OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 49 SUMMER 2025 NUMBER 3

COMMENT

MOODY V. NETCHOICE, LLC: SOCIAL MEDIA PLATFORMS, CONTENT MODERATION, AND THE MODERN AGE OF EDITORIAL DISCRETION

Joseph Fickett[*]

Introduction

There is no denying the predominant role that social media platforms play in modern-day society. Users are addicted to social media, whether they use the platforms to stay connected with old friends and family or as a news source; they spend endless hours scrolling through feeds across multiple platforms. With Facebook users sharing "more than 100 billion messages every day" and YouTube users uploading "500 hours of video . . . every minute," it should come as no surprise that, to make an individual user's experience more relevant, social media platforms utilize complex computer algorithms to engage in content moderation.[1] This process ranks, removes, and flags thousands of posts per day to regulate

* Joseph Fickett is a law student at Oklahoma City University School of Law, a member of the William J. Holloway American Inn of Court and Phi Delta Phi, and a former Research Fellow with the National Agricultural Law Center. He thanks his family, friends, and mentors for their unwavering support, and acknowledges that none of this would be possible without the love and guidance from He who lights his path.

1. Moody v. NetChoice, LLC, 603 U.S. 707, 719 (2024).

the speech of the social media platform's users. In response to what many viewed as a bias in social media platforms' content moderation processes, leading to users' feeds being "skewed against politically conservative voices" and a need "to balance the mix of speech on" social media platforms, some states have taken to their legislatures.[2] Two such states are Florida and Texas, both of which passed laws tasked with regulating content moderation and providing requirements for individualized reporting of removed posts by the social media platform.

First, this Comment will provide relevant background information regarding the First Amendment and its relation to editorial discretion and expression. Furthermore, to understand the U.S. Supreme Court's holding in *Moody v. NetChoice*, some knowledge of the nature and implications of a facial challenge under the First Amendment will be necessary. Finally, the first section will wrap up with an in-depth analysis of the development of editorial discretion under the First Amendment.

Secondly, this Comment will discuss the relevant facts, procedural history, and majority holding in the *NetChoice* decision. Next, it will provide an objective analysis, followed by a subjective analysis of the Supreme Court's reasoning. In the hope of not "hiding the ball," this Comment will argue that the Supreme Court came to the correct conclusion by utilizing the proper reasoning and case law. In agreeing with the Supreme Court, the subjective analysis highlights the lower court's error in evaluating NetChoice's *facial challenge* before recognizing that editorial discretion for social media platforms participating in expression on their forums is consistent with the principles of the First Amendment and the Court's precedent. Furthermore, the Florida and Texas laws implicate several dangers that government interference poses to a private speaker's expression, as highlighted in the Court's prior case law. Some of these dangers include the acquiescence of private speakers to viewpoints they do not believe in and the speaker's sole right to determine what should be said and not said within their forum without interference.

Finally, this Comment will discuss that the implications of the *NetChoice* decision reach much further than the majority's holding. It, in effect, implies that any government action tasked with balancing viewpoints on social media platforms will be struck down for interfering with the platform's expression and right to editorial discretion under the First Amendment. In doing so, it extends the right of editorial discretion

2. *Id.* at 718-19.

to content moderation practices by social media platforms, giving them discretion to allow or not allow certain viewpoints to be published on their forum. Thus, in practical effect, *NetChoice* extends immunity from government action to social media platforms when they are making decisions regarding the kind of content that can and cannot be shared on their forums.

I. Historical Background

A. The First Amendment

Under the First Amendment of the United States Constitution, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[3] In the context of a newspaper, this ensures that the publishers have a protected "exercise of editorial control and judgment."[4] For a private utility company, it ensures that it need not "carry speech with which it disagree[s]," which would cause it to "alter its own message" for the sake of "offer[ing] the public a greater variety of views."[5] Concerning "federal 'must carry' rules, requiring cable operators to allocate some of their channels to local broadcast stations," the First Amendment protects the cable operators' "editorial discretion over which stations or programs to include in [their] repertoire."[6] Finally, it protects a parade organizer's right to exclude a group from participation because the admittance of the group "would alter the expressive content of the parade."[7]

B. Facial Challenge Under the First Amendment

When a plaintiff chooses to challenge a law on its face, that is, to challenge it in its entirety rather than on singular provisions, the court will ask "whether a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate

3. U.S. CONST. amend. I.

4. *NetChoice*, 603 U.S. at 728 (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

5. *Id.* at 729 (citing Pac. Gas & Elec Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 11 (1986)).

6. *Id.* (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994)).

