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 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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This Court ruled in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* that a "speaker has the autonomy to choose the content of his own message and, conversely, to decide what not to say." The petitioners threaten this principle by restricting social media companies' First Amendment rights through content-moderation, individualized explanation, and general disclosure requirements. The respondents prevail for three main reasons. First, the Florida and Texas laws violate the First Amendment and fail strict scrutiny. Second, social media companies are not common carriers or public forums. Third, the laws unlawfully compel speech.

ARGUMENT

I. Florida S.B. 7072 and Texas HB 20 violate the social media companies' First Amendment rights.

A. Private companies have the right to restrict the user-generated content they host on their platforms.

Social media platforms are private companies that enjoy the protections of the First Amendment just as much as those of private individuals. Social media companies are undeniably private entities. In *Hurley*, this court established that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices." Furthermore, the court held that a private "speaker has the autonomy to choose the content of his own message and, conversely, to decide what not to say." *Hurley v. Irish-American, 515 U.S. 557, 558 (d).* Thus, it is within the rights of social media companies to choose the kind of speech they host and the kind of speech they ban. If the government regulates private content, it would threaten the "uninhibited marketplace of ideas in which truth will ultimately prevail." see *McCullen v. Coakley, 573 U.S. 464, II.*

This case should be trialed under the standards of *Hurley*, not *Good News Club v. Milford Central School 533 U.S. 98.* The Milford Central

School was a state-owned public school hosting a private club, but in *Hurley*, the Irish parade was a private event staged in public. As private entities, social media companies are like a virtual parade of users who can choose what content to involve. They are not public forums.

Editorial discretion is not synonymous to censorship. Private companies can not censor others should not be censored, as only the State can engage in censorship. This court recognized that it is "a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." see *Hudgens v. NLRB, 424 U.S. 507, 513.* Florida S.B. 7072 claims that social media companies are "censor[ing]" users based on viewpoint, when ironically, the state is engaging in censorship by restricting editorial and commercial speech. The constitution strictly prohibits unwarranted censorship, and the court established in *Terminiello v. Chicago* that "freedom of speech, though not absolute, is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Social media poses no such threats; it is wholly unjustified for the state of Florida to presume a nonexistent risk of public danger. Florida's law creates a slippery slope

towards unmitigated government censorship that would erode America's freedom of expression. The laws are a vast government overreach and a facial violation of the First Amendment.

B. The Florida and Texas laws should be subject to strict scrutiny.

Both state laws create content-based distinctions that restrict the companies' political speech. It seems that Florida has specifically targeted companies such as Facebook and Twitter for their political alignments. While the laws are facially content-neutral, the Court wrote in *Reed v. Town of Gilbert* that strict scrutiny applies "for laws that, though facially content-neutral, cannot be " 'justified without reference to the content of the regulated speech.'" Under the constitution, strict scrutiny is triggered if political speech is content-based. This is further supported by *National Institute of Family Life Advocates v. Becerra, 585 U.S.,* which states that "Content-based laws 'target speech based on its communicative content' and 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interest.'" Neither the Florida law nor the Texas law satisfies this criterion.

For one, the states have no substantial interest as they can not prove that there is a vital and pressing concern. The interest they purport to be

serving is manufactured. Florida and Texas purport a government threat, but no such threats are present in this case. Even Justice Thomas concurs in *Biden v. Knight First Amend. Inst. at Columbia Univ.* that "there is no threat alleged here." Moreover, if there was a valid compelling interest, the banned individuals could sue the companies and win; however, such cases have not been brought forward. Florida is basing the law merely on allegations that do not have any proven harm, and the government can not intervene solely under the assumption that there will be potential harm. Therefore, there is a lack of compelling state interest.

