No. 22-393

In the
Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OFc 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.

Table of Contents

Questions Presented……..…i

Table of Contents……..……..ii

Table of Authorities……..iv

Background……..1

Summary of Argument……5

Arguments…….....7

I. Social media websites are not common carriers. Rather are the equivalent to newspapers……7

A. Previously Florida law was found to have violated the freedom of the press……11

II. None of S.B. 7072's content-moderation restrictions survive intermediate—let alone strict—scrutiny……..……13

III. Section 230 of the communications decency act of 1996 preempts any expectation of liability……15

IV. The compelled speech doctrine establishes that the government cannot force individuals or groups to support certain expressions……18

V. Conclusion……22

TABLE OF AUTHORITIES

Cases

FCC v. Midwest Video Corp.,
440 U.S. 689 (1979).....8
Hurley v. Irish-Am. Gay, Lesbian
& Bisexual Grp. of Boston,
515 U.S. 557(1995).....18
Miami Herald Publ'g Co. v. Tornillo,
418 U.S. 241 (1974).....12, 14
Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n,
475 U.S. 1 (1986).....14
Reno v. Am. Civil Liberties Union,
521 U.S. 844 (1997).....10
Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011).....14
Turner Broad. Sys. v. FCC,
512 U.S. 622 (1994).....9, 10
U.S. Telecom Ass'n v. FCC,
855 F.3d 381 (D.C. Cir. 2017).....9
United States v. O'Brien,

391 U.S. 367 (1968).....13

Zauderer v. Office of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626 (1985).....16

Statutes

42 U.S.C. § 1983.....2

47 U.S. Code § 230.....3

S.B. 7072 § 1(9).....14

BACKGROUND

Social-media platforms are hosts of third party posts, which include text, photos, and videos, and distribute them to other users. These host companies are private enterprises, entitled to protection of the First Amendment free speech provisions. A person has no obligation to interact with a social media website and are free to migrate to another platform to contribute to the content. Unlike traditional media, these platforms primarily host content made by and for individuals rather than the company. Companies do engage in speech through terms of service and community standard regulation. They can curate and edit the content that users see through algorithms and removing posts that violate terms of service and community standards.

The State of Florida passed and enacted S.B. 7072 to fix the State's perceived bias from certain social media platforms with over 100 million users per month that remove content or expel users that have conservative voices. The legislation imposes restrictions and limitations on the social media platforms, for example prohibiting the deplatforming of political candidates and requiring disclosures and updates about content moderation policy. Its goal is to treat these platforms like common carriers with enforcement mechanisms of fines and civil suits.

NetChoice and the Computer & Communications Industry Association are trade associations that represent some internet and social-media companies like Facebook, Twitter, Google, and TikTok. Collectively suing the Florida officials who enforced S.B. 7072 under 42 U.S.C. § 1983 alleging that SB 7072 provisions violate the

social-media companies' right to free speech under the First Amendment and are preempted by federal law.

The district court granted NetChoice's motion for a preliminary injunction, concluding that the provisions of the Act that make platforms liable for removing or disincentivizing content are contradictory with federal law, specifically 47 U.S.C. § 230(c)(2), which immunizes platforms' decisions to block material that they "consider to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.". The Act's provisions also infringe on the platforms' First Amendment rights by restricting their "editorial judgment." The court has applied strict scrutiny to the Act's viewpoint-based purpose of defending conservative speech from perceived liberal bias. The court found that the Act does not hold up under strict scrutiny as it isn't

narrowly tailored and doesn't serve a legitimate state interest. The State appealed, and the U.S. Court of Appeals for the Eleventh Circuit affirmed these conclusions. Both parties have asked this court to grant Certiorari so that this important issue can be resolved.

SUMMARY OF ARGUMENT

Social media platforms as an important bastion for the exchange of ideas, can be likened to a row of privately owned coffee shops, restaurants, and stores. Websites, as private companies, use their editorial discretion to create and enforce policies to target speech violating the community standards or the websites' code of conduct. The creation and enforcement of this judgment is classified as speech along with the algorithms that display posts to users. Akin to a newspaper, each user is a writer with the editors above determining if the article is appropriate to publish or remain published. Different newspapers and similarly, different websites have different focuses and interests. Resulting in varying levels of editorial judgment.

Politicians and lawmakers in Florida perceived a bias in the way that large social media platforms regulated their content. Florida's Senate Bill 7072 imposes restrictions on the right of private companies to exercise editorial judgment over their websites. These restrictions don't hold up under strict scrutiny, triggered by First Amendment violations such as violations of the compelled speech doctrine, under the basis of viewpoint discrimination. Therefore, this law does not comply at all with the First Amendment.

