No. 22-393

In the Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL, STATE OF FLORIDA, et al.,

v.

NETCHOICE, LLC, and the COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Clayton Prisament
Phillip Liew
Regis High School
55 E 84th St
New York, NY 10028

QUESTION PRESENTED:

Whether SB 7072 (1) is preempted by federal law, and in particular whether SB 7072, in its entirety, (2) complies with the First Amendment.

Table of Contents

QUESTION PRESENTED:

Whether SB 7072 (1) is preempted by federal law, and in particular whether SB 7072, in its entirety, (2) complies with the First Amendment.

Cases

1. Netchoice v. Paxton

2. Zhang v. Baidu.com

3. U.S. Telecom Ass'n v. FCC

4. Pruneyard Shopping Center v. Robins

5. Tornillo v. Miami Herald

6. Knight First Amendment Institute v. Biden

7.Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio

8. Hirabayashi v. United States

9. United States v. Carolene Products Company

10. Vacco v. Quill

11. Supreme Court Case of United States v. O'Brien

12. Reed v. Town of Gilbert

13. Turner Broadcasting System Inc. v. FCC

Introduction And Summary Of The Argument:

The 1st amendment of the United States Constitution is paramount to the dialogue between both the Government and its peoples as well as discourse between the peoples. Pertaining to this case, the First Amendment promises those bound by the laws of the United States constitution that "Congress shall make no law… abridging the freedom of speech, or of the press". Various interpretations of this law have been produced in light of continuous technological advancement, both in the region of defining what constitutes a 'press', what constitutes 'speech', and perhaps most significantly, to what extent may this right be exercised by the aforementioned peoples. In particular, the rise of social media communication sites has signified a necessity to define a new subcategory within the definition of 'press' or 'speech medium' and specifically in regards to 'editorial discretion'. New questions have emerged relating to social media and the degree of which the government may carry out its duty to protect these First Amendment provisions. These questions—which have thus far been unanswered by normative authority—have led to *Moody v NetChoice;* we believe it is about time they are answered.

To proceed, we must posit two details that will be at the center of this case. Firstly, Speech posted by a third party user on a social media platform is not the speech of the platform but the speech of the user. This is how speech has been traditionally understood, and this the

only way to make sense of social media platforms as a whole. It is important to note that this distinction separates social media communication platforms from traditional virtual or physical press, as the content produced and displayed on a social media communication site was not originally created nor produced nor claimed by the communication company itself to be where said company is 'speaking'. Secondly, we must also note that to take down speech is only speech in of itself insofar as the speech a person(s) is taking down is the same speech the aforementioned person(s) produced and published before the moderation. From this, we must conclude that editorial discretion—a term that will likely be used frequently in this case but has not been precisely defined by this court—can only be understood to apply to an institution's own speech and not to the speech of others.

Additionally, this court should affirm intermediate scrutiny as the standard of review to be applied. The likely alternative—strict scrutiny—has historically only been invoked when there has been a serious challenge to a fundamental right or in light of clear and suspect classification. Neither of these are present in *Moody* and there is strong precedent to favor intermediate scrutiny for cases like *Moody v. NetChoice.*

It is also important to note that our overarching burden in this case is simply to prove that both Florida's content moderation restrictions, and Florida's accompanying individualized explanation requirements comply with the First Amendment of these United States. After a defining speech in a historical and sound way, the first burden can be cleared. Once we apply

court precedent—specifically Zauderer—it becomes rational for the court to rule in favor of the petitioner for the second burden as well.

This court must note that for NetChoice to defend their position, they must absolve the burden of redefining the First Amendment of the United States Constitution such that they believe laws advocating for less restricted dialogue would undermine the synonymous product of free speech. The very notion of NetChoice's interpretation of this alleged violation is not grounded within the contents of SB 7072, of which they have cited. Indeed, the contents of SB 7072 merely reflect on the consequences of social media companies that attempt to marginalize and deplatform political candidates, which in no logical connection nor historical precedence suggest an infringement on American speech rights.The above may be evidenced in the Fifth Circuit's recent move to preserve a sound and important Texas law in a closely-connected case, *Netchoice v. Paxton*, that once again calls for regulation against censorship by viewpoint. This court must side with a rational understanding of speech and allow SB 7072 to stand.

