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

Brief For Respondents

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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 rely on advertisers utilizing their platform as a billboard for their product in order to access revenue. As such, social media companies regulate their platforms in order to keep platforms both a pleasant experience for the users, as well as friendly to advertisers, who would otherwise pull their ads out of the platform if they did not want to be associated with the user generated content.

As a result, social media companies edit content that might harm the user experience, such as removing posts that contain obscene, explicit, or hateful content, or suspending or banning users who post such content in spite of the site´s rules and regulations.

S.B 7072 seeks to limit the ability of social media companies to curate content, due to Conservative lawmakers believing that there is a bias against Conservative users in the content curation process.

S.B 7072 prevents social media companies from taking disciplinary action against political candidates, limiting curation and disciplinary actions that social media companies can take, and requires any disciplinary action to have a ¨Precise and Thorough¨ explanation regarding the decision.

The provisions of the bill are overbroad, given the fact that the bill does not define what it means by a "Precise and Thorough" explanation, defines ¨Social media platform¨ as practically any access provider that makes more than $100,000,000 a year, which would include things such as search engines and social media companies, and infringes on social media companies' First Amendment rights to regulate the speech within their private property.

As a result, the respondents request the court to uphold the lower court's decision.

Argument

I. Florida law S.B 7072 places severe and unconstitutional restrictions on the ability of social media corporations to utilize content moderation.

Companies hold the right to curate and edit content via the right to editorial expression, as well as the right to include and exclude people from their platform as they wish, much like how a restaurant owner holds the right to exclude or ban people from their restaurant if they believe that their presence would harm the customer experience.

This right is upheld by judicial precedent. In *Miami v. Tornillo, (418 U.S. 241) (1974)*, the court struck down a Florida law that forced newspapers that criticized certain candidates to then give those candidates a platform to reply to the claims, arguing that forcefully granting a platform to somebody that the platform does not agree with is an infringement of the First Amendment. Given the similarities between social media

companies and newspapers, given that they generate a majority of their revenue from advertisements, and they contain speech that is not necessarily written by the company itself, whether it be a social media user or independent journalist, the protections created by *Tornillo* still apply to social media.

This is reinforced by *Lloyd v. Tanner, (407 U.S. 551) (1972),* where the court held that private property owners had the right to regulate speech, namely enforcing a policy against handing out pamphlets, within their mall, stating that acting as if public property and private property meant for public use had the same level of protection was ¨too far.¨. On its face, this is contradicted by *Pruneyard v. Robins, (447 U.S. 74) (1980)*, a similar case involving speech in a mall where the court ruled that *Pruneyard* Mall´s First Amendment rights were not infringed upon by students asking for signatures for a petition; however, the difference between these two cases is that *Lloyd* only banned the handing out of pamphlets, while allowing other avenues of expression, while *Pruneyard* banned all expressive speech. As a result, *Pruneyard* exists hand in hand with *Lloyd*, rather than overturning it, and thus *Lloyd´s* precedent is still in effect.

Wooley v. Maynard, (430 U.S. 705) (1977) compounds this. The court in *Maynard* ruled that a New Hampshire law requiring every license plate to say the state motto (Live free or die) was unconstitutional after a Jehovas witness removed the ¨Or die¨ part as he felt it infringed on his beliefs, and was subsequently charged for it. The court found that the provision forced car owners to utilize their private property as a billboard for the state´s ideological message. Forcing social media platforms to platform politicians by granting them immunity from disciplinary action as long as they have announced their candidacy counts as compelled speech, as by granting them a platform, companies are reasonably interpreted as approving of or accepting the speech, and such compelled speech is unconstitutional under *Maynard*.

Going further, *United States v. O´Brien, (391 U.S. 624) (1968)* created a formula to determine if a government act meant to regulate symbolic speech was allowed. Namely, the act must be within the government's constitutional power, further an important government interest, if said governmental interest is unrelated to the suppression of free speech, and if any

restriction placed on free speech is not greater than necessary for the achievement of said government interest.

Although it can be argued that the restrictions placed on social media companies by S.B 7072 are both within the government's constitutional power and do further a government interest, said government interest is directly tied to the suppression of free speech. The entire purpose of the law is to suppress the right to editorial expression of social media companies, as well as does far more than is necessary to further said interest, namely due to the unreasonably high punishments for minor infractions of said laws, as well as the sheer amount of restrictions being placed on the social media companies ability to moderate their sites, by requiring an undefined "Thorough & Precise" explanation for every single act of disciplinary action, as well as granting politicians immunity to content curation. The bill also includes a definition of "Social media platform" that is so broad that includes search engines, online video games, or practically any online service with enough users, placing an unnecessary burden on the speech of platforms that are unrelated to the bill's intended purpose.