S.B. 7072 also expects individualized explanations for any censoring or arranging of content, forces social media companies to wait 30 days before changing their codes of conduct and compels them to share any changes with users. These individualized explanations not only create an undue burden on the websites but in general, overburdens these companies to regulate their sites.

ARGUMENT

I. Social media websites are not common carriers. Rather are the equivalent to newspapers.

Florida seeks to evade First Amendment scrutiny by labeling social-media platforms as "common carriers." Claiming there is no speech created by the companies, just hosting of content created by others. Their position was outlined in their oral argument, "[t]here are certain services that society determines people shouldn't be required to do without," and that this is "true of social media in the 21st century." Oral Arg. at 18:37 et seq. The courts have not determined whether social media websites are common carriers or have the ability to make them by repealing the First Amendment rights that they currently possess. The state has no right to make

such a decision and if they were to, their logic fails. Common carriers are entities that "make a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing"—they don't "make individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979)* While social media platforms are open to the public, they do require, as a condition of access to the site, acceptance of their terms of service and abide by their community standards. Twitter is open to every individual if that individual agrees to not transmit content that violates the terms of conditions or community standards. Users as well are unable to freely transmit whatever they please because platforms make and always have made "individualized" content

and viewpoint based decisions about whether to publish particular messages or users.

Supreme Court precedent strongly suggests that internet companies, including social media platforms, are not common carriers. The Court has applied less strict First Amendment scrutiny to television and radio broadcasters; the Turner decision confined that approach to "broadcast" media because of its "unique physical limitations" referring to the scarcity of broadcast frequencies. *Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997)*. Instead of "comparing cable operators to electricity providers, trucking companies, and railroads—all entities subject to traditional economic regulation"—the Turner case "analogized the cable operators to the publishers, pamphleteers, and bookstore owners traditionally protected by the First Amendment." *U.S. Telecom Ass'n v. FCC, 855 F.3d*

381, 428(D.C. Cir. 2017) (Kavanaugh, J., dissental); see Turner, 512 U.S. at 639. In 1997 the court distinguished online media from broadcast media in *Reno v. American Civil Liberties Union 521 U.S. 844, 868–69 (1997)* making clear that the "vast democratic forums of the Internet" have never been "subject to the type of government supervision and regulation that has attended the broadcast industry." Thus social-media platforms should be treated as cable operators, which still retain their First Amendment right to exercise editorial judgment. Any law that infringes on that right should be assessed under the same standards that apply to other laws burdening First-Amendment-protected activity. Social media platforms do not serve the public indiscriminately like a common carrier but instead use editorial judgment to curate content that is displayed to users based on algorithms, an extension of their speech.

S.B. 7072 cannot force them to act as a common carrier without violating First Amendment scrutiny.

A. Previously Florida law was found to have violated the freedom of the press.

A similar Florida law(Statute Section 104.38) in 1974 gave political candidates that were criticized by any newspaper the right to have their responses to said criticisms published. This statute was held unconstitutional in an unanimous Supreme Court ruling as it violated the freedom of press protections found in the First Amendment because "press responsibility is not mandated by the Constitution and…cannot be legislated." as well it, "[intruded] into the function of

editors," and gave "a penalty on the basis of the content." The Burger Court relied on *New York Times v. Sullivan* to reason that the statute "[limited] the variety of public debate." See *Miami Herald Publishing Company v. Tornillo.*

Not as a common carrier, but as a private company akin to a newspaper, SB 7072 regulation on editorial judgment would also violate the freedom of press protections.

II. None of S.B. 7072's content-moderation restrictions survive intermediate—let alone strict—scrutiny.

A majority of provisions in S.B. 7072 are subject to strict scrutiny, to those not covered it is immensely likely that none survive even intermediate scrutiny. Laws subject to intermediate scrutiny must show that the regulation furthers an important government interest by means that are substantially related to that interest. Here, narrow tailoring means that the regulation must be "no greater than is essential to the furtherance of [the government's] interest." *United States v. O'Brien, 391 U.S. 367 (1968).* It's within our belief that S.B. 7072's content moderation restrictions and editorial judgment restrictions do not further any substantial or compelling governmental interest.

