"Speech Nirvanas" on the Internet: An Analysis of the U.S. Supreme Court's *Moody v. NetChoice* Decision

*Eric Goldman**

Overview

Following the January 6, 2021, insurrection and the widespread shutdown of President Donald Trump's Internet[1] accounts, Florida[2] and Texas[3] both enacted "social media censorship laws." The laws purport to restrict "social media platforms"[4] from "censoring" user content, but they do so by overriding the services' editorial policies and choices. Ironically, the laws' titles brazenly admit that the legislatures aspired to censor social media platforms.

Two industry associations, NetChoice and the Computer & Communications Industry Association (CCIA), challenged the social media

* Associate Dean for Research, Professor of Law, and Co-Director of the High Tech Law Institute, Santa Clara University School of Law. Email: egoldman@gmail.com. Website: http://www.ericgoldman.org. I appreciate the comments of Mary Rose Finnigan, Lisa Goldman, Brad Joondeph, Daphne Keller, Edward Lee, Mark Lemley, Jess Miers, Amanda Reid, Pam Samuelson, and Rebecca Tushnet.

In the *Moody* appeal, I filed an amicus brief supporting the challengers regarding mandatory editorial transparency and *Zauderer*. *See* Brief of Professor Eric Goldman as Amicus Curiae in Support of NetChoice and CCIA, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024) (No. 22-277), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4655464.

[1] This article intentionally capitalizes the Internet. *See* Wikipedia, *Capitalization of* Internet, https://en.wikipedia.org/wiki/Capitalization_of_Internet (last visited Sept. 3, 2024).

[2] S.B. 7072 (Fla. 2021).

[3] H.B. 20 (Tex. 2021).

[4] Both laws define the term "social media platform" to exclude smaller services. However defined, "social media platforms" is a problematic term. There is not a shared understanding of what constitutes a "platform," and the broad statutory definitions undoubtedly reach services that look nothing like "social media." This chapter sometimes uses the term "Internet service" as a more inclusive descriptor than "social media platform."

censorship laws. In July 2024, the Supreme Court issued its opinion in *Moody v. NetChoice* (along with its companion case *NetChoice v. Paxton*). But the Court didn't definitively resolve the laws' constitutionality. Instead, the Court unanimously remanded both cases for a more detailed analysis of the constitutional questions. These further proceedings surely will be appealed to the Supreme Court again, and final resolution of these cases is likely years away.

Although the Court's remand was anti-climactic, Justice Elena Kagan's majority opinion was a rousing celebration of the First Amendment online. Critically, the majority said that the First Amendment protects social media platforms' content moderation efforts. This conclusion jeopardizes much of the Florida and Texas laws as well as many other laws being enacted around the country.

Meanwhile, the Court will be asked to review other state laws regulating Internet services. Indeed, the day after issuing the *Moody* decision, the Supreme Court granted certiorari for a case challenging a Texas law that requires pornography websites to age-authenticate their users.[5] That case, and others that will soon follow, will give the *Moody* majority more opportunities to reiterate, or qualify, their commitment to protecting Internet speech.

This article proceeds in three parts. The first part describes the prelude to the Supreme Court decision, including passage of the laws and the prior court proceedings. The second part summarizes the Court's opinions. The third part discusses some implications of the Court's decision. The conclusion contextualizes this ruling as part of the Supreme Court's ongoing Internet law jurisprudence.

I. Background

This part describes why Florida and Texas enacted their social media censorship laws, what the laws say, and how the court challenges proceeded prior to the Supreme Court's decision.

A. Path to Passage

Overall, regulators took surprisingly deferential approaches to Internet regulation during the 1990s and early 2000s.[6] Notably, in

[5] Free Speech Coal., Inc. v. Paxton, No. 23-50627 (*cert. granted* July 2, 2024).

[6] Several 1990s-era laws to restrict minor access to online pornography were struck down as unconstitutional, including the Communications Decency Act, Child Online Protection Act, and state law equivalents.

47 U.S.C. § 230 (Section 230), Congress affirmatively eliminated Internet services' liability for third-party content in many circumstances, including civil and criminal regulations of third-party content at the state level.[7] As a result, state legislatures largely avoided Internet regulations during the 1990s and 2000s.

The deregulatory zeitgeist broke down in the mid-2010s for several reasons, including:

- The largest Internet services reached breathtaking levels of size, profitability, and market share,[8] which provoked consumer and regulatory pushback.
- The largest Internet services had several high-profile gaffes that eroded public trust in them, such as Google's Wi-Fi sniffing[9] and Facebook's Cambridge Analytica data leakage.[10]
- President Trump relentlessly criticized the media, accusing Internet services in particular of systematically favoring liberals' content over conservatives' content. The facts didn't support those allegations of bias,[11] but perceptions of bias nevertheless became accepted truth among conservatives.[12]

[7] Eric Goldman, *An Overview of the United States' Section 230 Internet* Immunity, in The Oxford Handbook of Online Intermediary Liability. 155 (Giancarlo Frosio ed., 2020).

[8] *See, e.g.*, Jasper Jolly, *Is Big Tech Now Just Too Big to Stomach?*, Guardian (Feb. 6, 2021), https://www.theguardian.com/business/2021/feb/06/is-big-tech-now-just-too-big-to-stomach; Shira Ovide, *How Big Tech Won the Pandemic*, N.Y. Times (Apr. 30, 2021), https://www.nytimes.com/2021/04/30/technology/big-tech-pandemic.html.

[9] *See e.g.*, Joffe v. Google, Inc., 746 F.3d 920 (9th Cir. 2013); *In re* Google Inc. Street View Elec. Commc'ns Litig. 21 F.4th 1102 (9th Cir. 2021); David Kravets, *An Intentional Mistake: The Anatomy of Google's Wi-Fi Sniffing Debacle*, Wired (May 2, 2012), https://www.wired.com/2012/05/google-wifi-fcc-investigation/.

[10] *Facebook–Cambridge Analytica Data Scandal*, Wikipedia, https://en.wikipedia.org/wiki/Facebook%E2%80%93Cambridge_Analytica_data_scandal (last visited July 30, 2024).

[11] *See e.g.*, Paul M. Barrett & J. Grant Sims, *False Accusation: The Unfounded Claim That Social Media Companies Censor Conservatives*, N.Y.U. Stern Ctr. for Bus. & Hum. Rts. (Feb. 2021), https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/6011e68dec2c7013d3caf3cb/1611785871154/NYU+False+Accusation+report_FINAL.pdf.

[12] *See e.g.*, Monica Anderson, *Americans' Views of Technology Companies*, Pew Rsch. Ctr. (Apr. 29, 2024), https://www.pewresearch.org/internet/2024/04/29/americans-views-of-technology-companies-2/ ("93% of Republicans say it's likely that social media sites intentionally censor political viewpoints that they find objectionable").

Conservatives' antipathy toward Internet services boiled over in 2020 when Twitter "fact-checked" President Trump for the first time.[13] In retaliation, President Trump issued an (unsuccessful) executive order attempting to eviscerate Section 230.[14] After the insurrection of January 6, 2021, several Internet services terminated President Trump's accounts, including Twitter.[15]

The Florida and Texas social media censorship bills were driven by conservatives' anger at "Big Tech" and guided by Justice Clarence Thomas's non-precedential musings about Section 230 and free speech.[16] However, these were "messaging bills" intended to rally the base;[17] they were never meant as serious policy proposals. Their "messaging bill" statuses partially explain why they were poorly drafted, contained a smorgasbord of undertheorized policy ideas, included mockably unserious provisions,[18] and were supported with public declarations that admitted partisan and censorial motivations.[19]

[13] *See e.g.*, Katie Paul & Elizabeth Culliford, *Twitter Fact-Checks Trump Tweet for the First Time*, Reuters (May 26, 2020), https://www.reuters.com/article/us-twitter-trump/twitter-fact-checks-trump-tweet-for-the-first-time-idUSKBN232389/.

