

### ***Moody v. Net Choice, LLC, No. 22-277***

Today, the Supreme Court held that the Fifth and Eleventh Circuits did not employ the proper analysis in assessing a facial challenge to Texas and Florida laws seeking to regulate social media platforms' content-moderation policies. The Court went on to explain the First Amendment principles that lower courts should apply in assessing the constitutionality of laws regulating platforms' content-moderation decisions.

**Background:** Virtually all social media companies that host third-party content have policies listing the subjects or messages that the platform prohibits or discourages. In 2021, Florida and Texas enacted laws regulating the criteria that social media companies could use in engaging in such content moderation by filtering, prioritizing, and labeling third-party content uploaded to their sites. The laws also require platforms to provide an individualized explanation to users for any removal or alteration of content.

NetChoice – a trade association representing social media platforms – brought a facial challenge to both laws, claiming that they violate the First Amendment. The Eleventh Circuit held that Florida's law ran afoul of Supreme Court precedent protecting private entities' rights to engage in "editorial discretion" and enjoined the law. By contrast, the Fifth Circuit held that the social media companies' editorial choices are not protected by the First Amendment and declined to enjoin the Texas law.

**Issue:** Whether state laws regulating the content-moderation policies of social media platforms are facially unconstitutional under the First Amendment.

**Court's Holding:** In an opinion authored by Justice Kagan, and joined by Chief Justice Roberts and Justices Sotomayor, Kavanaugh, Barrett, and Jackson, the Supreme Court held that the Fifth and Eleventh Circuits erred by failing to engage in a proper analysis of NetChoice's facial First Amendment challenges. The Court emphasized that a facial challenge under the First Amendment requires a plaintiff to establish that "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." The first step, the Court said, is to assess the scope of the state laws, including whether those laws apply to social media companies' other services such as direct messaging. The next step is to "explore the laws' full range of applications – the constitutionally impermissible and permissible both – and compare the two sets." Because the Fifth and Eleventh Circuits did not perform that analysis, the Court vacated and remanded the cases for further proceedings.

The Court then went on to explain that the Fifth Circuit's analysis "rest[ed] on a serious misunderstanding of First Amendment precedent and principle." The majority surveyed a number of the Court's precedents and derived three key principles:

- "[T]he First Amendment offers protection when an entity engaging in expressive activity, including compiling and curating others' speech, is directed to accommodate messages it would prefer to exclude. . . . And that is as true when the content comes from third parties as when it does not."
- "[N]one of that changes just because a compiler includes most [third-party] items and excludes just a few."
- "[T]he government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas. . . . [I]n case after case, the Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm."

The Court remanded the case to allow the lower courts to apply those principles to NetChoice's facial and as-applied challenges. (Justice Jackson did not join this aspect of the Court's decision.)

Justice Barrett filed a concurring opinion, expressing her view that as-applied challenges to these state laws would be more appropriate than facial challenges.

Justice Jackson filed an opinion concurring in part and concurring in the judgment, in which she disagreed with the majority's decision to "go on to treat" these facial challenges "like an as-applied challenge and preview our potential ruling on the merits."

Justice Thomas filed an opinion concurring in the judgment, in which he also disagreed with the Court's decision to "opine on certain applications" of the state laws.

Justice Alito filed an opinion concurring in the judgment, joined by Justices Thomas and Gorsuch, in which he emphasized the Court's "narrow" holding – limited, in his view, to NetChoice's failure to prove that the Florida and Texas laws are facially unconstitutional, with everything else "nonbinding dicta."

Mayer Brown filed an amicus brief in support of NetChoice on behalf of the Center for Democracy and Technology.

Read the opinion [here](#).