7. *Id.* at 730 (alteration in the original) (internal quotation marks omitted) (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 573 (1995)).

sweep."[8] When analyzing a facial challenge under the First Amendment, a court will be guided by a two-part balancing test.[9] First, the court will analyze a facial challenge by assessing the scope of the challenged law, which is to ask "[w]hat activities, by what actors, do the laws prohibit or otherwise regulate?"[10] Second, the court will "decide which of the laws' applications violate the First Amendment, and . . . measure them against" the constitutional applications of the law.[11] Notably, the Court has made a plaintiff's success on these claims difficult.[12]

C. Precedent

First, in the Court's seminal case on the issue, *Miami Herald Publishing Co. v. Tornillo*, a candidate for the Florida House of Representatives was criticized in two editorials published by the Miami Herald.[13] The candidate sought to invoke section 104.38 of the Florida Code, a so-called "right of reply" statute, which required that if a candidate was attacked on their "personal character or official record by any newspaper," they had the right to have the newspaper publish "any reply [that] the candidate may make to the newspaper's charges."[14] In reversing the Supreme Court of Florida's decision that held the statute was constitutional, the United States Supreme Court concluded that "the Florida statute fail[ed] to clear the barriers of the First Amendment because . . . it[] intru[des] into the function of editors."[15] The Court reasoned the newspaper was "more than a passive receptacle or conduit for news, comment, and advertising."[16] As such, "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of *editorial control and judgment*."[17] Furthermore, prior holdings "expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by

8. *Id.* at 723 (alteration in the original) (internal quotation marks omitted) (citing Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 615 (2021)).
9. *Id.* at 724-25.
10. *Id.* at 724.
11. *Id.* at 725.
12. *Id.* at 723.
13. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243 (1974).
14. *Id.* at 244.
15. *Id.* at 258.
16. *Id.* at 258 (footnote omitted).
17. *Id.* (emphasis added).

government on a newspaper to print that which it would not otherwise print."[18] Additionally, the Supreme Court's precedent on the issue implied that "any such compulsion to publish that which reason tells them should not be published is unconstitutional."[19] Finally, the *Tornillo* Court discussing the dangers of the right-of-access statute concluded that the "editors might well conclude that the safe course is to avoid controversy" and that the effect of the statute would be that "political and elect[oral] coverage would be blunted or reduced."[20]

Second, the Supreme Court referred to its holding in *Pacific Gas & Electric Co.* v. *Public Utilities Commission of California*, where the California Public Utilities Commission required a private utility company to use the additional envelope space in its monthly billing statements to include information from a consumer advocacy group.[21] The utility company had previously used the additional space to include a monthly newsletter containing political editorials and helpful information that the company wished to communicate to its customers.[22] The Supreme Court concluded that the order by the Commission "impermissibly burden[ed] appellant's First Amendment rights."[23] The *Pacific Gas* Court reasoned that the Commission's order essentially required that the utility "associate with speech with which [the utility company] may disagree."[24] Even with this burden, the Commission argued that its "order further[ed] the State's interest in promoting speech by making a variety of views available to" the utility company's customers.[25] The Supreme Court stated that these interests were unjustified because "the State cannot advance some points of view by burdening the expression of others."[26] Thus, the order was unconstitutional because it was "not a narrowly tailored means of furthering a compelling state interest," nor was it "a valid time, place, or manner regulation;" it was unconstitutional.[27]

Third, the Supreme Court referenced its holding in *Turner Broadcasting System, Inc. v. Federal Communications Commission,*

18. *Id.* at 256.
19. *Id.* (internal quotation marks omitted).
20. *Id.* at 257 (footnote omitted).
21. Pac. Gas & Elec Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 5 (1986).
22. *Id.*
23. *Id.* at 20.
24. *Id.* at 15.
25. *Id.* at 20.
26. *Id.* (citation omitted).
27. *Id.* at 21.

where the "must-carry" sections of the Cable Television Consumer Protection and Competition Act were at issue.[28] The "must-carry" provisions required cable operators to air some local commercial and noncommercial stations.[29] The cable operators, not so surprisingly, filed suit arguing that these act provisions were unconstitutional.[30] In reversing the district court's grant of summary judgment for the government, the *Turner* Court held that "[a] private party's collection of third-party content into a single speech product . . . is itself expressive, and intrusion into that activity must be specially justified under the First Amendment."[31] The Supreme Court in *Turner* reasoned that, at first glance, "[t]hrough . . . 'exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'see[k] to communicate messages on a wide variety of topics."[32] Thus, it was unquestionable that "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to" protection under the First Amendment.[33] The government's action by creating the must-carry rules acted as an interference to the cable operators' ability to engage in editorial discretion.[34] However, "not every interference with speech triggers the same degree of scrutiny under the First Amendment."[35] Thus, it is notable that in a later holding, the Court clarified that because the continued existence of local broadcasting was at stake, the must-carry regulations were justified.[36]

