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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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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- https://www.law.cornell.edu/
- Free Speech Center: 44 Liquormart, Inc. v. Rhode Island (1996)
- Free Speech Challenges to Florida and Texas Social Media Laws

JURISDICTION

THE ELEVENTH CIRCUIT ENTERED JUDGMENT ON MAY 23 2022. THE PETITION FOR CERTIORARI WAS TIMELY FILED ON SEPTEMBER 21 2022 AND GRANTED ON SEPTEMBER 29 2023.

SUMMARY OF ARGUMENT

The spirit of the American people is one undeniably proud of our rights to free speech. This case is an issue of not only free speech but of the hand that modern social media platforms have in hosting it. The Florida Senate Bill 7072 and similar Texas House Bill 20 both raise questions surrounding the First Amendment rights of users and owners of Social Media Platforms. NetChoice represents major Social Media Platforms (SMPs) such as Meta, X, and TikTok which are accused by users of unfair censorship of conservative viewpoints. The Attorney General of Florida acts as petitioner in Moody v. NetChoice, arguing that individualized-explanation requirements and content moderation restrictions both comply with the First Amendment. Free speech is undeniably a driving source of political progress and agency of the American people. There exist very specific guidelines that allow us to continue to enjoy these rights. Along with certain limitations on free speech, corporate entities known as common carriers exist under certain guidelines due to their role in the public transportation of information. Along with Section 230 of Title 47, SMPs are equivalent to common carriers and cannot be treated the same as traditional media outlets. It is the compelling state

and public interest to act in the preservation of speech of the people, not in favor of censorship due to advertiser or corporate interests. We ask the court to rule in favor of the petitioner in the case of Moody v. NetChoice.

ARGUMENT

I. Importance of Free Speech

A. Freedom of Speech is fundamental to American life.

Freedom of speech is the bedrock of a democratic society. Its existence is vital to the preservation and flourishing of the democratic ideals that underpin the system of governance. However, freedom of speech is not solely a law, but a fundamental part of American life.

In the words of Justice Benjamin Cardozo, freedom of speech is "[t]he matrix, the indispensable condition, of nearly every other freedom." Without freedom of speech, individuals would be unable to express their individuality and autonomy. It captures the essence of a free and open society. A similar sentiment is expressed in Justice Louis Brandeis' concurring opinion in *Whitney v. California* (1927): "[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." Still, the strive for self-governance and self-fulfillment are not the only reasons for our elevation of the freedom of speech; its

Justice Cardozo is far from alone in his assessment of the significance of free speech in the United States of America. Justice Thurgood Marshall too states, "[t]o suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity."

B. The Right to Free Speech is not absolute.

The First Amendment of the United States Constitution provides that "Congress shall make no law…abridging the freedom of speech." This freedom represents the core of individual liberty and autonomy. And because freedom of speech is intricately entwined with freedom of thought, an essential tool for democratic self-governance, it remains vital.

In *Ashcroft v. Free Speech Coalition* (2002), Justice Anthony Kennedy cautioned "The right to think is the beginning of freedom, and speech must be protected…because speech is the beginning of thought."

As R. George Wright states in Free of Speech As a Cultural Holdover "[t]here has long been a reasonably broad consensus as to the most important values thought to justify according special constitutional protection to much speech…(1) promoting in particular a general search for truth; (2) facilitating a meaningful process of democratic government; and (3) encouraging meaningful self-realization, self-actualization, or genuine autonomy".

Americans, regardless of their political ideology, have been known to revere the concept of freedom of speech and have historically recoiled from any restriction of speech. The United States is a society that views "more speech" near equivalent to "free speech," and thus has always treated the inclusion of speech–regardless of how low quality, nonsensical, or detrimental–with less skepticism than the exclusion of speech. Those who choose not to speak are labeled as cowards, and those who choose not to listen are even more so. This is only exacerbated by the increasing prevalence and influence of social media platforms. Leftwing ideologues view many expressions of opinion by rightwing individuals as impulsive and polarizing

"engagement." In this act of civil libertarianism, they justify the assertion of "safe spaces" and "trigger warnings" through an act they claim to be an assertion of professional judgment and enforcement of quality standards.

In a 2019 survey conducted by First Amendment Center at the Freedom of Institute, more than half of respondents agreed with the statement that "social media companies violate users' First Amendment rights when they ban users based on objectionable content they post." This response is not limited to members of the public, but also animates multiple lawsuits filed against companies such as Facebook, Twitter, and Google for free speech violations, as well as an increasing number of legislative and executive actions purporting to force social media companies to carry certain speech or provide access to certain speakers.

