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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[12/15/2023]

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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CONSTITUTIONAL PROVISIONS INVOLVED

THE FIRST AMENDMENT, U.S. CONST. AMEND. I, PROVIDES:

> CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF; OR ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS; OR THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE, AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.

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SUMMARY OF ARGUMENT

Since December 15th 1971, The First Amendment has been a Fundamental Aspect of American Society. The freedom to speak is a gift, granting Americans the right to express themselves without having to worry about government interference regardless of most circumstances, or current events. Due to this fundamental aspect of human life, the Supreme Court often has struggled throughout its existence to determine exactly which types of speech are actually protected. Legally, anything labeled as obscene has historically been excluded from First Amendment protection, for example, but deciding exactly what qualifies as obscene has been a problematic and recurring problem. Because of this, determining what words have qualified as true incitement has been decided on a case-by-case basis.

This being said, the question now, in the case of Moody V. NetChoice has become: is the State Government in violation of the 1st amendment by enacting laws that keep large, private Social Media Platforms like Youtube, and X (formerly Twitter) from restricting content and forcing them to disclose their media restriction policies to the public.

Social-media platforms collect third-party posts, including text, photos, and videos, and distribute them to other users within the platforms. They are merely conduits of millions of diverse voices. Adding to this, the specific type of speech that media platforms were limiting in the first place could arguably be considered to be a form of pure speech (though this is considered on a case by case basis), which is protected under the First Amendment regardless of whether the companies represented by NetChoice are private or not. The First Amendment protects every individual American, regardless of political viewpoint from the restriction of their own voice, assuming the restriction is from the government. And determining

that one viewpoint or person is allowed the right to free speech while restricting another on the same platform is unconstitutional in itself.

This Court is best suited to rule in favor of the Petitioner (Attorney General of the state of Florida), in that the laws' content-moderation restrictions do comply with the First Amendment, as well as the laws' individualized-explanation requirements also comply with the First Amendment. and therefore are constitutional and just.

ARGUMENT

I. The Digital Platforms represented by NetChoice fall under the conditions of legally defined "Common Carriers" and thus should be regulated as such.

A. Digital platforms which give themselves to the public most definitely resemble traditional common carriers.

Though these platforms are now digital instead of physical, at their core they are networks of communication, whose job is to "carry" or take information from one user on the platforms to another. Federal law dictates that companies cannot "be treated as the publisher or speaker" of information that they merely distribute. 110 Stat. 137, 47 U. S. C. §230(c). In other words, the entity does not hold ownership of content, and is merely there to navigate and transport the flow of information. In public, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader public. The United States legal system has been historically known to subject certain businesses, which could be defined or known today as "common carriers" to special regulations. In the United States there is historical precedent for the regulation of communications and transportation networks, in a manner that is alike to that of traditionally defined

common carrieres. Candub 398-405. In 1894, the telegraphs were regulated due to the fact they "resemble[d] railroad companies and other common carriers," and also, were "bound to serve all customers alike, without discrimination." *Primrose* v. *Western Union Telegraph Co.*, 154 U. S. 1, 14 (1894). This set the precedent of a general requirement to serve all comers. Even though large media platforms fall under these standards much like broadband service providers like Verizon or Comcast, they still enjoy the contradicting standards that are regulations on restriction, Candeub, Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230, 22 Yale J. L. & Tech. 391, 398–403 (2020). A common carrier is defined as a private or public entity that transports goods or people, in which the carrier is responsible for the safe transport of the aforementioned (In this case goods refers to information and property of posts/accounts on media platforms). therefore insinuating that the media platforms represent an obligation to ensure all information is received regardless of material. In concurrence with this, see also Burdick, The Origin of the Peculiar Duties of Public Service Companies, Pt. 1, 11 Column. L. Rev. 514 (1911). In which it is defined as the duty of the common carrier to "serve all who apply for service". So, when an entity (private or public) begins to block and deter certain information, and allow others, it is natural that the power of the state steps in and regulates content moderation. While Common carriers have held physical aspects historically, Large media platforms though not necessarily physical still embody and deeply resemble that of a common carrier.

B. Common carriers may be justified, even for industries not historically recognized as common carriers, when "a business, by circumstances and its nature, . . . rise[s] from private to be of public concern."