Fourth, in its "capstone" case in this line of precedent, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, the Supreme Court heard a case in which the organizers of a St. Patrick's Day Parade had refused to allow an Irish-American group to participate to show their pride as open members of the LGBTQ community.[37] Once rejected, the group filed a lawsuit under a state law that prohibited discrimination in

28. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 626 (1994).
29. *Id.*
30. *Id.* at 634.
31. Moody v. NetChoice, LLC, 603 U.S. 707, 729-30 (2024).
32. *Turner Broad. Sys.*, 512 U.S. at 636 (quoting Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986)).
33. *Id.* (citing Leathers v. Medlock, 499 U.S. 439, 444 (1991)).
34. *Id.* at 636-37.
35. *Id.*
36. *NetChoice*, 603 U.S. at 729 (citing *Turner Broad. Sys., Inc.*, 520 U.S at 185).
37. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 561 (1995).

public places based on a person's sexual orientation.[38] In reversing the lower court's decision, the *Hurley* Court held that the state law requiring the admittance of the group, which was "expressing a message not of the private organizers' own choosing[,] violate[d] the First Amendment."[39] The Supreme Court in *Hurley* reasoned that parades were undoubtedly "a form of expression" and that "[t]he protected expression that inheres in a parade is not limited to its banners and songs."[40] Under the Constitution, we must "look[] beyond written or spoken words as mediums of expression."[41] Furthermore, the leniency of the council's admission of participants did not forfeit their constitutional protection because "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[42] The *Hurley* Court further reasoned that the application of the State law, in this case, was peculiar because "[s]ince every [parade participant] affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade."[43] In using the State's power in this way, the State "violate[d] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[44] Thus, the State was not able to tell the parade organizers what groups should be included. It exercised its First Amendment right when "decid[ing] to exclude a message it did not like from [a] communication it chose to make."[45]

In distinguishing its holdings in the above cases, the Supreme Court has rejected First Amendment challenges to government actions on two occasions because the "expression" of the challenger was not affected.[46] This first occurred in *PruneYard Shopping Center v. Robins*, where a shopping mall challenged a California statute that required the mall to allow individuals to pass out pamphlets on its premises.[47] The challenge

38. *Id.*
39. *Id.* at 566 (citation omitted).
40. *Id.* at 569.
41. *Id.*
42. *Id.* at 569-70.
43. *Id.* at 572-73.
44. *Id.* at 573.
45. *Id.* at 574.
46. Moody v. NetChoice, LLC, 603 U.S. 707, 730 (2024).
47. *Id.* (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).

was rejected because the mall's owner was neither engaged in expression nor did "he object[] to the content of the pamphlets."[48] In a later case, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, where law schools challenged a statute requiring that they include the military in on-campus recruiting, the Supreme Court held that because a school does "not speak[] when they host interviews," it has "no First Amendment right to exclude the military based on its hiring policies."[49] In summary, *PruneYard* and *Rumsfeld* clarify "that a First Amendment claim will not succeed when the entity objecting to hosting third-party speech is not itself engaged in expression."[50]

II. The *NetChoice* Decision

A. Facts

In the first part of the Court's *NetChoice* majority opinion, written by Justice Kagan, the Court highlights technological advances concerning social media, defines social media platforms, describes the Court's duty in protecting social media platforms' First Amendment rights, and concludes by discussing the Florida and Texas laws that led to the lawsuit.[51] First and foremost, it is essential to note that the last few decades have led to a "dizzying transformation in how people communicate."[52] This transformation is mainly attributable to global increased access to the internet and the overwhelming popularity of social media as a means of connecting.[53] When regulating social media platforms, the role of the courts is to protect the platforms' "rights of speech, as courts have historically protected traditional media's rights."[54]

In describing what constitutes a "social media platform," the Court states that such platforms are "websites and mobile apps that allow users to upload content—messages, pictures, videos, and so on—to share with others."[55] Due to the "staggering amount of content" that social media

48. *Id.*
49. *Id.* at 730-31 (quoting Rumsfeld v. F. for Acad. & Inst. Rts. Inc., 547 U.S. 47 (2006)).
50. *Id.* at 731.
51. *Id.* at 719-22.
52. *Id.* at 716.
53. *Id.*
54. *Id.*
55. *Id.* at 719.

platforms host, the major platforms, in this case, YouTube and Facebook, "cull and organize uploaded posts in a variety of ways."[56] One way, referred to as "content moderation," is, in essence, the process of "curating" a social media "users' posts into collections of content that [the social media platform] disseminate[s] to others."[57] Importantly, this process will result in some of the posts to social media platforms being removed, ranked/prioritized, and/or flagged with a warning/label.[58] Additionally, some of these content moderation decisions may be made due to the posts conformity or lack thereof with the social media platforms "Community Standards and Community Guidelines."[59] An example may be helpful to see how this works in practice.