Argument

I. This court should define what speech belongs to whom reasonably

It is key to observe that, in a social media environment, the people are creating, editing, and publishing their own speech. Such speech must be distinguished from the speech of the social media provider, as media trends have suggested that the only

speech produced by a social media company comes in the form of licenses and agreements, not mainstream posted content. Take X (formerly Twitter) for example: should a user create a post on X, he must endorse that statement, hold accountability for that statement, and be held liable under the pretense of ownership over that statement. X has similar speech rights. X is more than entitled to post on its own official X page and have such post considered the speech of X. The distinction comes when we ask: is the speech produced by a user of X also speech of X? The answer is no for a few reasons. Firstly, the common public perception relays that "No 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." The content above, quoted from Section 230 47 U.S.C. §.230, relays the historical attitude toward user generated speech on social media platforms—the social media platform that hosts the speech is given broad legal protections from accountability for third-party speech on its platform as it is not the speech of the company. A common challenge to this idea, is to claim that social media's presentation and indexing of ideas are in of itself speech of the social media platform. Nonetheless, there are substantial differences between indexing search results and presenting third-party speech versus real-time communication. While a media company, such as X, may be engaged in the former, usually through its algorithm, that does not function as a communication-level basis with people reading the posts. To be entitled to First Amendment protections, the content in question must be adopted or selected by

the speaker to be its own. For the sake of ambivalence, this court ought to recognize that although cases such as *Zhang v. Baidu.com*, Inc. have ruled that social media corporations do in fact have a first amendment right to its algorithms, these decisions are erroneous and have been limited to trial courts, meaning the therefore cannot be used as wide precedent. More prominent cases—albeit not directly related to social media—such as *U.S. Telecom Ass'n v. FCC* have concluded that "Because a broadband provider does not — and is not understood by users to — 'speak' when providing neutral access to internet content as common carriage, the First Amendment poses no bar to the open internet rules." Due to the absence of high-level court precedent for social media specific regulation, we must look to examples like US Telecom Ass'n as precedence. In this instance, it is logical to conform most major social media corporations, in the definitions enacted for SB 7072, as being the provider of "internet content" that hosts opinions. By that justification, we may replace "broadband provider" with X, Facebook or Tik Tok and on the merits of both precedence and linear logic, this court ought to conclude that the content a user posts on social media is not the speech of the social media companies. The much larger question—pertaining to one's ability to express oneself in an environment facilitated by a privately-owned company– has been addressed by the Supreme Court through the *Pruneyard Shopping Center v. Robins* Case in which it was ruled that men exercising their first amendment right, even on private property that prohibited such expression, are not

bound to legislation inferior to the promises in the Federal constitution.

II. This court must also affirm that editorial discretion only applies to one's own speech and not to the speech of others.

Now that we understand presenting and indexing speech is not equivalent as to when we "speak", the second foundation we must lay for this case is to prove that editorial discretion should only be understood if it applies to one's own speech. This is intuitive. Every high profile case regarding editorial discretion—including *Miami Herald v. Tornillo*—has revolved around moderating one's own content. We completely agree that Facebook should be able to choose what they wish to say on their own official Facebook page, but they do not have a right to editorial discretion when it comes to other people's speech. We are dealing with message posting and carrier apps, these are speech platforms that market themselves as speech hosting platforms. This is the key distinction when it comes to editorial discretion: the press is a speech platform that specifically tailors each word to be exactly what the company wants to say, social media platforms are public forums where anyone who wants to speak on the platform–-insofar as they do not have past violations of policy—may speak on the platform. Therefore, the idea of considering social media companies as common carriers or a company town—both of which include much wider first amendment protections for its users—

are the better choices than considering social media as part of ‘the press’.

NetChoice v. Paxton explains the place of editorial discretion in the courts “the Supreme Court’s cases do not carve out ‘editorial discretion’ as a special category of First Amendment" instead, the case points out that what truly matters when seeing if a law complies with the First Amendment is “whether a challenged regulation impermissibly compels or restricts protected speech.” editorial discretion exists to protect the speech of an entity, but if the speech users create is not the speech of social media platforms, then there is no speech that SB 7072 would be compelling or restricting, the law would merely ensure tolerance. Some may challenge the constitutionality of ensuring tolerance citing Biden v. Knight First Amendment Institute at Columbia University. This decision rendered a previous 2nd U.S. Court of Appeals ruling that upheld the constitutional requirement of public entities to tolerate others' speech moot. What is important to notice is that the court merely vacated the case on the grounds that Trump, the original defendant, was leaving office and was already banned by twitter, the supreme court never overturned the original decision. With this in mind, We happen to side with the 2nd U.S. Court of Appeals, and while the case does not apply to private entities, and facebook’s official facebook page is more than entitled to block whomever it wishes, we do believe this precedent to extend to entities like company towns and also to common carriers, both of which are extraordinarily similar to modern day social media platforms. Ultimately, this means that SB 7072 does not

violate the First-Amendment through its content moderation requirements. However, what this does not mean is that twitter can no longer censor people for being insulting, hateful or explicit. There's a difference between the means and content of speech. If excessive profanities are used at a city council meeting to get even a mainstream point across, or if a person is being too disruptive at a school board meeting, you can be removed or have your mic muted. What's being prevented is your means of conveying your ideas, not your ideas itself. Ultimately, this means that SB 7072 will not be too burdensome on social media platforms as it would hold them to a standard seen at other public forums.