Today, modern digital platforms allow many avenues for unprecedented amounts of speech, this includes speech by political figures such as Donald Trump. What is also historically unprecedented is the control of so much public and individual speech in the hands of a few (private) parties. The situation between Netchoice and its resemblance to the common carriers can be remedied by allowing laws that would restrict the right to exclude content, ensuring the complete flow of information. BIDEN v. KNIGHT FIRST AMENDMENT. INST. AT COLUMBIA UNIV., 141 S. CT. 1220 (2021). Common carriers may be justified, even for industries not historically recognized as common carriers, when "a business, by circumstances and its nature, . . . rise[s] from private to be of public concern." See *German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 411 (1914)* (affirming state regulation of fire insurance rates). On top of essentially being Common Carriers, they also fit the definition as a Place of Public Accommodation. Although definitions can vary, a company generally is defined as a place of public accommodation if it provides the following: "lodging, food, entertainment, or other services to the public . . . in general." Black's Law Dictionary 20 (11th ed. 2019) (defining "public accommodation"); accord, 42 U. S. C. §2000a(b)(3) (covering places of "entertainment"): "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and

accommodations of any place of public accommodation.." Twitter and other digital platforms bear minor resemblance to that definition-though viewpoints are not yet considered a protected class-providing diverse advertisements as well as unlimited entertainment. In fact the platforms being represented in this case do technically fall under this category.

In this light, the United States has enacted restrictions on other common carrier esq. corporations, whose business involves the public and their rights to media (and consequently the 1st amendment) such as in *TURNER BROADCASTING SYSTEM , INC.. V. F.C.C (93-44), 512 U.S. 622 (1994).* In which congress passed the Cable Television Consumer Protection and Competition Act of 1992, in which sections 4 & 5 required the cable to broadcast local commercial and public broadcast stations. The District Court ruled eventually that the provisions were in fact consistent with the First Amendment. The struggles faced with content, and the outcome in this case clearly show that laws enacted that restrict the right to exclude content do not violate First Amendment rights. In concurrence with this, in *Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980)*, which the Supreme Court of California reversed, protected speech and petitioning (if correctly enacted) in centers like the Pruneyard Shopping Center despite the center being privately owned. This proves that the result from this case in the protection of free speech does not in fact infringe on property rights that are also protected under the constitution.

II. Freedom of speech and expression under the First Amendment have regulations that can

be constitutionally applied to the Digital Platforms represented by Netchoice.

A. First Amendment free speech and expression can be constitutionally regulated

In cases of Freedom of expression and speech protected under the First Amendment, expression and speech have often been constitutionally regulated in instances where the audience is "young and impressionable." In the case of *Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)*, the regulation of political speech or expression is permitted unless there is "disruption" to the environment the speech or expression is conducted in. In the case of large social media platforms like Twitter/X, "disruptive" speech is defined in their community guidelines as not allowing users to, "threaten, incite, glorify, or express desire for violence or harm." Restrictions also include attacks on, "other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease." It is arguable that these companies have already put in place regulations however *Twitter, Inc. v. Taamneh, 598 U.S. 471* proved they are far from sufficient. ICIS was able to plan a terrorist attack without any being flagged down on Twitter, proving that these regulations have not served their purpose and are still allowing these platforms to be a dangerous unregulated form of media. Past regulations on media due to their content and audience have been found constitutional; these are the

same type of regulations this Florida law is proposing. In the case of *Packingham v. North Carolina, 582 U.S. 98 (2017)*, regulations were put in place not allowing a registered sex offender to join sites and platforms that minors are allowed to join, such as several social media platforms like X or Instagram where the minimum age to join is 13 years old. This point is confirmed by the precedent of McCullen v Oakley, 573 U.S. 464 (2014) that argues the regulations of Packingham v. North Carolina, 582 U.S. 98 (2017) on social media were constitutional because they are not, "narrowly tailored to serve a significant governmental interest." Speech online is taken very seriously, in the case of *Elonis v. United States, 575 U.S. 723 (2015),* Anthony Elonis was criminally convicted for multiple threats to his ex wife he posted online. Elonis argued he was not intending for these threats to be taken seriously, however he was sentenced 44 months of imprisonment as affirmed by the Supreme Court. These threats online were not flagged by the social media platforms and remained posted until his ex-wife and the FBI brought them to court. There are not sufficient restrictions and processes currently put in place by the social media platforms to address the criminal acts being conducted online. In a case out of Florida, *Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)*, a Florida law that required the press to publish responses to editorials. This was a restriction that, in this case, restricted a politician's ability to share his opinion on what was being said about him in the press. This is very similar to the restriction being proposed under the Florida law.