Hypothetically, let's say that a Facebook user creates and publishes on the platform a post in which there is a video of then-Vice President and Presidential candidate Grant Lexington eating a donut at a rally. The post states, "Large donut companies back Vice President Lexington and, if elected, he has vowed to prioritize the inclusion of donuts in high school nutritional programs across the country. A vote for Lexington is a vote for childhood obesity." Additionally, the rules constituting Facebook's community standards and community guidelines have stated that posting false information about the 2024 presidential race is prohibited. In further assuming that there is no merit to the claim of Vice President Lexington's supposed fascination with donuts, this post will likely be removed for violating the community standards and community guidelines.

Florida and Texas passed similar laws in 2021 in response to unfair practices of regulating users on social media platforms.[60] Both laws contained provisions relating to content moderation and "restrict[ed] covered platforms' choices about whether and how to display user-generated content to the public."[61] One of the ways that these state laws did so was by requiring that social media platforms provide a reason for which the platform had determined to remove or restrict a given post.[62] While the laws differed in their applicability, they had much of the same effect on those that fell under the umbrella of the law's regulation.[63]

---

56. *Id.*
57. Netchoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1205 (11th Cir. 2022).
58. Moody v. NetChoice, LLC, 603 U.S. 707, 719 (2024).
59. *Id.*
60. *Id.* at 720.
61. *Id.*
62. *Id.*
63. *Id.*

The Florida law contains ten components and is much more expansive than its Texas counterpart.[64] The statute defines social media platforms as:

> any information service, system, Internet search engine, or access software provider that:
>
> 1. Provides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site;
> 2. Operatés as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity;
> 3. Does business in the state; and
> 4. Satisfies at least one of the following thresholds:
>   a. Has annual gross revenues in excess of $100 million . . .
>   b. Has at least 100 million monthly individual platform participants globally.[65]

The statute prevents social media platforms from "censor[ing] or shadow ban[ning] a user's content or material or deplatform[ing] a user . . . [w]ithout notifying the user who posted or attempted to post the content or material."[66] If the platform restricts or removes the post, it must provide that user with a notification that "[i]nclude[s] a thorough rationale explaining the reason that the social media platform censored the user."[67]

The Texas law, which contains four components—including General Provisions, Disclosure Requirements, Complaint Procedures, and Enforcement—is seemingly vague compared to the Florida law.[68] The Texas legislature defined a social media platform as "an internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images."[69] The Texas law further states that it "applies only to a social media platform that

64. FLA. STAT. § 501.2041 (2024).
65. *Id.* § 501.2041(g).
66. *Id.* § 501.2041(d).
67. *Id.* § 501.2041(3)(c).
68. TEX. BUS. & COM. CODE ANN. § 120 (West 2023).
69. *Id.* § 120.001(1).

functionally has more than 50 million active users in the United States in a calendar month."[70] Under the statute, "if a social media platform removes content based on a violation of the platform's acceptable use policy . . . the social media platform shall, concurrently with the removal: . . . notify the user who provided the content of the removal and explain the reason the content was removed."[71] This provision is the Texas statute's "individualized explanation provision[]."[72]

In bringing a facial challenge under the First Amendment as representative trade associations for social media companies such as Facebook and YouTube, NetChoice and the Computer & Communications Association filed suit.[73] Their argument was based on the contention that both state laws were an unconstitutional restriction of the social media platforms' right to "editorial discretion" under the First Amendment.[74]

B. Procedural History

After challenges were brought in Florida and Texas state courts, preliminary injunctions were granted, preventing the Florida and Texas laws from being enforced.[75] On appeal, the Eleventh and Fifth Circuits took varied approaches to resolving the issue.[76]

The Eleventh Circuit agreed with the social media companies and upheld the preliminary injunctions granted at the trial court level.[77] "[T]he court held that the obligation to explain 'millions of [decisions] per day' is 'unduly burdensome and likely to chill platforms' protected speech.'"[78] The court reasoned that the Florida law likely would not survive scrutiny under the Supreme Court's First Amendment cases that protect "editorial discretion."[79] This is "because a State has no legitimate interest in counteracting 'private censorship' by 'tilting public debate in a preferred direction.'"[80]

---

70. *Id.* § 120.002(b).
71. *Id.* § 120.103(a)(1).
72. Moody v. NetChoice, LLC, 603 U.S. 707, 720 (2024).
73. *Id.* at 721.
74. *Id.*
75. *Id.* at 707.
76. *Id.* at 721-22.
77. *Id.* at 722.
78. *Id.* (citing NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1230 (11th Cir. 2022)).
79. *Id.*
80. *Id.* (alteration in original) (quoting *NetChoice*, 34 F.4th at 1227-28).