[14] Exec. Order No. 13925, 85 Fed. Reg. 34079 (May 28, 2020) (Preventing Online Censorship). President Biden quickly repealed that order. Exec. Order No. 14029, 86 Fed. Reg. 27025 (May 14, 2021) (Revocation of Certain Presidential Actions and Technical Amendment).

[15] *See, e.g.*, Sara Fischer & Ashley Gold, *All the Platforms That Have Banned or Restricted Trump So Far*, Axios (Jan. 11, 2021), https://www.axios.com/2021/01/09/platforms-social-media-ban-restrict-trump.

[16] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13 (2020) (Thomas, J., respecting the denial of certiorari); Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring); Doe v. Facebook, Inc., 142 S. Ct. 1087, 1088 (2022) (Thomas, J., respecting the denial of certiorari). The day after the *Moody* decision, Justice Thomas issued a fourth anti–Section 230 statement. Doe v. Snap, Inc., 144 S. Ct. 2493, 2494 (2024) (Thomas, J., dissenting from the denial of certiorari).

[17] *See, e.g.*, Aram Sinnreich et al., *Performative Media Policy: Section 230's Evolution from Regulatory Statute to Loyalty Oath*, 27 Comm. L. & Pol'y 167 (2023).

[18] As discussed below, Texas's law hobbled email spam filters. Florida's law initially exempted theme park operators. Dominick Reuter, *The New Florida Law That Fines Tech Platforms for Removing Politicians Has a Huge Loophole for Companies That Own Theme Parks in the State*, Bus. Insider (May 25, 2021), https://www.businessinsider.com/florida-censorship-law-loophole-for-theme-park-operators-2021-5. Florida subsequently repealed the theme park exemption to punish Disney for disagreeing with Gov. Ron DeSantis. S.B. 6-C (Fla. 2022).

[19] *See* Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2407 (2024) (enumerating some examples of the bill supporters' partisan rhetoric).

Normally, messaging bills languish in the legislative process. But with Republicans in control of the Florida and Texas executive and legislative branches,[20] these messaging bills passed.

B. Summaries of the Laws

This subpart selectively summarizes the laws, a lengthy chore because the laws were packed with policy ideas.

1. Florida S.B. 7072

Section 2 says social media platforms cannot "deplatform" known political candidates during their candidacy.[21]

Section 3 (which constitutes about half of the bill's length) creates an "antitrust violator vendor list" (a blocklist) of entities restricted from transacting with the state.[22] Social media platforms may be placed on the list if they have been accused or found guilty (civilly or criminally) of antitrust violations. NetChoice and CCIA did not challenge this provision in court. As of July 2024, Florida apparently has not named any entities to the blocklist.[23]

Section 4 regulates social media platforms' content moderation efforts in multiple ways.[24]

- (2)(a) requires social media platforms to publish their editorial criteria for content removal or downranking.
- (2)(b) requires social media platforms to apply those editorial criteria "in a consistent manner."
- (2)(c) requires social media platforms to notify users of their publication criteria before implementing them. Social media platforms cannot change their editorial criteria more than once every 30 days.

[20] "Trifecta" states have single-party control over the legislative and executive branches. Following the 2023 elections, 40 states were trifectas (23 Republican, 17 Democratic). *State Government Trifectas*, Ballotpedia, https://ballotpedia.org/State_government_trifectas (last visited July 30, 2024).

[21] Fla. Stat. § 106.072 (2021).

[22] Fla. Stat. § 287.137 (2022).

[23] *Antitrust Violator Vendor List*, Fla. Dep't of Mgmt. Servs., https://www.dms.myflorida.com/business_operations/state_purchasing/state_agency_resources/vendor_registration_and_vendor_lists/antitrust_violator_vendor_list (last visited July 30, 2024). On July 30, 2024, the page said, "There are currently no vendors on this list."

[24] Fla. Stat. § 501.2041 (2024).

- (2)(d) requires social media platforms to notify users when removing/downranking their content or deplatforming users (unless the content is obscene).
- (2)(e) requires social media platforms to provide viewership statistics to posting users.
- (2)(f) requires social media platforms to "[c]ategorize algorithms used for post-prioritization and shadow banning" and allow users to opt out of those algorithms "to allow sequential or chronological posts and content."
- (2)(g) requires social media platforms to annually notify users about those algorithms and reoffer the opt-out opportunity.
- (2)(h) restricts social media platforms from applying their "post-prioritization and shadow banning" algorithms to content from or about political candidates.
- (2)(i) requires social media platforms to give deplatformed users access to their content for at least 60 days.
- (2)(j) restricts social media platforms from removing or downranking content from journalistic enterprises based on their content (except for obscene content).
- (3)(c) requires that notices of removal/downranking include "a thorough rationale explaining the reason that the social media platform censored the user."
- (3)(d) requires that those notices also provide "a precise and thorough explanation of how the social media platform became aware of the censored content or material," including a thorough explanation of any algorithms the platform used to identify the content.
- (5) gives enforcement authority to the Florida Attorney General's office.
- (6) creates a private right of action—including potential statutory damages of up to $100,000, punitive damages, injunctive relief, and attorneys' fees—for alleged violations of the provisions requiring consistent content moderation and user notifications about content removal/downranking.
- (7) characterizes out-of-state social media platforms as doing business in Florida if they make any content moderation decisions affecting Florida users or Florida political candidates.
- (8) allows the Florida Attorney General's office to subpoena "any algorithm used by a social media platform related to any alleged violation."

2. Texas H.B. 20

Sections 120.051–120.053 impose multiple disclosure obligations regarding social media platforms' editorial practices. Social media platforms must publish an "acceptable use policy" that conforms to statutory specifications. They must also publish numerous very detailed transparency reports about their editorial operations and decisions.

Sections 120.101–120.102 require social media platforms to provide users with an easy way to submit complaints about other users' content. The platforms then must "evaluate the legality of the content or activity" within 48 hours of receiving a user complaint.

Sections 120.103–120.104 impose several "procedural due process" obligations on social media platforms when they remove user content for violating their acceptable use policies (with limited exceptions). Platforms must notify the user of the removal; provide an explanation of the removal decision; allow the user to appeal the removal decision (in some cases, within 14 days); and notify appealing users of the appeals decision. If the platform reverses the removal decision, it must explain the reversal.

Section 120.151 authorizes the Texas Attorney General's office to seek injunctions and enforcement costs.

Section 321.054 restricts an electronic mail service provider (such as Gmail) from "intentionally imped[ing] the transmission" of email except for (1) commercial spam if it "provides a process for the prompt, good faith resolution of a dispute" by the sender, and (2) other email if it "has a good faith, reasonable belief that the message contains malicious computer code, obscene material, material depicting sexual conduct, or material that violates other law." This provision includes a private right of action with statutory damages of the lesser of $10 per impeded email or $25,000 per day of impeded email. NetChoice and CCIA did not challenge this provision in court, but I am not aware of any enforcement attempts to date.

Sections 143A.002–143A.008 restrict social media platforms from "censoring" (a defined term) "a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state," whether the viewpoints are expressed online or off. Users cannot waive this

protection contractually. The provisions extend to any user who "shares or receives expression," and to "expression that is shared or received," in Texas. The anti-"censoring" provisions have several statutory exclusions, including exceptions for expression that

- "is the subject of a referral or request from an organization with the purpose of preventing the sexual exploitation of children and protecting survivors of sexual abuse from ongoing harassment;"
- "directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge;" or
- "is unlawful expression."