Even if the court concedes a substantial interest, the laws fail strict scrutiny as they are not narrowly tailored. Justice Alito in *Packingham v. North Carolina, 137 S. Ct. 1730* states that while North Carolina had a compelling governmental interest (protecting children from sexual predators), that in and of itself was not enough to satisfy strict scrutiny. The state must not "burden substantially more speech than is necessary to further the government's legitimate interests." Florida and Texas impose significant burdens on the speech of private corporations, and their stated interest is far less compelling than preventing sexual predators from harming children. Furthermore, in *Hurley*, the court ruled that "the State's purpose…could be achieved by

more narrowly drawn means." Similarly, less radical alternatives exist to achieve Florida and Texas' interests. Many other social media platforms, such as Parler, Truth Social, and Rumble, cater to conservative views. These platforms satisfy Florida and Texas's interest in equally distributing viewpoints in social media.

The Florida and Texas laws serve no valid governmental interest and are not narrowly tailored. Therefore, they fail strict scrutiny.

C. The Florida and Texas laws are overly burdensome and potentially ruinous to social media companies.

Social media platforms engage in commercial and editorial speech, and both categories are protected.

While commercial speech has historically enjoyed fewer protections, it is still entitled to First Amendment protection. In *Zauderer v. Office of District Counsel*, *471 U.S. 626*, this court established that demanding the entire disclosure of business terms is a requirement so "unduly burdensome" as to violate the First Amendment. *Zauderer* further states that "[such] a requirement, compelling the publication of detailed fee information that would fill far more space than the advertisement itself, would chill the publication of protected commercial speech, and would be entirely out of proportion to the State's

legitimate interest in preventing potential deception." Texas and Florida unduly burden social media companies just like that in *Zauderer*.

The Florida law ruins editorial speech by prohibiting "post-prioritization or shadow banning algorithms for content and material posted by or about" political candidates. Not only is the definition of a "political candidate" vague and an unprotected class but prohibiting "post-prioritization" burdens the companies' revenue. As private businesses, social media platforms use algorithms to give each user a feed of posts that keep them engaged; content curation is central to the social media business model. By prioritizing some speech over others, the platforms personalize a user's page and make advertisement revenue. Advertising accounted for 90% of Twitter's revenue, amounting to 5.1 billion dollars. Since Elon Musk's leadership and change to moderation standards, user numbers have dropped by 10%. Twitter has experienced a 55% decline in ad revenue out of distrust of the platform's ability to advertise to its user base. Dan Milmo, *'Musk Destroyed All That': Twitter's Business Is Flailing after a Year of Elon*, The Guardian (2023), Antonio Pequeño IV, Forbes, Year Of Musk: X Faces Slashed Valuation And Fewer Advertisers One Year After Twitter Takeover, (Oct. 7, 2023).

Imposing similar debilitating changes to other social media companies violates the free market economy. The companies have a responsibility to generate revenue for their shareholders, and as the Court ruled in *Packingham,* a statute that intervenes with how social media platforms curate content is "a prohibition unprecedented in the scope of First Amendment speech it burdens."

Florida and Texas also regulate the tech companies' ability to remove, edit, and arrange content. Florida laws require companies to "apply censorship, deplatforming, and shadow banning standards in a consistent manner", and to allow users to see posts in "sequential or chronological" order instead of by the algorithm. Twitter and Facebook host a combined total of 850 million new posts per day, and filtering through each of these new posts to confirm that they abide by the law's provisions burdens its systems and codes. The cable television systems in *Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622* were subjected to no such burdens because the ability to host local broadcasting already existed. The law in *Turner* only required cable systems to dedicate a portion of their systems, but Florida's law would require companies to develop entirely new systems and algorithms.

Furthermore, social media companies rely on their ability to filter out and ban fake accounts. Fake

accounts are online accounts that do not belong to real people and are run by malicious bots. Social media companies take out these fake accounts through "covert influence operations." 'INTEGRITY REPORTS, THIRD QUARTER 2023', META, (NOV. 30, 2023).

If the states' laws are enacted, social media companies would be forced to disclose and compromise these operations that keep fake accounts contained. These fake accounts could undermine national security. For example, more than 50,000 Russia-linked bots on Twitter during the 2016 election reached 1.4 million Americans Tauhid Zama, Yale Insights, Can We Protect Our Election from the Bots?, (Oct. 16, 2020). Such bots trick the algorithm, make certain issues "trending," and recommend inaccurate or misleading information to American users. These bots not only hurt the quality of the platform but also drown out real users and decrease free speech on the platform.