In agreeing with the State, the Fifth Circuit reversed the preliminary injunctions issued by the trial court, holding that "the platforms' content-moderation activities [were] 'not speech' at all" and thus do not impute any First Amendment protections.[81] Additionally, the Fifth Circuit held that even if content moderation amounted to expression, "the State could regulate them to advance its interest in 'protecting a diversity of ideas.'"[82] Regarding the individualized explanation provisions, the Fifth Circuit held that because the provisions were "not unduly burdensome," the provisions "would likely survive" scrutiny under the First Amendment.[83]

C. Majority Holding

The Supreme Court's majority holding in *NetChoice* relies not on the merits of NetChoice's First Amendment claim but on the lower court's errors in "properly consider[ing] the facial nature of NetChoice's challenge," causing an underdeveloped record for the Court.[84] Thus, since the Supreme Court is one "of review, not of first view," the case was vacated and remanded to their respective circuit courts.[85]

D. Objective Analysis

In vacating the circuit courts' decisions, the Supreme Court reasoned that NetChoice's decision "to litigate these cases as facial challenges . . . c[ame] at a cost."[86] The cost in this case and all other facial challenges is that the Court has "made facial challenges hard to win."[87] While facial challenges under the First Amendment apply a different, less rigorous standard in order "[t]o 'provide[] breathing room for free expression,'" they are certainly no exception to a plaintiff's uphill battle to win a facial challenge.[88]

Under the First Amendment, the plaintiff must show that "a substantial number of the law's applications are unconstitutional, judged in relation

81. *Id.* at 707 (quoting NetChoice L.L.C. v. Paxton, 49 F.4th 439, 466, 494 (5th Cir. 2022)).
82. *Id.* (quoting *Paxton*, 49 F.4th at 482).
83. *Id.* at 722 (quoting *Paxton*, 49 F.4th at 487).
84. *Id.* at 717.
85. *Id.* at 726 (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)).
86. *Id.* at 723.
87. *Id.*
88. *Id.* (quoting United States v. Hansen, 599 U.S. 762, 769 (2023)).

to the statute's plainly legitimate sweep."[89] However, neither the parties nor the lower courts had "paid much attention to that issue" and had instead focused on "how the laws applied to Facebook's News Feed and YouTube's homepage."[90] This led to the circuit courts deciding "whether a state law can regulate the content-moderation practices used in Facebook's News Feed (or near equivalents)."[91] Thus, the circuit courts had "treated the[] cases more like as-applied claims than like facial ones."[92] When analyzing a facial challenge under the First Amendment, a court is guided by a two-part balancing test.[93]

Under the first part of the test, the Supreme Court analyzed the facial challenge by assessing the scope of the challenged law, which, in essence, required the justices to ask, "[w]hat activities, by what actors, do the laws prohibit or otherwise regulate?"[94] At the oral argument, the Supreme Court justices inquired of the parties whether the scope of the law's application went past just social media platforms, and they were left with more questions than answers.[95] Since the Court must "determine what the law covers" before moving on, the Court could not conduct a proper analysis.[96]

Under the second part of the facial challenge analysis, the Court had "to decide which of the laws' applications violate the First Amendment[] and to measure them against the" constitutional applications of the law.[97] Concerning the content moderation provisions, the Court had to ask "as to every covered platform or function, whether there is an intrusion on protected editorial discretion."[98] A similar analysis must also be conducted regarding the individualized explanation provisions.[99] The crux is that, yet again, the Supreme Court could not perform a proper analysis under the second part of the test because the record was underdeveloped.[100]

---

89. *Id.* at 723 (alteration in the original) (internal quotation marks omitted) (citing Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 615 (2021)).

90. *Id.* at 724.

91. *Id.*

92. *Id.*

93. *Id.* at 724-25.

94. *Id.* at 724.

95. *Id.* at 724-25.

96. *Id.* at 725 (alteration in original) (quoting United States v. Hansen, 599 U.S. 762, 770 (2023)).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 726.

Since the Supreme Court is "a court of review, not of first view," it could not "undertake the needed inquiries" to properly analyze NetChoice's facial challenge of the state laws.[101] However, the Court reasoned that due to the erroneous nature of the Fifth Circuit's holding below, "it [was] necessary to say more about how the First Amendment relates to the laws' content-moderation provisions, to ensure that the facial analysis proceeds on the right path in the courts below."[102]

In part three of the opinion, the Court stated that when faced with the question of "whether ordering a party to provide a forum for someone else's views implicates the First Amendment," the Court has "repeatedly held that it does so if, though only if, the regulated party is engaged in its own expressive activity."[103] Furthermore, "expressive activity includes presenting a curated compilation of speech originally created by others."[104] Additionally, the Court established three general points by reviewing its precedent on the issue of editorial discretion and expression.[105]