The anti-"censoring" provisions provide a private right of action for declarative relief (plus enforcement costs) and injunctive relief. The court must enforce injunction violations using "all lawful measures to secure immediate compliance with the order, including daily penalties sufficient to secure immediate compliance." The Texas Attorney General's office can seek injunctions and enforcement costs.

Although the Florida law was enacted first, the Texas law didn't appear to copy verbiage from the Florida law. Still, the laws share some common themes. Both laws override platforms' content moderation discretion (e.g., Florida requires "consistent" moderation, Texas requires viewpoint-neutral moderation). Both laws require platforms to explain content moderation actions to users. And both laws authorize enforcement via private rights of action. However, the laws also have significant differences. For example, Florida created the antitrust blocklist and prioritized journalists' and politicians' content; while Texas banned email filtering, compelled a wider range of editorial transparency, and created appellate rights for content moderation decisions.

C. Court Proceedings Leading up to the Supreme Court's Review

Two industry trade associations, NetChoice and CCIA, challenged both laws (with some exceptions) in federal court. Both district court judges preliminarily enjoined enforcement of the challenged provisions.[25]

[25] NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082 (N.D. Fla. 2021); NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092 (W.D. Tex. 2021).

On appeal, the Eleventh Circuit upheld most of the injunction against Florida's law, except with respect to certain disclosure obligations that qualified for less stringent review under the Supreme Court's *Zauderer* precedent.[26] The Eleventh Circuit panel summarized its conclusions with this chart:[27]

Provision	**Fla. Stat. §**	**Likely Constitutionality**	**Disposition**
Candidate deplatforming	106.072(2)	Unconstitutional	Affirm
Posts by/about candidates	501.2041(2)(h)	Unconstitutional	Affirm
"Journalistic enterprises"	501.2041(2)(j)	Unconstitutional	Affirm
Consistency	501.2041(2)(b)	Unconstitutional	Affirm
30-day restriction	501.2041(2)(c)	Unconstitutional	Affirm
User opt-out	501.2041(2)(f),(g)	Unconstitutional	Affirm
Explanations (per decision)	501.2041(2)(d)	Unconstitutional	Affirm
Standards	501.2041(2)(a)	Constitutional	Vacate
Rule changes	501.2041(2)(c)	Constitutional	Vacate
User view counts	501.2041(2)(e)	Constitutional	Vacate
Candidate "free advertising"	106.072(4)	Constitutional	Vacate
User-data access	501.2041(2)(i)	Constitutional	Vacate

Both sides cross-appealed the Eleventh Circuit opinion to the Supreme Court.

[26] Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626 (1985).

[27] NetChoice, LLC v. Att'y Gen. of Fla., 34 F.4th 1196 (11th Cir. 2022).

With respect to the Texas law, the Fifth Circuit initially lifted the district court's injunction without issuing an opinion.[28] The challengers made an emergency appeal to the Supreme Court.[29] The Supreme Court (voting 5–4) restored the injunction pending the Fifth Circuit's opinion.[30] Justice Samuel Alito and two other Justices dissented and said the case's legal questions raised "issues of great importance that will plainly merit this Court's review."[31]

A few months later, the Fifth Circuit issued its decision lifting the injunction.[32] Judge Andrew Oldham wrote the lead opinion, with which Judge Edith Jones mostly concurred. Judge Leslie Southwick concurred with the court's decision to lift the injunction on the mandatory transparency obligations, but he dissented on the rest. Judge Oldham's opinion expressly rejected the Eleventh Circuit's prior decision: "The Platforms urge us to follow the Eleventh Circuit's *NetChoice* opinion. We will not."[33] The challengers again appealed the case to the Supreme Court.

Although it seemed certain that the Supreme Court would accept both cases, the Court invited the Solicitor General's views about granting certiorari. This move delayed the cases from the 2022–2023 Term to the 2023–2024 Term. The Solicitor General recommended narrowing the Questions Presented to "1. Whether the laws' content-moderation restrictions comply with the First Amendment [and] 2. Whether the laws' individualized-explanation

[28] NetChoice, LLC v. Paxton, No. 21-51178, 2022 U.S. App. LEXIS 13434 (5th Cir. May 11, 2022) (order granting motion to stay preliminary injunction), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3669&context=historical. The Fifth Circuit ironically upheld a law requiring platforms to provide individualized explanations for their decisions—without providing an individualized explanation for its decision.

[29] Emergency appeals like this are sometimes called the Supreme Court's "shadow docket."

[30] NetChoice, LLC v. Paxton, 142 S. Ct. 1715 (2022).

[31] *Id*. at 1716 (Alito, J., dissenting from grant of application to vacate stay).

[32] NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022).

[33] *Id.* at 488.

requirements comply with the First Amendment."[34] The Supreme Court accepted this recommendation and granted certiorari for both cases.

II. The Supreme Court Decision

On July 1, 2024 (the last day of its 2023–2024 Term), the Supreme Court issued its decision in *Moody v. NetChoice*,[35] which also resolved the *NetChoice v. Paxton* appeal. The Justices unanimously agreed to vacate the Fifth and Eleventh Circuit opinions and remand the cases back to the lower courts for reexamination of the facial First Amendment challenges.

The Justices' unanimity was only superficial. The Justices wrote five opinions totaling 96 pages and nearly 28,000 words. Justice Kagan wrote the majority opinion on behalf of herself and four other Justices (John Roberts, Sonia Sotomayor, Brett Kavanaugh, and Amy Coney Barrett). Justice Ketanji Brown Jackson joined Parts I, II, and III-A of Justice Kagan's opinion. Justices Barrett and Jackson wrote concurrences that qualified their support for Justice Kagan's opinion (Justice Jackson's concurrence was partially in the judgment). Justice Alito wrote an opinion concurring in the judgment that was joined by Justices Thomas and Neil Gorsuch. According to CNN reporter Joan Biskupic, Justice Alito was originally slated to write a majority opinion, but he lost the votes of Justices Barrett and Jackson.[36] Justice Thomas wrote his own concurrence in the judgment. In total, six Justices supported First Amendment protection for content moderation and three Justices disagreed.

[34] Brief for the United States as Amicus Curiae, Moody v. NetChoice, LLC, NetChoice, LLC v. Moody, & NetChoice, LLC v. Paxton, 144 S. Ct. 2383 (2024) (Nos. 22-277, 22-393 & 22-555) (on petitions for writs of certiorari), https://www.supremecourt.gov/DocketPDF/22/22-277/275249/20230814145135723_NetChoice%20Invitation%20Brief%208.9%20—%20For%20Final.pdf.

[35] Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

[36] Joan Biskupic, *Exclusive: How Samuel Alito Got Canceled from the Supreme Court Social Media Majority*, CNN (July 31, 2024), https://www.cnn.com/2024/07/31/politics/samuel-alito-supreme-court-netchoice-social-media-biskupic/index.html.