This understanding of the First Amendment's application to social media platforms is not unfounded. In recent decades, social media platforms have become extraordinarily influential. Society has grown to become so dependent on these platforms for everything from news to commerce to education so that restriction of access to these outlets are arguably a violation of constitutional significance.

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." In the landmark case *West Virginia State Board of Education v. Barnette (1943)*, the Supreme Court held that forcing students to salute the American flag or recite the Pledge of Allegiance was a violation of the First Amendment. In Justice Jackson's majority opinion, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what

shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." An individual's ability to participate in democratic deliberation–a fundamental of democracy – is inhibited by forcing said individuals to support or associate themselves with ideas they find objectionable. Furthermore, such coercion also infringes personal autonomy, and distorts the truth, and the marketplace of ideas.

II. SMP Actions in accordance with Section 230 and Free Speech.

A. Section 230 allows SMPs privileges only under the fact that they are not recognized as the publisher.

SMPs act as vessels of information, but not in the way of traditional media. Privileges are given to SMPs under 47 section 230 to not "be held liable on account of any action taken to enable or make available to information content providers or others the technical means to restrict access to material." This privilege is enabled by 230s "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." To enjoy such privilege of non-liability, SMPs voids their rights as publisher and therefore cannot enjoy the rights of a publisher. As established in CBS v Democratic Nat'l Committee and in Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., publishers are afforded editorial judgment and editorial discretion as an elaboration to the freedom of the press as established in the First Amendment, also per Miami Herald Pub.

Co. v. Tornillo, 418 U.S. 241 (1974) Being exempt from the liabilities held by publishers, SMPs, by nature, forfeit editorial discretion. The SMP's First Amendment rights are not violated, as they are not the publisher. Rather, they are inclined to not unfairly use their infrastructure to block the free speech of third-party viewers.

The traditional check on media is liability litigation, but SMPs are immunized via Section 230. This immunization stems from Congress' findings that "The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." and that "Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services." Thus, SMP actions to suppress American access to political information through the deplatforming and prior restraint of political figures violate the intentions of Section 230, while Bill 7072 upholds them.

B. Deplatforming users, especially prominent ones, must be justified and only under serious offenses.

In the modern world, the removal of a user, especially a prominent figure, from an SMP is analogous to removing them from society. SMPs must adhere to the burden to prove a significant threat to policy or community, and critically, provide individualized explanations on the removal. The hosting of a user and their content is not a violation of the Compelled Speech Doctrine as unlike newspapers or other publishers, Social Media

Platforms "shall not be treated as the publisher or speaker of any information provided by another information content provider" as per Section 230. Therefore, the argument that hosting a user and their speech compels speech from the SMP is invalid.

The deplatforming of political candidates goes against the compelling interest of the state. SMPs, in accordance with Florida bill 7072 and Texas House bill 20, must allow an appeals process for users to return. Without an appeals process, the permanent removal of a user is a de facto ban on certain types of speech. Once again, this is a blockage to free speech if the state does not take action.

C. It is the spirit of the First Amendment to protect political diversity in speech, and many SMP policies subvert this.

The states of Florida and Texas are within their rights to protect free speech rights for users so long as it does not unreasonably impose on the rights of private owners as decided in Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). Along with private establishments open to the public, broadcasting companies are also subject to impositions on editorial autonomy. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994).

Much of the argument for SMPs intense content moderation originates in the defense of protected classes. Meta prohibits hate speech which is defined "as a direct attack against people based on our protected characteristics: race, ethnicity, national origin, disability, religious affiliation, caste, sexual

orientation, sex, gender identity and disease." However, along with this statement, Meta defines one of its core principles as Giving people a voice: "People deserve to be heard and to have a voice — even when that means defending the rights of people we disagree with." While this agrees with the spirit of the First Amendment to protect "an uninhibited marketplace of ideas," Meta and other SMPs' hate speech policies go against protected First Amendment speech - even if they aim to be anti-discriminatory. 303 Creative LLC v. Elenis, 600 U.S. ___ (2023). Additionally, no matter how "hateful" speech is, content-based regulation is problematic per R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

III. SMPs should be classified as Common Carriers

A. SMPs meet the standards and definition of a common carrier

As defined in Title 47, Section 153, a "'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." As well as in Title 48, Section 47.001, "Common carrier means a person holding itself out to the general public to provide transportation for compensation." As modern manifestations of telecommunication systems and

equivalent forms of information carriage, SMPs qualify as common carriers. As they are open to the public in exchange for compensation through the form of advertisement, SMPs transport information and facilitate interstate and foreign communication for compensation through the means of the Internet. The internet and methods of accessing it both through either a cellular network and/or radio. As originally referenced in Propeller Niagara v. Cordes, 62 U.S. 7 (1858), the common carrier's first and primary purpose is to transport goods impartially. Since the inception of the Common Carrier Doctrine in that case, this obligation of impartial transportation of goods and/or information has extended to communication through wire and radio via the Communications Act of 1934. As fundamental descendants of the common carriers of wire and radio, SMPs should also be considered common carriers and be obliged to impartial transportation of information and user speech.