The first of these points is that "the 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."[106] In short, when an entity compiles and curates others' speech, it is engaged in an "editorial function [which] itself an aspect of speech."[107] This point "is as true when the content comes from third parties as when it does not."[108] Furthermore, "[w]hen the government interferes with such editorial choices . . . it alters the content of the compilation."[109] Second, referring to its holding in *Hurley*, the Court reasoned that "just because a compiler includes most items and excludes just a few" does not mean that it is not still engaged in editorial discretion.[110] Finally, "the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas."[111] While "it is critically important to have a well-functioning sphere of expression, in which

101. *Id.* (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)).
102. *Id.*
103. *Id.* at 728.
104. *Id.*
105. *Id.* at 728-31.
106. *Id.* at 731.
107. *Id.* (quoting Denver Area Ed. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 737 (1996)).
108. *Id.*
109. *Id.* at 731-32.
110. *Id.* at 732.
111. *Id.*

citizens have access to information from many sources," the government cannot take actions that would effectively "forc[e] a private speaker to present views it wished to spurn in order to rejigger the expressive realm."[112]

Upon review of the applicable precedent and based on the idea that regardless of the challenges that arise in "'applying the Constitution to ever-advancing technology, the basic principles' of the First Amendment 'do not vary,'" the Fifth Circuit came to the wrong conclusion regarding the legality of the state statute.[113] This is "because of the core teaching elaborated in the" Supreme Court's precedent on the issue, which makes it clear that "[t]he government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey."[114]

Fundamentally, the Supreme Court's rationale is that because "[t]he key" to Facebook's News Feed and YouTube's homepage is the "prioritization of content," it requires the platform to "control the content that will appear to users, exercising authority to remove, label or demote messages they disfavor."[115] In essence, social media platforms exercise their expression through their editorial discretion, and the "Texas[] law limits their power to do so."[116] The Texas law has such an effect because it "profoundly alters the platforms' choices about the views they will, and will not, convey."[117] Again, this "type of regulation" has consistently been held "to interfere with protected speech."[118] Regardless of the origins of the speech from third parties, the "larger offering is the platform's," and the choice of which content or viewpoint to convey is solely the platforms'.[119] This "give[s] the feed a particular expressive quality," which was targeted by the Florida and Texas laws "by forcing the major platforms to present and promote content on their feeds that they regard as objectionable."[120] The fact that social media platforms "happily convey" a large percentage of the posts submitted by users "makes no significant

112. *Id.* at 732-33.
113. *Id.* at 733 (quoting Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011)).
114. *Id.* at 734.
115. *Id.* at 734-36 (footnote omitted).
116. *Id.* at 736-37.
117. *Id.* at 737.
118. *Id.* at 738.
119. *Id.*
120. *Id.* at 738-39.

First Amendment difference."[121] Nor does a social media platform "lose [its] First Amendment protection just because no one will wrongly attribute to them the views in an individual post."[122]

Finally, in clarifying that while the typical First Amendment challenge requires the Court to decide what level of scrutiny applies, even if it were assumed that the lesser of the two would apply, the "Texas[] law does not pass" muster.[123] This is because Texas's "objective is to correct the mix of speech that the major social-media platforms present," and that is not "a substantial governmental interest" that is "unrelated to the suppression of free expression," which is necessary under intermediate scrutiny.[124] Thus, "the government may not 'restrict the speech of some elements of our society in order to enhance the relative voice of others,'" and if the government does so, as the Texas and Florida laws do, "the government may not pursue it consistent with the First Amendment."[125]

E. Concurrence(s)

While all of the justices agreed that the case should be vacated and remanded on the facial challenge issue, several justices concurred, arguing that the Court went too far in analyzing the case as applied.[126] Justice Jackson stated that when the Court is "[f]aced with difficult constitutional issues arising in new contexts on undeveloped records, [the] Court should strive to avoid deciding more than is necessary."[127] Justice Thomas's view departed from that of his colleagues regarding "[t]he Court's decision to opine on certain applications of [the state] statutes" at issue.[128] His concurrence goes on to argue that Article III of the Constitution only confers jurisdiction to the Court to hear "cases" and "controversies" between the parties, so the Court's analysis of the statutes as applied to non-parties goes too far.[129] Furthermore, his concurrence clarified that

121. *Id.* at 738.
122. *Id.* at 739.
123. *Id.* at 711.
124. *Id.* at 740-41 (internal quotations omitted) (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).
125. *Id.* at 742 (quoting Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)).
126. *Id.* at 749 (Jackson, J., concurring in part and concurring in the judgment).
127. *Id.* (Jackson, J., concurring in part and concurring in the judgment) (citation omitted).
128. *Id.* (Thomas, J., concurring).
129. *Id.* at 750-51 (Thomas, J., concurring in the judgment).