A. Justice Kagan's Majority Opinion

Beyond vacating the lower court rulings and remanding the cases for further consideration, the majority opinion accomplished four major things. First, it specified how facial constitutional challenges should be reviewed. Second, it stated that social media platforms' content moderation decisions qualify for First Amendment protection. Third, it indicated that the Florida and Texas laws probably violate the First Amendment. Fourth, it reviewed and distinguished several key speech-related precedents. A closer look at these four points, as well as a brief discussion of dicta, follows:

1. The opinion specified the review standard for facial First Amendment challenges

   The majority said that the Fifth and Eleventh Circuits did not conduct their facial challenge reviews properly. A facial First Amendment challenger must show that "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[37] On remand, the courts "must determine a law's full set of applications, evaluate which are constitutional and which are not, and compare the one to the other."[38] The majority provided a two-step process:

   Step 1: The courts must "assess the state laws' scope. What activities, by what actors, do the laws prohibit or otherwise regulate?"[39]

   Step 2: The courts must "decide which of the laws' applications violate the First Amendment, and [] measure them against the rest. For the content-moderation provisions, that means asking, as to every covered platform or function, whether there is an intrusion on protected editorial discretion. And for the individualized-explanation provisions, it means asking, again as to each thing covered, whether the required disclosures unduly burden expression. . . . [T]he courts below must explore the laws' full range of applications—the

[37] Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 615 (2021).

[38] *Moody*, 144 S. Ct. at 2394.

[39] *Id.* at 2398.

constitutionally impermissible and permissible both—and compare the two sets."[40]

Thus, on remand, the lower courts will need to consider how dozens of statutory provisions could apply to dozens of potentially regulated entities that each have multiple communication modalities—a daunting multidimensional project for all involved. As the majority said, "NetChoice chose to litigate these cases as facial challenges, and that decision comes at a cost."[41]

2. Content moderation received First Amendment protection

The Florida and Texas laws overrode the editorial and publication policies and decisions of social media platforms. The majority clearly and emphatically rejected this legislative objective. The majority stated, "To the extent that social-media platforms create expressive products, they receive the First Amendment's protection."[42] The majority then explained that social media platforms' content moderation, including algorithmic presentations of content, cause the outputs to be "expressive products": "In constructing certain feeds, those platforms make choices about what third-party speech to display and how to display it. They include and exclude, organize and prioritize—and in making millions of those decisions each day, produce their own distinctive compilations of expression."[43]

Later, the majority wrote, "That Facebook and YouTube convey a mass of messages does not license Texas to prohibit them from deleting posts with, say, 'hate speech' based on 'sexual orientation.' It is as much an editorial choice to convey all speech except in select categories as to convey only speech within them."[44]

The majority analogized the expressive products created by social media platforms to the work of "traditional publishers

[40] *Id.*

[41] *Id.* at 2398.

[42] *Id.* at 2406.

[43] *Id.* The majority called social media platforms "compilers" rather than "publishers."

[44] *Id*. Justice Jackson did not join this part of the opinion.

and editors."[45] In both cases, "government efforts to alter an edited compilation of third-party expression are subject to judicial review for compliance with the First Amendment."[46]

The majority also wrote that "social-media platforms do not lose their First Amendment protection just because no one will wrongly attribute to them the views in an individual post."[47] The opinion explains that the audience may attribute to the platform the overall viewpoints expressed in its publicly accessible corpus;[48] and the First Amendment applies even if the audience doesn't misattribute anything.

However, not every electronic communications modality will receive favorable levels of constitutional protection. For example, the majority suggested that "transmitting direct messages," such as email or chat, might be treated differently from "[c]urating a feed."[49] This implies that private messaging services might receive less First Amendment protection than other content disseminators. However, this perceived distinction may fade once the Court understands how private messaging services undertake extensive and socially important curatorial and trust-and-safety efforts (such as sorting incoming email into folders and deploying anti-spam filters).

3. The Florida and Texas laws likely restrict First Amendment–protected content moderation

The majority opinion said,

> [T]he current record indicates that the Texas law does regulate speech when applied in the way the parties focused on below—when applied, that is, to prevent Facebook (or YouTube) from using its content-moderation

[45] *Id.* at 2393. Justice Kagan confirmed that platforms' "house rules" act as editorial policies. *Id*. at 2406 ("When the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices."). *See generally* Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. Free Speech L. 191 (2021).

[46] *Moody*, 144 S. Ct. at 2393.

[47] *Id.* at 2406. Justice Jackson did not join this part of the opinion.

[48] "[P]latforms may indeed 'own' the overall speech environment." *Id.*

[49] *Id.* at 2398.

> standards to remove, alter, organize, prioritize, or disclaim posts in its News Feed (or homepage). The law then prevents exactly the kind of editorial judgments this Court has previously held to receive First Amendment protection. It prevents a platform from compiling the third-party speech it wants in the way it wants, and thus from offering the expressive product that most reflects its own views and priorities. Still more, the law—again, in that specific application—is unlikely to withstand First Amendment scrutiny.[50]

Later, the majority wrote, "Texas's law profoundly alters the platforms' choices about the views they will, and will not, convey. And we have time and again held that type of regulation to interfere with protected speech."[51]

Florida and Texas cannot justify their efforts based on a purported goal to "de-bias" the media: "[I]t is no job for government to decide what counts as the right balance of private expression—to 'un-bias' what it thinks biased, rather than to leave such judgments to speakers and their audiences. That principle works for social-media platforms as it does for others."[52]

Later still, the majority added:

> States (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views. That is, indeed, a fundamental aim of the First Amendment. But the way the First Amendment achieves that goal is by preventing *the government* from "tilt[ing] public debate in a preferred direction." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578–579 (2011). It is not by licensing the government to stop *private actors* from speaking as they wish and preferring some views over

[50] *Id.* at 2394.

[51] *Id.* at 2405. Justice Jackson did not join this part of the opinion.

[52] *Id.* at 2394. Justice Barrett reinforced that the First Amendment protects any political bias by social media platforms: "Assume that human beings decide to remove posts promoting a particular political candidate or advocating some position on a public-health issue. If they create an algorithm to help them identify and delete that content, the First Amendment protects their exercise of editorial judgment—even if the algorithm does most of the deleting without a person in the loop." *Id.* at 2410 (Barrett, J., concurring).

> others. . . . [I]t cannot prohibit speech to improve or better balance the speech market. On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana.[53]

The majority didn't decide whether strict or intermediate scrutiny applies to Texas' law; it suggested that the law would not pass either.[54] The majority wrote that Texas sought "to correct the mix of speech that the major social-media platforms present,"[55] but "the interest Texas has asserted cannot carry the day: It is very much related to the suppression of free expression, and it is not valid, let alone substantial."[56] Thus, "Texas does not like the way those platforms are selecting and moderating content, and wants them to create a different expressive product, communicating different values and priorities. But under the First Amendment, that is a preference Texas may not impose."[57]

4. The opinion cleaned up precedent

The majority reviewed seven First Amendment precedents stretching back over a half-century: *Miami Herald*,[58] *PG&E*,[59] the two *Turner* rulings,[60] *Hurley*,[61] *PruneYard*,[62] and *Rumsfeld*.[63] The majority distilled three lessons from these precedents:

First, "the First Amendment offers protection when an entity engaging in expressive activity, including compiling and curating others' speech, is directed to accommodate

[53] *Id.* at 2407 (majority opinion). Justice Jackson did not join this part of the opinion.

[54] *Id.* Justice Jackson did not join this part of the opinion.

[55] *Id.*

[56] *Id.* If the interest is invalid, the law would not survive rational basis review.

[57] *Id.* at 2408. Justice Jackson did not join this part of the opinion.

[58] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

[59] Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1 (1986).

[60] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).

[61] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557 (1995).

[62] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

[63] Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47 (2006).

messages it would prefer to exclude. . . . And that is as true when the content comes from third parties as when it does not. . . . When the government interferes with such editorial choices—say, by ordering the excluded to be included—it alters the content of the compilation."[64]

Second, the first principle applies even if "a compiler includes most items and excludes just a few."[65]

Third, the "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."[66]

At times, pro-regulatory advocates have cherrypicked parts of these precedents in attempts to validate government censorship of social media platforms. The principles set out in the majority opinion should end those efforts.