III. The individualized explanation requirement is not unjust compelled speech

While it is true that for SB 7072's individualized explanation requirement is compelled speech, it is important to provide historical precedent to this fact. Using the precedent from *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio* through the Zauderer Standard, we see that commercial speech can be compelled insofar as (1) the compelled speech is "commercial" in nature; (2) whether it is purely factual and not "controversial"; and (3) whether it is supported by a State interest beyond merely satisfying consumer curiosity. (1) clearly passes as informing customers about their status is commercial, (2) passes as the requirement is for social media companies to justify their objectively—as it would be

under SB 7072—based actions, and (3) passes as it ensures the preservation transparency and tolerance of speech, specifically by political candidates, something critical to ensuring our elections have a fair campaign period.

IV. This court should apply intermediate scrutiny

Historically, Strict scrutiny has only been applied against instances of blatant human classification (*Hirabayashi v. United States*) or if it directly threatens a fundamental and inalienable right (*United States v. Carolene Products Company, Vacco v. Quill*). *Moody* clearly does not cause human classification, so the only remaining basis to possibly justify strict scrutiny is to ask if the law threatens a fundamental human right. The answer to this is no, the main content of the case revolves around editorial discretion, which, as mentioned in *Netchoice v. Paxton* is not anywhere near the core of the 1st amendment. Furthermore, the challenge of compelled speech remains in regards to the applicability of Zauderer and also is not relating to an uncharted central tenet of the 1st amendment. In fact, the *Supreme Court Case of United States v. O'Brien* established precedence to avoid strict scrutiny, but rather, testing based on intermediate scrutiny even in regards to speech. On the grounds that *Moody v. Netchoice* does not involve a challenge to a fundamental right nor does it involve a suspect classification, this court would benefit most from avoiding strict scrutiny as a method of decision-making. While some may argue court precedent such as *Reed v. Town of Gilbert* shows

strict scrutiny is applicable, we must note that in the aforementioned case, strict scrutiny was only applied due to a content-based speech challenge. We do not believe there is any speech being restricted or restricted in a content-based fashion. The Compelled speech is content-neutral as it is to be applied universally across all speech that is flagged by social media, not just some speech that is flagged. Therefore, should the court turn to *O'Brien*'s establishment of intermediate scrutiny, which requires that 1.) the Government abstain from regulating the specific content of messages but rather the conduct with or between such expression, 2.) that the regulation must serve a government interest beyond that of suppression of some form of free speech, and 3.) that the regulation in question may not call for more suppression than necessary, regulation of media broadcasting could still align with the first amendment. An example of this is *Turner Broadcasting System Inc. v. FCC*, in which the standard of intermediate scrutiny was applied in the context of selective broadcasting, in which the court ruled that the must-carry regulations were constitutional and obligatory. Such content regulation, as the majority opinion claimed, was in accordance with the first amendment should it be content neutral, serving a Government interest, and limited to the extent of which is necessary. In *Moody*, we clearly see government interest in preserving transparency in the private sector and ensuring a free intellectual process around America's elections. This law, as has been previously shown, is not too burdensome and is tailored purely to preserving properly conveyed ideas and valid candidates.

V. SB 7072 is not preempted by 47 U.S. Code § 230

While it is true that 47 U.S. Code § 230 does grant social media companies the power to "restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent", we do not believe this preempts SB 7072 for a few reasons. Firstly, it must be noted that SB 7072 specifically prevents "Deplatforming" and not all means of "[restricting] access". SB 7072 specifically defines "deplatforming" in the same way it is defined in the Fla. Stat. § 501.2041, that is "the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days." Ultimately, social media companies may still flag or delete certain inappropriate posts, even if they are from a candidate. This is crucial as the federal law solely allows the restriction of "material", something completely different than the removal of persons entirely from a platform. Under SB 7072, Social media companies may restrict and flag inappropriate material already posted by candidates, but they cannot "deplatform" a candidate entirely. Secondly, 47 U.S. Code § 230 requires "good faith". Restricting speech by censoring candidates' for arbitrary or otherwise suspect reasons is not in "good faith" nor is it preventing any sort of undue means of presenting speech, rather it is censoring ideas. Overall, we can say with confidence

that SB 7072 builds upon 47 U.S.C. and is not preempted by it.

Conclusion:

It has been proven that in the case of *Moody v. Netchoice*, the aim of legally ensuring that "social media platform[s]" (Defined per Senate Bill 7072) 1.) cease deplatforming candidates based on beliefs, 2.) engage in transparency and publish moderation guidelines that the aforementioned company adheres to, and 3.) Specifying justification for the removal or censorship of user-generated speech does not interfere with the rights guaranteed by the First amendment of the Constitution of the United States of America.

Respectfully submitted,

Clayton Prisament
Phillip Liew

Regis High School
55 E 84th St
New York, NY 10028