III. States may experiment with policies and individualized explanation requirements that

discourage censorship while respecting the limits of the First Amendment.

A. The States can regulate censorship and individualized explanation on social-media platforms without constitutional violation.

America as a country has long been governed by the constitution, and as the interests of the people change, the fixed meanings can, and must as well. "Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." In the case of *N. Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2132 (2022).* The decision found that the constitutional right to self defense applies to the individual, not just militias, while simultaneously showing that the written meaning of the constitution fluctuates, just as it might within the current situation at hand. In the case of *Riley v. California, 573 U.S. 373, 15 406–07 (2014),* the court eventually ruled that when deciding on constitutional cases, the Court does not (and should not) "mechanically apply [a] rule used in the pre digital era" to technology of today. This includes media platforms like the ones represented by NetChoice, especially when about 3.5 billion people on the planet, out of 7.7 billion, are active social media participants. Given this information, it is crucial that the Court take a more developmental, restrictive approach to private internet cases like *Moody v. NetChoice*, purely because this is a case that is both unprecedented and unusual in a historical sense. The

states are also correct in the regulation and censorship of platforms simply because many social media platforms can also be regulated and defined as common carriers. The rules and regulations that govern common carriers have historically granted the State more leeway to regulate the censorship of information, as it is being held in *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc., 487 U.S. 781, 796–97 (1988).*

In the social-media context, like in others, citizens (and by extension the state) have an important "interest in the functioning of the community in such a manner that the channels of communication remain free." In their interest in creating free channels, it can generally be stated that all messages going through said channels have the ability to be seen and heard. When NetChoice argues that the laws in question violate the 1st amendment, we say that it does not, because the posts and content in question are not actually owned, or spoken by the Media Platforms themselves. This is because requiring a private actor to host a speech does not always require that actor to speak. This is why in *PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 76 (1980),* the Court was able to uphold a law in which protestors were protected and allowed "individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public [was] invited." This bears striking similarity to how the public is "invited" on privately owned social media platforms. In the case of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 64–65 (2006),* the Court found that Congress could limit federal funding to schools based on whether they provide equal access to

military recruiters. Similarly to the Florida law, though this decision required the hosting of speech, it did not violate the First Amendment's prohibition on compelling speech.

Media platforms are more like hosts to the party actually creating posts and content on the site. And when Media platforms are considered both hosts and common carriers: one important question to ask is whether social-media platforms are even "speaking" at all, and whether or not they actually own content. They are not "speaking" through the content, which gives the hosts no basis on which they can regulate individualized explanation requirements. The represented parties essentially all but concede they are not speaking through contents, by embracing the protections included in §230 of the 1996 Telecommunications Act. That provision exempts social-media platforms from liability relating to most content that they host; it says that "[n]o provider … of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. §230(c)(1). So, if Media is neither the publisher, speaker nor owner of content, why do they have the ability to strike down or ban content without an explanation as to why. By allowing the states to provide laws in which the citizens are protected by the assurance of an explanation for the banning of specific content, we further protect the coveted flow of information and protected speech. As shown in previously stated cases, it is possible and not necessarily unheard of to protect speech content even in a private situation. As stated in, 447 U.S. at 87, "views expressed by members of the public" on social-media platforms would, "not likely be identified

with those of the owner." The companies that host these platforms are thus hosts, not speakers. So they are not made to speak when they are barred from engaging in censorship. Therefore, it is constitutional to regulate censorship as well as enforce individualized explanation requirements, and as such does not violate the First amendment.

CONCLUSION

Shown thoroughly through both case and common law it has been demonstrated that the laws and restrictions in question do both comply with the First Amendment of the United States, the individual right to Speech and expression.

Respectfully submitted,

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