5. Does the majority opinion's dicta matter?

To vacate the Fifth and Eleventh Circuit opinions, the majority opinion could have simply explained why the lower courts' analyses of the facial constitutional challenges were incorrect and stopped there. Because the opinion goes further, the extra discussion becomes dicta.

Critics will use that dicta status to marginalize the majority opinion's significance. It won't work.[67] The majority opinion is a major First Amendment precedent.[68]

[64] *Moody*, 144 S. Ct. at 2401–02.

[65] *Id.* at 2402.

[66] *Id.*

[67] *See* Cathy Gellis, *In the* NetChoice *Cases, Alito and His Buddies Are Wrong, but Even if They Were Right It May Not Matter, and That's Largely Good News*, Techdirt (July 1, 2024), https://www.techdirt.com/2024/07/01/in-the-netchoice-cases-alito-and-his-buddies-are-wrong-but-even-if-they-were-right-it-may-not-matter-and-thats-largely-good-news/.

[68] Professor Noah Feldman called the decision a "blockbuster" and "the *Brown v. Board of Education* of the emerging field of social media law." Noah Feldman, *Social Media Ruling Is a Free-Speech Landmark: Noah Feldman*, Bloomberg (July 1, 2024), https://news.bloomberglaw.com/us-law-week/social-media-ruling-is-a-free-speech-landmark-noah-feldman.

> It demonstrates that six Justices, spanning the Court's "conservative" and "liberal" wings, will not tolerate censorial messaging bills. It also provides essential guidance on a fundamental topic—does the First Amendment protect content moderation?—that's currently at the nexus of substantial legislative activity. After reading the majority opinion, many legislators ought to rethink their censorial agendas toward Internet services. Otherwise, those laws will be invalidated.

B. Justice Barrett's Concurrence

Justice Barrett's opinion makes three key points. First, emphasizing the majority's skepticism of facial constitutional challenges, she suggested that facial review may not be available here: "[D]ealing with a broad swath of varied platforms and functions in a facial challenge strikes me as a daunting, if not impossible, task. . . . A facial challenge to either of these laws likely forces a court to bite off more than it can chew."[69]

Second, Justice Barrett spun some hypotheticals involving algorithms:

> [W]hat if a platform's algorithm just presents automatically to each user whatever the algorithm thinks the user will like—e.g., content similar to posts with which the user previously engaged? The First Amendment implications of the Florida and Texas laws might be different for that kind of algorithm. And what about [artificial intelligence (AI)], which is rapidly evolving? What if a platform's owners hand the reins to an AI tool and ask it simply to remove "hateful" content? If the AI relies on large language models to determine what is "hateful" and should be removed, has a human being with First Amendment rights made an inherently expressive choice . . . ? In other words, technology may attenuate the connection between content-moderation actions (e.g., removing posts) and human beings' constitutionally protected right to "decide for [themselves] the ideas and beliefs deserving of expression, consideration, and adherence."[70]

[69] *Moody*, 144 S. Ct. at 2409–11. (Barrett, J., concurring).

[70] *Id.* at 2010. (internal quotation mark omitted).

These purported distinctions don't make sense. In her examples, publishers make difficult and nuanced decisions about what content is appropriate for their audiences. For example, personalized algorithms necessarily reflect a service's editorial judgment (1) that the chosen algorithm will better cater to its audience than other algorithms, and (2) about how to define similarity, which is not a binary assessment at all.[71] Similarly, in her AI example, some human editor chose to (1) deprioritize hateful content, (2) define what "hateful" content means, an exceedingly difficult task filled with judgment calls,[72] and (3) pick a method to identify and exclude "hateful" content consistent with its editorial agenda. The First Amendment shouldn't care what technological means the publisher chooses to implement these editorial goals.

Third, Justice Barrett gave another hypothetical:

> Corporations, which are composed of human beings with First Amendment rights, possess First Amendment rights themselves. . . . But foreign persons and corporations located abroad do not. *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 591 U.S. 430, 433–436 (2020). So a social-media platform's foreign ownership and control over its content-moderation decisions might affect whether laws overriding those decisions trigger First Amendment scrutiny. What if the platform's corporate leadership abroad makes the policy decisions about the viewpoints and content the platform will disseminate? Would it matter that the corporation employs Americans to develop and implement content-moderation algorithms if they do so at the direction of foreign executives?[73]

Justice Barrett is clearly anticipating the Court's review of Congress's efforts to ban TikTok.[74] Three constitutional challenges are

[71] Content-ordering algorithms are *never* neutral because they inherently prioritize certain attributes over others, and deciding which attributes to preference is an editorial decision. *See* Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 Yale J.L. & Tech. 188 (Spring 2006).

[72] *See, e.g.*, *Hate Speech*, Stan. Encyc. of Phil. (Jan. 25, 2022), https://plato.stanford.edu/entries/hate-speech/ ("the concept of hate speech" raises "many difficult questions").

[73] *Moody*, 144 S. Ct. at 2410 (Barrett, J., concurring) (citations omitted).

[74] Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50 (2024).

pending before the D.C. Circuit on their way to the Supreme Court.[75] Barrett left open the possibility of distinguishing the TikTok ban from this ruling. However, the "foreign persons and corporations located abroad" exclusion may not apply to TikTok given its extensive U.S. presence.[76]

C. Justice Jackson's Concurrence in Part/Concurrence in the Judgment

Justice Jackson reinforced the majority's concerns about facial challenges: "[C]ourts must . . . carefully parse not only what entities are regulated, but how the regulated activities actually function before deciding if the activity in question constitutes expression and therefore comes within the First Amendment's ambit."[77]

D. Justice Alito's Concurrence in the Judgment

Justice Alito's concurrence in the judgment[78] criticizes Justice Kagan's majority opinion extensively. Justice Alito called the majority's discussion of the First Amendment's application to content moderation "nonbinding dicta."[79] He wrote that the majority's description of the laws and the litigation "leaves much to be desired," that it provides an "incomplete" summary of the Court's precedents,

[75] TikTok, Inc. v. Garland, No. 24-1113 (D.C. Cir. complaint filed May 7, 2024); Firebaugh v. Garland, No. 24-1130 (D.C. Cir. complaint filed May 14, 2024); BASED Politics Inc. v. Garland, No. 24-1183 (D.C. Cir. complaint filed June 6, 2024).

[76] *See* Bridges v. Wixon, 326 U.S. 135, 148 (1945) ("Freedom of speech and of press is accorded aliens residing in this country."); Free Speech Coal., Inc. v. Colmenero, 689 F. Supp. 3d 373 (W.D. Tex. 2023), *rev'd,* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024), *cert. granted*, 2024 WL 3259690 (U.S. July 2, 2024) ("[T]he does not read *AOSI* to abrogate First Amendment protection for speech occurring in the United States and directed at the United States but hosted by foreign entities[.]").

[77] *Moody*, 144 S. Ct. at 2411–12 (Jackson, J., concurring in part and concurring in the judgment); *accord* Eric Schlachter, *Cyberspace, the Free Market, and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 Hastings Commc'ns & Ent. L.J. 87 (1993).

[78] A reminder that Justice Alito initially drafted a majority opinion. Biskupic, *supra* note 36. For additional critiques of Justice Alito's concurrence, *see* Eric Goldman, *Everything You Wanted to Know about the* Moody v. NetChoice *Supreme Court Opinion*, Tech. & Mktg. L. Blog (July 25, 2024), https://blog.ericgoldman.org/archives/2024/07/everything-you-wanted-to-know-about-the-moody-v-netchoice-supreme-court-opinion.htm.