NetChoice failed to meet the burden required to bring a facial challenge under the First Amendment.[130]

F. Subjective Analysis

Although the Court's primary holding—based on the lower court's failure to address NetChoice's facial challenges—initially seems convenient, it ultimately constitutes an error that prevents the court from conducting more than a surface-level inquiry.[131] A facial challenge is one that attacks the entirety of a statute rather than focusing on a singular provision.[132] These challenges are intentionally designed to be harder to win and require the plaintiff to meet a much heavier burden.[133] On the other hand, as-applied challenges are ones in which the plaintiff challenges the constitutionality of particular provisions of a law as it applies in the plaintiff's situation; for example, one might challenge the Controlled Substances Act as it applies to only medicinal marijuana.[134] Therefore, the limitations on the Supreme Court become evident upon reviewing the lower court decisions, which analyzed the issue before them as it applied *only* to social media platforms rather than focusing on how the statute applies on a holistic level. In short, the Supreme Court's purpose as "a court of review, not of first view" runs contrary to its ability to resolve the issue.[135] So, the Court was correct in concluding that this case could not be effectively resolved and had to be remanded back to the circuit courts.

Regarding the Court's analysis of the Fifth Circuit's clearly erroneous holding—that when a social media platform is engaging in content moderation it does not constitute speech—it is difficult to conclude that the Supreme Court is wrong, especially when considered in light of First Amendment principles and the Court's prior precedent. It is indisputable that one of the fundamental principles of the First Amendment is "that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[136] When a social media platform decides what content should and should not be included

130. *Id.* at 754-57 (Thomas, J., concurring in the judgment).
131. *Id.* at 724-27.
132. City of Los Angeles v. Patel, 576 U.S. 409, 415 (2015).
133. Moody v. NetChoice, LLC, 603 U.S. 707, 723 (2024).
134. Gonzales v. Raich, 545 U.S. 1, 48 (2005).
135. *NetChoice*, 603 U.S. at 726 (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)).
136. Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 641 (1994).

on its interface, it engages in this principle. When a government action has this effect or "requires the utterance of a particular message favored by the Government," it poses an "inherent risk that the Government seeks not to advance a legitimate regulatory goal[] but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."[137] Either of these effects of government action is applicable here because Texas officials tried to justify the law by saying that "they thought [Facebook's] feeds skewed against politically conservative voices," making it clear that Texas's likely motivation was to advance a conservative message which it favored.[138] Furthermore, it can be argued that the Florida and Texas statutes hinder social media platforms' ability to engage in the above fundamental principle of the First Amendment by regulating their content moderation provisions. On the other hand, it could be argued by regulators that since social media platforms are corporations rather than private individuals, they should not be afforded the same First Amendment protection. However, this argument would likely be unsuccessful because under the First Amendment, whether the speaker is a person or a corporation is a moot point.

As the Supreme Court stated in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, "the identity of the speaker is not decisive in determining whether speech is protected."[139] Like an individual, a corporation, or in this case social media platforms, "contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."[140] So, in this case, the "speech does not lose its protection because of the corporate identity of the speaker."[141] Thus, the Court correctly concluded that the social media company's viewpoint should be protected. In this case, the effect of not safeguarding the regulation of speech that conforms to the viewpoints of social media platforms through editorial discretion could be substantial.

In many instances in which the Court articulates an opinion in favor of protecting speech, it considers the effect that the government regulation will have on the speaker. Put another way, the Justices seem to answer the question of whether government regulation will lead to the acquiescence

137. *Id.*
138. *NetChoice*, 603 U.S. at 718-19.
139. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986).
140. *Id.* (citation omitted).
141. *Id.* at 16 (citation omitted).

of the regulated individuals or entities. In *Miami Herald Publishing Co. v. Tornillo*, the Court discussed that the effect of the "right to reply" statute might very well be that newspapers take the course of compliance merely because it would require fewer challenges in the operation of the newspaper. Similar reasoning was used in *Pacific Gas,* where the Court reasoned that the utility company may view the compliance with the Commission order as the road easier traveled, even though it would implicate that the utility must include speech which they did not believe in. This could likely be the situation that arises in the case of the Florida and Texas laws regarding the content moderation and individualized explanation provisions. The provisions effect may very well be that the social media platforms comply with the laws merely because it is easier, even though it would require the social media platforms "to affirm in one breath that which they deny in the next."[142] Additionally, social media platforms should be able to determine what content should and should not be included on their forums.

