION

Social media platforms are used by billions of people as a means to communicate with one another and connect with people they agree with as well as see the viewpoints of people who think differently. Social media platforms make communicating with people on the other side of the world as easy as clicking a button. To stifle this easy manner people use to communicate for reasons that are often not revealed to its users is not only unfair to its users and shows the monopoly social media companies have on the transmission of communication but it decreases freedom of speech.

We pray that this court will reverse the decision of the lower court and rule in favor of the petitioner, Florida.

Respectfully submitted,

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