[79] *Moody*, 144 S. Ct. at 2422 (Alito, J., concurring in the judgment).

that its discussions about Facebook's newsfeed and YouTube's home page are "unnecessary and unjustified," that it "inexplicably singles out a few provisions and a couple of platforms for special treatment," and that it "unreflectively assumes the truth of NetChoice's unsupported assertion" that social media platforms can be analogized to newspapers.[80] He added that the majority opinion "rests on wholly conclusory assumptions that lack record support."[81]

Justice Alito's opinion focuses on whether social media platforms warrant First Amendment protection for their "compilation" decisions. He articulated three prerequisites for such protection: (1) the entity must "exercise 'editorial discretion in the selection and presentation' of the content it hosts"; (2) "the host must use the compilation of speech to express 'some sort of collective point'—even if only at a fairly abstract level"; and (3) "a compiler must show that its 'own message [is] affected by the speech it [is] forced to accommodate.'"[82]

Applying that test, Justice Alito wrote that NetChoice did not adequately establish "*which entities* the statutes cover," "what kinds of content appear on all the regulated platforms," and "how websites moderate content."[83]

E. Justice Thomas's Concurrence in the Judgment

Justice Thomas's concurrence in the judgment revisits several of his longstanding pet topics, with 18 self-citations to his prior opinions. Consistent with his anti–Section 230 statements from a few years ago, Justice Thomas again evangelized a common carriage regulatory approach to social media platforms.[84] The majority opinion never expressly engages with this argument or mentions the terms "common carrier" and "common carriage." Nevertheless, because

[80] *Id*.

[81] *Id.* at 2438.

[82] *Id.* at 2431–32.

[83] *Id.* at 2433–36.

[84] Justice Thomas bizarrely claimed that, in *Moody*, "the Eleventh Circuit appropriately strove to apply the common-carrier doctrine." *Moody*, 144 S. Ct. at 2413 (Thomas, J., concurring in the judgment). The Eleventh Circuit actually said that "social-media platforms are not—in the nature of things, so to speak—common carriers." NetChoice, LLC v. Att'y Gen. of Fla., 34 F.4th 1196, 1220 (11th Cir. 2022).

social media platforms are analogous to publishers, the majority opinion clearly rejects arguments that social media platforms can be regulated like common carriers.[85]

F. What's Next?

On remand, the challengers must decide whether to continue with their facial challenges despite the Supreme Court's strong cautions. However, as-applied challenges pose several problems. Most important, the challengers may run into pre-enforcement standing problems. In the *Murthy* case,[86] also issued this Term, a Court majority said, "plaintiffs must demonstrate a substantial risk that, in the near future, they will suffer an injury that is traceable to a Government defendant and redressable by the injunction they seek." Will challengers of the Florida and Texas laws have the requisite evidence of that "substantial risk" before the laws are enforced? Or must the challengers defy the law and wait to make their constitutional challenges after enforcement actions have been brought?

It's unclear how the Supreme Court's vacatur of the appellate opinions affected the preliminary injunctions issued by the district courts. If injunctions are not in place, the Texas and Florida Attorney General's offices could bring enforcement actions. Given the majority opinion's clear skepticism of the laws' constitutionality, that would be highly unwise. But wisdom has always been in short supply in defending the laws. Also, a few individual litigants have already brought private claims to enforce the laws, even while the injunctions were in place. The vacatur of the appellate opinions might encourage more ill-advised private suits.

In the district courts, the challengers raised a range of objections to the laws, of which the First Amendment was just one. The Texas court blocked the Texas law solely on First Amendment grounds.[87] The Florida court blocked the Florida law on both First Amendment

[85] *See e.g.*, *Moody*, 144 S. Ct. at 2399 (("[O]rdering a party to provide a forum for someone else's views implicates the First Amendment [if] the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt[.]"). Feldman says the majority opinion makes common carriage analogies "passé." Feldman, *supra* note 68.

[86] Murthy v. Missouri, 144 S. Ct. 1972, 1981 (2024).

[87] NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092 (W.D. Tex. 2021).

and Section 230 grounds,[88] though the Eleventh Circuit didn't affirm the Section 230 discussion. The challengers could ask the district courts to reconsider their objections beyond the First Amendment.

Regardless of the further proceedings, Florida and Texas at any time can enforce the unchallenged parts of their laws (including the antitrust blocklist in Florida and the email filtering ban in Texas), but doing so would likely trigger as-applied constitutional challenges.

III. Some Additional Implications

This part highlights four implications of the decision: how it interplays with the venerable *Reno v. ACLU* precedent; some consequences for First Amendment challenges; the unresolved questions about the laws' compelled editorial transparency; and the need for ongoing Supreme Court supervision of the Fifth Circuit.

A. The Silent Shadow of Reno v. ACLU

In 1997, in *Reno v. ACLU*,[89] the Supreme Court struck down the Communications Decency Act,[90] a law that required websites to prevent minors from accessing pornography. That decision called the Internet "a unique and wholly new medium of worldwide human communication."[91] As a result, unlike the broadcasting and telephony media, the Supreme Court's "cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to" the Internet.[92]

Although the *Reno* decision has been the Court's flagship Internet First Amendment case for the past quarter-century, it got only a single citation across the five *Moody* opinions.[93] Nevertheless, the majority opinion quietly pays homage to the *Reno* precedent.

Like *Reno*, the majority opinion does not downgrade the level of First Amendment scrutiny applied to social media platforms. The majority rejected (sometimes expressly, sometimes implicitly)

[88] NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082 (N.D. Fla. 2021).

[89] Reno v. Am. Civ. Liberties Union, 521 U.S. 844 (1997).

[90] Communications Decency Act of 1996, Pub. L. No. 104-104 tit. V, 110 Stat. 133 (Feb. 8, 1996) (codified at 47 U.S.C. § 223).

[91] *Reno*, 521 U.S. at 845.

[92] *Id.* at 870.

[93] *See Moody*, 144 S. Ct. at 2393.

analogies between social media platforms and other entities that sometimes receive reduced First Amendment protection, including common carriers, shopping mall owners, law schools, cable broadcasters, and private actors who become state actors.

Instead, the majority opinion accepts the analogy between social media platforms and traditional offline publishers like newspapers. This analogy holds despite the unique attributes of social media publishers compared with other publishers. These unique attributes include that social media publishers have a high volume of published content;[94] publish mostly third-party content rather than first-party content;[95] decline to publish only a small percentage of the content submitted to them;[96] primarily exercise editorial discretion through post-publication content moderation rather than pre-publication review;[97] use automated algorithms to organize and present content;[98] and don't necessarily have consumers attribute third-party content to them.[99]

Like *Reno*, the majority opinion simultaneously embraces and rejects Internet exceptionalism. The majority rejected the exceptionalist arguments seeking to treat social media platforms as something less publisher-like than traditional publishers,[100] such as Justice

[94] *Id.* (social media platforms make millions of decisions per day).

[95] *Id.* at 2402 (the principle that content selection and presentation is an expressive activity "is as true when the content comes from third parties as when it does not").

[96] *Id.* at 2402, 2405 (it doesn't matter if "a compiler includes most items and excludes just a few. . . . That those platforms happily convey the lion's share of posts submitted to them makes no significant First Amendment difference"). Justice Kagan added, "The individual messages may originate with third parties, but the larger offering is the platform's. It is the product of a wealth of choices about whether—and, if so, how—to convey posts having a certain content or viewpoint. Those choices rest on a set of beliefs about which messages are appropriate and which are not (or which are more appropriate and which less so). And in the aggregate they give the feed a particular expressive quality." *Id.* at 2405.

[97] The majority opinion repeatedly treats content "removal" as an editorial function.