How the *O´Brien* test is specifically applied to social media is explained in *Packingham v. North Carolina (137 S. Ct. 1730) (2017)*, where the court ruled that although the government did have an important government interest in preventing registered sex offenders from utilizing social media platforms, the laws provisions were overbroad due to the law going beyond social media websites, much like the Florida law, while the court also noted that the law failed to take into account the many different functions that Social Media serves, noting that a more narrowly tailored bill would have likely survived the court's scrutiny.

As a result, due to the precedent previously set by the court regarding the rights that companies have to regulate the content of their platforms, social media companies hold a First Amendment right to editorial expression, and attempts to restrict it must pass strict scrutiny, which, due to the broad definition and the lack of compelling government interest, the state fails to pass.

A. The act of content curation and editorial expression counts as speech.

The 11th Circuit decision *Coral Ridge Ministries Media v. Amazon (21-802) (2021)* ruled that for an act or conduct to be considered speech, it is asked whether the average person would infer some sort of message from the action. If a restaurant owner kicked out a customer who was being rude or disruptive, it would be protected by the First Amendment, as the average person would interpret a message that the restaurant did not consider such behavior to be acceptable.

Likewise, the act of content curation falls under such a standard. When a social media company curates or deletes a post, or takes action against the user who made the post, the average person can infer a message from said action, namely that the company does not approve of the content in the post.

By the standard set by *Amazon*, the act of content curation counts as speech and is thus entitled to the protections granted to it by the First Amendment. The infringement of the fundamental right to speech would result in the application of strict scrutiny, something that the S.B 7072 would not pass since the law is neither narrowly tailored, due to its overbroad definitions, as well as the lack of a compelling government interest.

II. Social Media companies are not common carriers

Common Carriers are transport or communication companies that hold substantial market power, and open themselves to everyone as affirmed by the Supreme Court in the case of *Knight v. Biden (141 S. Ct. 1220*). Social media companies are communications companies that occupy market share, however, no social media company is considered open to everyone.

A. Social Media companies do not fit the definition of a common carrier

Telephone companies and internet service providers are common carriers and are obligated to convey information without editorial discretion as ruled in *Turner Broadcasting v. Federal Communications Commission, 512 U.S. 622*. Said companies are purely bridges of communication, with the sole task of transmitting information without altering the content.

The existence of terms of service and conditions reserves social media companies to not be open to everyone. Social Media companies are public businesses such as malls, if a customer were to behave in defiance of the mall's guidelines, they would be kicked out. *Lloyd Corporation, Ltd. v. Tanner (71-492) (1972)* held that private property owners have the right to regulate speech on their land. The mall was defined as a privately owned space, therefore it was meant for public use and was "reaching too far".

Social media platforms are privately owned and operated entities. They each have their own terms of service and community guidelines which users must agree to in order to use the platform. When a user agrees to the terms of service they agree to comply with the platform's rules. As a private organization, social media platforms have the right to remove any message a user may generate on their platform. An action to force a private citizen to include a group expressing a message the organizer does not wish to convey "violate[s] the fundamental First Amendment rule that a speaker has the autonomy to choose the content of his message and, conversely, to decide what not to say." as unanimously held in *Hurley v. Irish - American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S 557 (1995).*

As social media platforms have the right to remove content due to the user's agreement to the terms of service and conditions, they do not offer "mandatory service" which is a requirement of common carriers.

B. Social Media companies are private operations

Places such as public squares, public parks, public buildings, and public parks are open for public expression where an individual may express their view. In these public spaces, the government has restricted the ability to regulate speech as the First Amendment protects certain speech. However in private

operations, individuals have a greater ability to regulate speech on their property as ruled in *Pruneyard Shopping Center v. Robins, 447 U.S. 74*, which states individuals may express their speech if it does not unreasonably intrude on the First Amendment rights of the property owners.

The Supreme Court unanimously ruled in *Reed et al. v. Town of Gilbert, Arizona et al.* to strike down an ordinance from Gilbert, Arizona as it imposed restrictions based on content. The Court's ruling reaffirmed that the government can not force private actors to endorse speech. This reinforces social media platforms, which are privately owned, to curate the content on their sites to align with their speech.