B. SMPs, adhering to common carrier classification, should cease shadowbanning and cooperate with Bill 7072 and the public interest.

Title 47 Section 202 states, "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular

person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." As such "communication services" and as equivalents to common carrier cellular networks, SMPs actions of unjust censorship discriminate in service for classes of users. Several recent examples include TikTok "shadowbanning" content with phrases surrounding the Black Lives Matter moment, and Twitter "visibility filtering," the corporate equivalent for colloquial "shadowbanning" conservative users. "Shadowbanning" is the uninformed banning or partial banning of a user on a platform. Public distress has also been expressed legally in legal complaints such as Millan v. Facebook and Belknap v. Alphabet.

"When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use. He may withdraw his grant by discontinuing the use." Munn v. Illinois, 94 U.S. 113 (1876). Florida Bill 7072 takes into full account the public interest and aims to take action to control a facet of the SMPs to clarify the moderation and restriction techniques used by the SMPs and ensure that there is no unfair removal of user-created content.

IV. Arguments to the Contrary lack merit

A. SMPs do not maintain their own First Amendment rights.

While the Respondents may argue that as a private institution, SMPs First Amendment rights extend to freedom of the press, SMPs do not sufficiently curate, edit, or discern news and information to qualify for editorial discretion. As the information comes from external users, and SMPs do not go through sufficiently transformative and creative efforts to present information, the only First Amendment Rights they maintain is to present their own opinions, rather than edit their users'.

B. Section 230 does not blindly allow all restrictions on content

Although respondent will cite the text of Section 230 as "No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected;" Respondent will emphasize that "any action" taken to restrict is non-liable. However, this argument is ignorant of the exception of "good faith." As stated by Section 230 above, action taken in "good faith to restrict access" is allowed, but other restrictions are not. With this court having time and time again protected pure speech, we believe SMPs have arbitrarily and in bad faith restricted the voices of American people and restricted their access to political information. As such, they have overstepped provisions as allowed in Section 230, and suppressed the voices of their users.

C. Arguing for respondents on the basis of an ideological slippery slope is invalid.

While the respondents and opponents of Bill 7072 may argue that allowing state governments to limit censorship based on viewpoint will allow for more and more extreme or "hateful" viewpoints to emerge, this argument contains two main issues, besides the slippery slope fallacy. Firstly, SMPs have already allowed for violence and terrorism to exist on their platforms. SMPs as well as the public and judiciary understand a certain level of violence or unwanted content exists on any SMP, and said SMP cannot be held liable simply for transmitting that information. (TWITTER, INC. v. TAAMNEH, 598 U.S. ___ (2023)). Additionally, the main aim of both the Floridian and Texan bills is to end the silencing of conservative voices on SMPs. Yet opponents argue that restrictions on moderation will allow radical and violent opinions. The argument that any given State wishes to enable violence on an SMP is speculative - relying on a slippery slope logic to intimidate fair restrictions on moderation.

CONCLUSION

The legislation brought about by Florida and Texas do not violate the First Amendment. Petitioners urge the court to support the freedom of speech of the people, and to understand Section 230 as an exchange of freedoms; SMPs are given freedom from litigation and liability in exchange for their rights and classification as a publisher. For the private SMPs, First Amendment rights extend only to expressing their own opinions, not suppressing those of their users.

SMPs fit under the category of the Common Carrier, joining its predecessors such as telephone lines and other communication networks. Under their fitting Common Carrier status, SMPs must cooperate with state compellation. Throughout history, the role of the Common Carrier has been to follow the public interest, and not discriminate against the public. Bill 7072 and others like it aim to protect the liberties of its people and guarantee their access to political information, as well as the freedom to express contrarian political opinions. It is in the best interest of the people and in the spirit of the First Amendment, for the Court to rule in favor of the petitioner, enabling freedom of speech for the user.

Respectfully submitted,

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