The state will no doubt declare that they prevent "unfair" private "censorship" that privileges some viewpoints over others on social media platforms. S.B. 7072 § 1(9) However a state "may not burden the speech of others in order to tilt public debate in a preferred direction," Sorrell, 564 U.S. at 578–79, or "advance some points of view," Pacific Gas, 475 U.S. at 20 (plurality op.) There is no legitimate nor substantial interest in leveling the playing field. We must remind ourselves that there is no right to a social media account, to do and say what they want on privately owned platforms that would prefer you not do whatever you are doing. Private actors have the First Amendment right to be unfair which is a way of expressing their own points of view and there is a lack of substantial governmental interest to prevent that. *Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974)*

III. Section 230 of the communications decency act of 1996 preempts any expectation of liability.

The Fifth Circuit of Appeals explained in *NetChoice, LLC v. Paxton, 142 S. Ct. 1715 (2022)* ruling that "editorial discretion" generally comes with concomitant legal responsibility. They gave the example of "a newspaper's editorial judgments in connection with an advertisement," may be held liable "when with actual malice it publishes a falsely defamatory" statement in an ad. Citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels413 U.S. 376, 386 (1973).*

The fifth circuit asserts that liability comes from the "editors and editorial employees… determin[ing] the news value of items received" and therefore taking responsibility for the accuracy of the

items transmitted because editors can then regulate any liable speech. *Associated Press v. NLRB, 301 U.S. 103, 127 (1937).* However, that supposed that social media companies are able to 'determine the value of items received.' Section 230 recognizes the difficulty with evaluating every user's posted content and *Zauderer v. Office of Disc. Counsel, 471 U.S. 626 (1985)* clarifies as well, that individual explanations of censorship

can be "unduly burdensome" and therefore chill platforms protected free speech. Within the consideration that "the targeted platforms remove millions of posts per day, ("YouTube alone removed more than a billion comments in a single quarter of 2021.") including the ongoing struggle with speech that is not protected in any way, such as child pornography. Facebook, for example, has over 100 employees alone working around the clock to sift

through their hundreds of millions of users to find pedophiles, constantly avoiding detection by changing the words they use, is why social media companies are exempt from liability while still having editorial judgment. The solution to redress when you have a problem with a post online should be with taking action with the account user themselves, and not the company at large.

IV. The compelled speech doctrine establishes that the government cannot force individuals or groups to support certain expressions.

As some social media companies do not wish to platform certain individuals and speech, then S.B. 7072 violates the First Amendment rule that a speaker can choose the content of their message and what not to say. If Florida attempts to alter and regulate the message by trying to make it more acceptable to others then it goes directly against this court's precedent. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995)* the court held that a lower court's mandate to a Veterans Council to require GLIB members in its parade did violate the Council's free speech rights. Subordinating private speech for public accommodation has been ruled before in the court

and should follow similar logic. Especially when the public accommodation advocated for in S.B. 7072 is not content neutral and is unfortunately in response to conservative voices being deplatformed. This attempt and partisan regulation of private enterprise should not be tolerated.

Some may call into question whether large companies like X or Facebook are allowed the same protections as individuals. The First Amendment not only limits the government from punishing a person for his speech but also prevents the government from acting against those who disagree with its messages. If a corporation is a group of persons united in one body for a purpose, then it would go without saying that this right extends to corporations. A prevailing answer comes from *Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)* where the court ruled that the Religious Freedom Restoration Act should be read

as applying to corporations, as they are a group of individuals achieving a desired end. When the Affordable Care Act required that employers provide preventive care, like contraceptives, the plaintiffs said it violated the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act. The court ruled in Hobby Lobby's favor affirming that corporations have the First Amendment rights guaranteed in the constitution. Companies are also entitled to protections from the Equal Protection Clause of the 14th Amendment. In *San Mateo County v. Southern Pacific R. Co., 116 U.S. 138 (1885)*, the plaintiffs argued that the 14th Amendment is not limited to natural persons, and the court affirmed, implying they have the same. It is interesting to note that the council arguing was U.S Senator Roscoe Conkling, who helped draft the 14th Amendment as he knew the purpose and intention of its ratification.

If, under the court, corporations are held as individuals and individuals are protected under the Equal Protection Clause, then the Compelled speech doctrine protects the rights of social media companies.

CONCLUSION

Florida's case rests on whether social media sites are considered common carriers, they are not and should be regulated as such. S.B. 7072's content-moderation restrictions do not comply with the First Amendment. S.B. 7072's individualized-explanation requirements do not comply with the First Amendment. The Supreme Court should rule S.B. 7072 unconstitutional.

Respectfully submitted,

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