The burdens imposed upon these companies do not represent American free market capitalism and inhibit free speech on the platform.

II. Social media platforms are neither common carriers nor public forums.

A. Social media is not a common carrier.

In the common law, a common carrier is defined as "a business that is distinguishable from

other businesses in that their services are available to the general public" The Oxford Companion to the Supreme Court of the United States, (Kermit L. Hall et al. eds., 1992). Furthermore, their services are of specific significance to social and economic life. Historical examples of common carriers include railroads, telegram companies, and telephone lines.

Social media platforms are more similar to newspapers than to telegram companies and other common carriers. While telegrams only facilitate the interaction of individuals, social media does much more than that. Social media explicitly curates a content platform that aligns with the business image or message they want to uphold. This is analogous to editorials that have discretion over their publications. As upheld in *Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241,* editorial review is akin to speech and is protected under the Freedom of the Press. Furthermore, "press responsibility is not mandated by the Constitution and…cannot be legislated," meaning that while bipartisan newspapers and social media platforms are desirable, the government has no jurisdiction over them. To deny social media companies the right to choose the content they display is to threaten the marketplace of public debate. *Miami Herald* also stated, "While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad

range of opinions to readers." The same applies to social media companies that have a diverse array of platforms that cater to diverse political opinions. Parler, Truth Social, and Rumble are examples of platforms that cater to conservative users, and Facebook and X are entirely within their rights to cater to liberal users.

Justice Thomas has suggested that social media is a common carrier because the platforms "'carry' information from one user to another." *Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021*). A more accurate description would be that they curate information for a user. While social media does communicate information between users, its algorithm deliberately selects which information to communicate. This is no different from editorials that collect information from people and then decide what to convey.

B. Florida and Texas' laws include "must-carry" provisions that undermine the First Amendment.

A clear distinction is made in *Turner* that must-carry provisions must be "structured in a manner that [does not carry] the inherent risk of undermining the First Amendment." The Cable Television Consumer Protection and Competition Act was preserved because one, "the must-carry provisions do not burden or benefit speech of

particular content, and two, the government adequately proved that local broadcasting was in enough jeopardy to warrant government intervention." In today's case, the petitioners fulfill neither prong of this test. While the must-carry rules in *Turner* "[ensured] that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue," Florida's laws threaten the core mechanism that social media companies use for ad revenue. Facebook and Twitter's algorithms are necessary to engage users for ad revenue. Secondly, Florida and Texas have no concrete evidence that social media is putting the public in jeopardy. In *Turner*, the local broadcasting was in "dysfunction." The same can not be said for the public regarding social media, especially since no individuals have sued, claiming that social media companies violated their rights. The perceived threat to politicians appears to be in response to the deplatforming of former President Donald Trump after his involvement in the January 6th insurrection. However, he was reinstated in a year, and when he was banned from Twitter, he still had access to traditional media and other social media platforms, including the one he founded, to communicate his speech. Indeed, this demonstrates that his First Amendment rights were not diminished by being unable to use Twitter. The Florida law is

unduly burdensome, and there is insufficient evidence of harm to warrant a common carrier status.

Even if the courts decide social media is a common carrier, Florida and Texas's requirements can not be enforced as they misunderstand the common-carrier doctrine. For example, on public transportations such as Philadelphia's SEPTA train system, there are designated quiet spaces that, by definition, restrict the speech of passengers. If the passengers do not comply, they can be forcibly removed from the train. While it is true that common carriers have a duty to serve all those who applied for their services, businesses are entitled to remove those who do not comply with reasonable terms of agreement. Therefore, establishing social media companies as common carriers does not automatically justify the requirements the respondents are trying to enforce.

Indeed, these requirements violate the First Amendment.

C. Social media is not a public forum as it is not a government-controlled space.

In *Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220*, Justice Clarence Thomas wrote that "the Second Circuit's conclusion that Mr. Trump's Twitter account was a public forum is in tension with, among other things, our frequent

description of public forums as 'government-controlled spaces'."