[98] *Id.* at 2393 ("In constructing certain feeds, those platforms make choices about what third-party speech to display and how to display it.").

[99] *Id.* at 2406 ("[S]ocial-media platforms do not lose their First Amendment protection just because no one will wrongly attribute to them the views in an individual post.").

[100] *Id.* ("[L]aws curtailing [publishers' and editors'] editorial choices must meet the First Amendment's requirements. The principle does not change because the curated compilation has gone from the physical to the virtual world.").

Thomas's common carriage analogy. At the same time, like the *Reno* court's valorization of Internet publication, the majority reiterated that Internet services deserve an unqualified level of constitutional protection, unlike broadcasting or telephony. In that way, *Reno*'s spirit pervades the majority opinion.

B. The Future of First Amendment Challenges to Government Censorship

The *Moody* case will require challengers to spend more money and do more upfront case preparation to bring facial First Amendment challenges. Some censorial laws won't be prospectively challenged simply because of those burdens. Regulators can also intentionally overstuff policy ideas into a censorial law as another way of discouraging facial challenge.[101]

With respect to as-applied First Amendment challenges, Article III standing often plays a critical gatekeeping role, as evidenced by *Murthy*'s dismissal of the challengers' suit.[102] Together, the *Moody* and *Murthy* cases are a one-two punch for challengers of government censorship. *Moody* drives challengers away from facial challenges and toward as-applied challenges, but *Murthy* highlights potential standing difficulties with as-applied challenges.

C. Can Governments Compel Editorial Transparency?

The Florida and Texas social media censorship laws made a historically unprecedented move of compelling substantial affirmative disclosures from publishers about their editorial operations

[101] David Greene, *Platforms Have First Amendment Right to Curate Speech, As We've Long Argued, Supreme Court Said, but Sends Laws Back to Lower Court to Decide If That Applies to Other Functions Like Messaging*, EFF (July 14, 2024), https://www.eff.org/deeplinks/2024/07/platforms-have-first-amendment-right-curate-speech-weve-long-argued-supreme-1 ("This decision thus creates a perverse incentive for states to pass laws that by their language broadly cover a wide range of activities[.]").

Bounty-based private enforcement is another technique legislatures are intentionally using to thwart facial constitutional challenges. *See, e.g.*, Free Speech Coal., Inc. v. LeBlanc, 2023 WL 6464768 (E.D. La. Oct. 4, 2023).

[102] Murthy v. Missouri, 144 S. Ct. 1972 (2024).

and decisions.[103] Historically, legislatures have not demanded similar disclosures from traditional publishers. And that's for good reasons, including the obvious chilling effects of such laws.[104] Despite this novelty, the Fifth and Eleventh Circuits agreed that the relaxed *Zauderer*[105] standards of constitutional review applied. Both courts held that many of the disclosure requirements survived constitutional review, except for the Eleventh Circuit's rejection of the individualized explanations obligation.

The Supreme Court granted review of the compelled individualized explanations disclosures, but its decision didn't invest much energy in the topic.[106] The majority instructed that on remand, the lower courts should ask "whether the required disclosures unduly burden expression."[107] In a footnote, the majority reinforced the point that individualized explanations "violate the First Amendment if they unduly burden expressive activity."[108] And the Court clarified that its "explanation of why Facebook and YouTube are engaged in expression when they make content-moderation choices in their main feeds should inform the courts' further consideration of that issue."[109]

[103] Brief of Amici Curiae Prof. Eric Goldman and TechFreedom in Support of Appellees and Affirmance, Volokh v. James, No. 23-356 (2d Cir. filed Sept. 25, 2023) ("Prior to the Internet, legislatures apparently never attempted to impose mandatory disclosure requirements like Section 394-ccc on publishers of newspapers, magazines, books, music, and other printed materials."). *See also* Brief of Professor Eric Goldman, *supra* note *. In addition, I published two articles on this topic: Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 Hastings L.J. 1203 (2022) [hereinafter Goldman, Hastings]; and Eric Goldman, Zauderer *and Compelled Editorial Transparency*, 108 Iowa L. Rev. Online 80 (2023) [hereinafter Goldman, Zauderer]. *See also* Daphne Keller, *Platform Transparency and the First Amendment*, 4 J. Free Speech L. 1 (2023), https://www.journaloffreespeechlaw.org/keller2.pdf.

[104] Goldman, Hastings, *supra* note 103. For example, "[t]here is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed." Herbert v. Lando, 441 U.S. 153, 174 (1979).

[105] Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626 (1985).

[106] The five opinions reference *Zauderer* by name a total of 16 times.

[107] *Moody*, 144 S. Ct. at 2398.

[108] *Id.*at 2399 n.3.

[109] *Id.*

This decision leaves open critical questions about the individualized explanations, *Zauderer*, and editorial transparency mandates more generally.

First, do the individualized explanations provisions qualify for relaxed *Zauderer* scrutiny, and if so, why?[110] Over nearly 40 years, the Supreme Court has upheld only two compelled commercial disclosure laws using *Zauderer*, both of which sought to prevent deceptive omissions in ad copy.[111] The majority implied that *Zauderer* applies but never explained why, even though individualized explanations are quite different from the only two laws that the Supreme Court has upheld using *Zauderer*. Perhaps *Moody* and *NIFLA*[112] imply that the *Zauderer* test applies to every type of compelled corporate speech.

Second, if *Zauderer* scrutiny applies, what factors will courts use to evaluate the individualized explanations provisions? In *Zauderer*, the Court said that a disclosure obligation would survive scrutiny if it (1) is not unjustified, (2) is not unduly burdensome, and (3) reasonably relates to preventing consumer deception.[113] In its brief discussion of *Zauderer*, the majority silently omitted the first and third considerations, implicitly leaving only a single-factor *Zauderer* evaluation of whether the disclosure obligations "unduly burden expressive activity." Did the majority permanently reduce the *Zauderer* evaluative factors from three to one without explaining why the stricken considerations no longer apply? Or will lower courts revert back to using all three evaluative factors as initially articulated in the *Zauderer* opinion?[114]

With respect to the Florida and Texas individualized explanations, the majority's truncated recapitulation of the *Zauderer* factors may not matter. The Eleventh Circuit has already concluded that Florida's

[110] Justice Alito said that because "these regulations provide for the disclosure of 'purely factual and uncontroversial information,' they must be reviewed under *Zauderer*'s framework." *Moody*, 144 S. Ct. at 2439 (Alito, J., concurring in the judgment). That incompletely enumerates *Zauderer*'s prerequisites and assumes without analysis or citations that the mandated disclosures are "purely factual" and "uncontroversial," but they really are not. *See* Goldman, Zauderer, *supra* note 103.

[111] Goldman, Zauderer, *supra* note 103.

[112] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755 (2018).

[113] *Zauderer*, 471 U.S. 626.

[114] The Supreme Court also garbled the *Zauderer* factors in *NIFLA*. *See* Goldman, Zauderer, *supra* note 103.

individual explanations provision is "particularly onerous."[115] As the court put it, the provision is also

> unduly burdensome and likely to chill platforms' protected speech. The targeted platforms remove millions of posts per day; YouTube alone removed more than a billion comments in a single quarter of 2021. For every one of these actions, the law requires a platform to provide written notice delivered within seven days, including a "thorough rationale" for the decision and a "precise and thorough explanation of how [it] became aware" of the material. This requirement not only imposes potentially significant implementation costs but also exposes platforms to massive liability. . . . Thus, a platform could be slapped with millions, or even billions, of dollars in statutory damages if a Florida court were to determine that it didn't provide sufficiently "thorough" explanations when removing posts. It is substantially likely that this massive potential liability is "unduly burdensome" and would "chill[] protected speech"—platforms' exercise of editorial judgment—such that § 501.2041(2)(d) violates platforms' First Amendment rights.[116]

The Supreme Court did not accept review of the challenge to Texas's detailed statistical and operational disclosures, and Florida's law did not have an analogous provision. However, Texas's additional disclosure requirements also pose serious threats to free speech.[117] They impose substantial operational burdens and costs, and they require services to make many judgment calls about how to classify the data. In any enforcement action, regulators can second-guess both those classification decisions and the underlying editorial decisions. And regulators will exercise their prosecutorial discretion to maximize their censorial or partisan goals.[118] For those reasons, mandatory statistical and operational disclosures also should be deemed to "unduly burden expression" and should fail accordingly.