Under the Supreme Court's prior reasoning, "[s]ince *all* speech inherently involves choices of what to say and what to leave unsaid," it should follow naturally that a social media platform should have the right to "decide what not to say" on their platforms.[143] Furthermore, the general rule that speakers should be able to choose what to say and what not to say "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."[144] Thus, it would be counterintuitive with the First Amendment's fundamental principles and the Supreme Court's prior holdings that social media platforms do not enjoy the right to express their viewpoints through content moderation.

142. *Id.*

143. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 573 (1995) (internal quotation marks omitted) (quoting *Pac. Gas & Elec. Co.*, 475 U.S. at 11-16).

144. *Id.* at 573 (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995)).

III. Implications of *NetChoice*

A. Immunity from Government Action

In utilizing its precedent on editorial discretion and expression, the *NetChoice* Court reiterates its prior holdings that "[t]he government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey."[145] For many champions of the First Amendment, this holding will be considered a "thorny rose," if you will, because it was the only result that would best preserve the principles of the First Amendment, yet its implications for users of social media platforms can be far-reaching.

This holding essentially preserves for the purpose of the First Amendment the "viewpoint" or "expression" of a private party or, in this case, a social media platform. However, for the social media platform users, it means that the words and things they choose to publish on the forums may be ranked or removed for their conforming to, or lack thereof, to the platform's viewpoint. In application, the Court's reasoning implies that any government action balancing the views on the social media platform will be struck down for interference with the platform's expression and right to editorial discretion under the First Amendment. Thus, the Supreme Court's reasoning in *NetChoice* clarified that social media platforms enjoy the same immunity from government interference in their newsfeeds as newspapers' choice of what to and not to print.

B. Preservation of Private Party Expression

The Supreme Court, in its opinion, utilizes its "preexisting doctrinal framework for addressing the propriety of state laws requiring public-facing platforms . . . to carry and transmit unwanted speech."[146] It does so to reiterate its prior holdings "that 'ordering a party to provide a forum for someone else's views implicates the First Amendment'" so long as "the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt."[147] However, this precedent is

145. Moody v. NetChoice, LLC, 603 U.S. 707, 734 (2024).

146. Blaine H. Evanson & Minsoo Kim, *Feature: Selected Recent Supreme Court Decisions from 2024: The Supreme Court's Social Media Docket*, 66 ORANGE CNTY. LAW. 34, 35-37 (2024) (discussing Moody v. NetChoice decision).

147. *Id.*

being utilized "in a new factual context" in a case where "third-party speech [is] transmitted online on social media platforms."[148]

In application, the Court's holding extends the right of editorial discretion to content moderation practices by social media platforms, giving them discretion to allow or not allow certain viewpoints to be published on their forum. Whether there are any limits to this discretion is still unclear. For example, if a social media platform were to back a political candidate who favors its viewpoint, would it be constitutional for the platform, through an algorithm, to rank that candidate's posts higher so they are seen more frequently by its users? If so, does that discretion extend to the platform's decision to remove all posts supporting the adversarial candidate?

Conclusion

In conclusion, the *NetChoice* decision reiterates the Court's purpose as "a court of review, not of first view" and highlights the importance of expression in exercising editorial discretion.[149] It also highlights the critical differences between as-applied and facial challenges, the latter of which impose a much more significant burden on a plaintiff to succeed. Upon a quick examination of the historical background, it becomes evident that editorial discretion under the First Amendment applies to the case at hand. The fact that social media platforms act as a conduit for the expression of others does not disqualify them from enjoying the right of editorial discretion. Furthermore, the fact that the vast majority of published posts are free from the platform's interference does not have any substantial First Amendment effect. The objective analysis in this Comment highlights these essential points and reiterates that any government action that interferes with a private speaker's right to expression through editorial discretion will be held to a rigorous standard and will most likely be held to conflict with the First Amendment.

In agreeing with the Supreme Court, the subjective analysis highlights the lower court's error in evaluating NetChoice's claim. Additionally, it recognizes that editorial discretion for social media platforms participating in expression on their forums is consistent with the principles of the First Amendment and the Court's precedents. Furthermore, the Florida and

148. *Id.*

149. *NetChoice*, 603 U.S. at 726 (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)).

Texas laws implicate several dangers of government interference with a private speaker's expression, highlighted in the Court's prior case law. Some of these dangers are the acquiescence of private speakers to viewpoints they do not believe in and the speaker's sole right to determine what should be said and not said within their forum without interference. The implications of the *NetChoice* decision reach much further than the majority's holding, as it in effect implies that any government action tasked with balancing the views on social media platforms will be struck down for interference with the platform's expression and right to editorial discretion under the First Amendment. In doing so, it extends the right of editorial discretion to content moderation practices by social media platforms, giving them discretion to allow or not allow certain viewpoints to be published on their forum. Thus, in practical effect, the decision extends immunity from government action to social media platforms when they are making decisions regarding the kind of content that can and cannot be shared on their forums.