Public forums fall into three categories: traditional public forums, limited public forums, and off-limits private property. A traditional public forum is established by the government and must provide access to all speakers regardless of the viewpoint they express. A limited public forum, such as the public school classroom in *Good News Club v. Milford Cent. Sch., 533 U.S. 98, 99* "must not discriminate against speech based on viewpoint, ibid., and must be reasonable in light of the forum's purpose". Social media does not fit the definition of the above two categories. An off-limits private property must provide reasonable access to the public. In *Pruneyard Shopping Center v. Robins, 447 U.S. 74, 75*, this court stated that "a State [...] may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision". In the case of a privately-owned shopping center, the private property can not bar the public from exercising their Free Speech Right. Oppositely, off-limits private properties like social media companies are not public forums, and unlike shopping centers have the right to exclude others so as to distinguish themselves from the user-generated content they host.

None of the categories listed above apply to social media platforms, as they are privately-owned businesses that do not serve a specific governmental purpose. They are not state actors and can not be forced to operate according to the standards of public forums.

Even if this court is to consider social media platforms as off-limits private properties, the Texas and Florida statutes are too restrictive in acting as a blanket action that in practice will transform social media platforms into public forums. The heavy governmental regulation imposed on Social media companies by the Florida and Texas laws would constitute a taking under the Fifth Amendment and the laws still need to be struck down.

III. The Texas and Florida laws unconstitutionally compel speech.

A. The imposed general disclosure and individualized-explanation requirements are unconstitutional.

Florida S.B. 7072 requires social media companies to disclose how it: "(1) curates and targets content to users; (2) places and promotes content, (3) moderates content; (4) uses search, ranking, or other algorithms or procedures that determine results on the platform; and (5) provides users' performance data on the use of the platform and its products and

services." For each of these, the platform must give "a thorough rationale".

The Eleventh Circuit held that the individualized-explanation requirements that force companies to disclose why a user got banned likely violates the First Amendment. States have the burden to prove that the disclosure requirements are "neither unjustified nor unduly burdensome" *Nat'l Inst. of Family Life Advocates v. Becerra 138 S.Ct. 2361.* In the same case, it is stated that the state must consider alternatives that do not "[burden] a speaker with unwanted speech." On Twitter and Facebook where there are hundreds of millions of posts per day, forcing the companies to filter through and disclose for each post they ban is unreasonable and heavily burdensome.

Disclosure requirements commonly required by pharmaceutical companies are justified by potential harm to the public, but social media does not pose such risks. Any harm posed by social media is negligible compared to the potential health risks of pharmaceuticals.

B. The Texas and Florida laws compel social media companies to include speech on their platforms that do not align with their own beliefs.

The laws require social media companies to represent opinions they may disagree with. This is a

form of compelled speech. This Court first denied the constitutionality of compelling action in *West Virginia State Board of Education v. Barnette*, when it held that schools could not compel schoolchildren to salute the American Flag and pledge allegiance. According to the case, compelled speech "requires affirmation of a belief and an attitude of mind." Social media companies do not need to relinquish either of those in favor of state interest, as private businesses have the right to operate their own beliefs.

Furthermore, social media platforms are private properties that enjoy the right to exclude content that does not align with their beliefs. Since *Barnette,* the rationale that private properties must be free from state-required affirmations of belief is continuously upheld by this Court. In *Wooley v. Maynard*, *430 U. S. 706*, this Court states that "[the} State may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." If this Court recognizes in *Wooley* that the right of private owners of automobiles was violated by an "unconstitutional 'required affirmation of belief", the Court must recognize the same violation in Twitter and Facebook's case, as the social media platforms are private properties that belong to private individuals.

The sanctity of private property rights must be protected and free from state interference.

CONCLUSION

The content-moderation restrictions and individualized explanation requirements of the Florida and Texas laws violate the First Amendment and threaten American free-market capitalism and public debate. This court must protect the First Amendment rights of social media companies from unwarranted governmental intervention.

We pray that the court reverses the decision of the Fifth Circuit and upholds the principles of free speech.

Respectfully submitted,

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