Third, if the lower courts determine that other parts of the social media censorship laws violate the First Amendment, will that

[115] NetChoice, LLC v. Att'y Gen. of Fla., 34 F.4th 1196, 1203 (11th Cir. 2022).

[116] *Id.* at 1230–31.

[117] Goldman, Zauderer, *supra* note 103.

[118] *Id.*; Goldman, Hastings, *supra* note 103.

affect the constitutional analysis of the individualized explanations requirement? The majority wrote that social media platforms' engagement in expressive activities "should inform the courts' further consideration" of the *Zauderer* issue. This gives courts another basis to strike down the disclosure mandates.

The *Zauderer* issues understandably got overshadowed by the more blatant censorship components of the Florida and Texas laws, but the disclosure issues have critical implications for the First Amendment as well. Given their significance, the *Zauderer* issues deserve the Court's full attention when it sees these cases again.

D. The Fifth Circuit Has Gone Rogue

In the Supreme Court's 2023–2024 Term, the Fifth Circuit had an underwhelming record of three affirmances and seven vacaturs or reversals.[119] This low 30 percent batting average should surprise no one. The Fifth Circuit routinely disregards binding Supreme Court precedent and opinions from other circuits, causing jurisprudential chaos. Unless that changes, the Supreme Court's docket will be clogged with appeals from the Fifth Circuit for the foreseeable future.[120]

Judges Oldham and Jones ought to feel embarrassed by the Supreme Court's assessment of their work. The majority called their positions "wrong" at least four times.[121] As Justice Barrett succinctly put it, "the Eleventh Circuit's understanding of the First Amendment's protection of editorial discretion was generally correct; the Fifth Circuit's was not."[122] Indeed, the majority provided its First

[119] Supreme Court Cases, October Term 2023–2024, Ballotpedia, https://ballotpedia.org/Supreme_Court_cases,_October_term_2023-2024 (last visited July 30, 2024).

[120] The day after the Supreme Court issued the *Moody* opinion, it agreed to review another Fifth Circuit Internet Law case, *Free Speech Coalition v. Paxton*. In that case, the Fifth Circuit applied rational basis scrutiny to mandatory online age authentication by citing a 50-year-old opinion (*Ginsberg*), even though the Supreme Court had subsequently twice applied strict scrutiny to mandatory age authentication laws (*Reno v. ACLU* and *Ashcroft v. ACLU*) and expressly rejected the *Ginsberg* case's application to online age authentication (in *Reno*).

[121] *Moody*, 144 S. Ct. at 2399, 2403, 2406. Justice Kagan added, "Contrary to what the Fifth Circuit thought, the current record indicates that the Texas law does regulate speech when applied in the way the parties focused on below." *Id.* at 2394.

[122] *Id.* at 2409 (Barrett, J., concurring). Justice Jackson echoed, "the Eleventh Circuit at least fairly stated our First Amendment precedent, whereas the Fifth Circuit did not." *Id.* at 2411 (Jackson, J., concurring in part and concurring in the judgment).

Amendment dicta to help the Fifth Circuit do its job better.[123] Will that succeed? As the Magic 8 ball might respond, "Don't count on it."

The Fifth Circuit and the Supreme Court's Internet law "dialogue" is just beginning. The Court has already granted review of the challenge to Texas's age-authentication law, *Free Speech Coalition v. Paxton*. The legislatures in the Fifth Circuit's geographic territory will keep enacting censorial messaging bills. And the Fifth Circuit will keep analyzing constitutional challenges to those laws without regard for binding precedent.

Conclusion

We've entered a new phase of Internet law jurisprudence at the Supreme Court. After a long stretch where the Supreme Court took zero or one Internet law cases a year, this Term the Court took five[124]—and the count will continue to grow in future years as states pass more censorial laws that lead to court challenges. Justice Kagan once joked that the Justices "are not, like, the nine greatest experts on the internet,"[125] but they will need to become more Internet savvy to review the censorial Internet laws flooding their docket.

So far, Supreme Court review has worked out OK for the Internet. For example, in the 2022–2023 Term, *Twitter v. Taamneh*[126] was a significant win for Internet services, and *Gonzalez v. Google* didn't destroy Section 230.[127] In 2023–2024, *Moody* validated the services' First Amendment protection (though it made facial First Amendment challenges harder), and the *Murthy* case further acknowledged that Internet services have editorial discretion to deny government censorship requests.

[123] As the majority opinion says, "there has been enough litigation already to know that the Fifth Circuit, if it stayed the course, would get wrong at least one significant input into the facial analysis." *Id.* at 2409. Justice Kagan added that the need for additional guidance "is especially stark for the Fifth Circuit." *Id.* at 2399.

[124] Moody v. NetChoice LLC, 144 S. Ct. 2383 (2024) (including the *NetChoice v. Paxton* case combined with it); Murthy v. Missouri, 144 S. Ct. 1972 (2024); Lindke v. Freed, 601 U.S. 187 (2024); O'Connor-Ratcliff v. Garnier, 601 U.S. 205 (2024); Coinbase, Inc. v. Suski, 144 S. Ct. 1186 (2024) (involving an Internet industry defendant but focusing on contract and arbitration law).

[125] Transcript of Oral Argument at 46, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No. 20-1333).

[126] Twitter, Inc. v. Taamneh, 598 U.S. 471 (2023).

[127] Gonzalez v. Google LLC, 598 U.S. 617 (2023).

Nonetheless, many reasons to worry about the future of Internet law at the Supreme Court remain. First, Justices Thomas, Alito, and Gorsuch subscribe to a radically different vision of Internet free speech compared with the other Justices, and those three Justices seemingly have little concern about *stare decisis*. If this bloc ever assembles a majority, the outcomes could be shocking.[128]

Second, the sheer volume of Internet law cases on future Supreme Court dockets poses its own risk. It takes only one ruling going sideways to dramatically affect the Internet. As the Court hears more such cases, the odds increase that a case *will* go sideways. In effect, the Internet must bat 1.000 across all these cases to preserve its status quo.

Finally, censorship-minded legislators will exploit any ambiguous wording or hypothetical musings in the Court's opinions, even if the case outcome favors the Internet overall. For example, Justice Barrett's *Moody* concurrence expressed caveats regarding foreign ownership, highly personalized algorithms, and AI. State legislators may use her musings as inspiration for new censorial policy proposals. Even if the Supreme Court ultimately strikes down those new efforts, the laws will cause chaos (and impose huge costs on challengers) in the interim.

Both Democrats and Republicans favor censorial restrictions of the Internet; it's a rare topic that brings together legislators across the aisle. This leaves the Supreme Court as the last line of defense for Internet freedoms of speech and press. Will it fulfill that role? The *Moody* decision did, for now, but we'll have to see how long the Court's resolve will last.

[128] As Biskupic observed, Justice Alito's "tactics could have led to a major change in how platforms operate" had he not lost his majority in Moody. Biskupic, *supra* note 36.