Businesses may be required to display a certain message if it is reasonably related to the state's interest in preventing consumer deception. Examples are side effects of medicine or ingredients in a food product. These examples meet the standard established in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985).* The *Zauderer* Standard test if the speech being mandated to be spread is "purely factual and uncontroversial". Social media companies do not attempt to remove content that is "uncontroversial" as the reason to remove it is if it is controversial and does not align with the platform's beliefs. Additionally, users attempting to appeal a decision to curtail their statement on a social media platform make said statement controversial therefore failing the *Zauderer* Standard.

The difference between public and private areas is the most significant factor in deciding the First Amendment's ability to protect speech. An independent activist may spread their message non-violently in a public area without worry of complying with another's message, however, on a private platform must act per the owner's guidelines or be subject to having their speech curated so as to not give the appearance of a private owner spreading a message that they do not agree with. The must-carry rules must be followed by public

television stations as established in *Turner Broadcasting v. Federal Communications Commission, 512 U.S. 622*, not by private businesses.

III. The bill's provisions are overbroad and overburdensome.

S.B 7072´s definitions are overbroad and lack specificity, making the bill apply to several different online services that do not fit the traditional concept of social media. The bill defines a ¨Social media platform¨ as ¨Any information service, system, internet search engine, or access software provider that provides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site; Operates as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity; Does business in the state; and either has over one hundred million monthly users or generates one hundred million dollars in revenue.¨ *Florida S.B 7072.*

By this definition, practically any successful online service qualifies as a social media platform, including services that the reasonable person would not consider to be social media platforms, such as internet search engines, online video games, etc. And thus would, for example, result in video game players playing out of Miami having different, and looser, codes of conduct than players in the rest of the country, despite the fact the bill is not meant to apply anywhere beyond the traditional social media spaces.

S.B 7072 also requires social media companies to notify users when undergoing content curation and to grant a ¨Precise and thorough rationale¨ as to how the platform became aware of the content and why action was taken.

The bill requires said rationale to be posted for every form of disciplinary action that a social media company takes, however, the bill does not define what it means by ¨Precise & Thorough rationale¨, essentially leaving the definition up to the courts. The vague wording of the bill creates a significant burden for social media companies, if these vague terms are not completed, then companies are liable for fines up to 100,000 dollars, along with legal fees.

YouTube, for example, takes action against one billion comments per quarter. The Florida law essentially requires each one of those billion comments to have a vague ¨Precise and thorough ¨ explanation attached to it. It would be difficult for YouTube to only target commenters from Florida, as that would require screening every single comment, and each commenter's address is likely unknown. As a result, YouTube´s content moderation process would be significantly overcomplicated, and if even one in a thousand comments are not up to S.B 7072´s vague standards, this would cost Google, the owners of Youtube, 100 billion dollars in fines, per quarter.

Such a large fine would result in the entire American tech sector repealing a vast majority of its content moderation policies, including in states where their policies are legal or have legal protections, or risk the entire sector imploding.

The overbroad definitions of the bill expand the bill's scope to go beyond the issues the bill was meant to address, and if the bill is not struck down, the extravagant fines S.B 7072 imposes would result in either Florida forcing its will onto other states, or the implosion of the American tech sector.

A. Anti-Trust legislation would be the correct legal mechanism for carrying out the state´s goals.

If the state of Florida wished to limit the ability of social media companies to censor without bankrupting the American tech sector or encroaching on the right to editorial expression, then the solution would be to break up the social media companies into smaller companies with smaller ability to censor large amounts of people.

An Anti-Trust suit would not raise legal issues regarding First Amendment rights, and thus remove the bill from strict scrutiny. Such a suit would curb the ability of individual platforms to censor viewpoints, serving the state´s interest, while also serving other interests that the state might have, such as guaranteeing a competitive market and limiting the company's ability to influence politics.

Due to the number of legal questions that would be sidestepped by the use of an Anti-Trust lawsuit, it would be within the state's best interest to utilize Anti-Trust legislation instead of the current overbroad and legally questionable bill that it used to attempt to limit corporate power.

CONCLUSION

While the state´s supposed goal of encouraging free speech and removing restrictions on what opinions may be shared is theoretically noble, the methods it has enacted to attempt to achieve such a goal are poorly thought out, destructive, unconstitutional, and set a dangerous precedent for government involvement in content moderation and censorship. If this bill is not struck down, Florida will exert its will onto the rest of the nation, do irreparable damage to America's tech sector, and wither First Amendment protections by allowing the government to insert itself in the editorial process.

Respondents believe that the government dictating what is and is not allowed within private platforms will only result in a change from corporate censorship, to government censorship. Due to this, the respondents requested the court to affirm the circuit court's ruling and strike down S.B. 7072.

Respectfully submitted,

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