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Why High Court Social Media Ruling Will Be Hotly Debated

By **Jacob Canter and Joanna Rosen Forster** (July 9, 2024, 4:17 PM EDT)


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On July 1, the U.S. Supreme Court released its much-anticipated decision in Moody v. NetChoice and NetChoice v. Paxton, cases challenging Florida and Texas content moderation laws.

A unanimous court found that the U.S. Court of Appeals for the Fifth Circuit and the U.S. Court of Appeals for the Eleventh Circuit, in determining whether the laws were facially unconstitutional, erred by not considering the full range of activities and platforms covered by the laws.

Vacating the lower courts' diverging judgments, the Supreme Court remanded the cases back to the circuits for further proceedings.[1] But that was where consensus ended, and is not the reason why this case will be oft cited and hotly debated in the months and years to come.

Rather, it is what the justices said about social media platforms — which range from traditional social media companies like Meta and X, to e-commerce companies, ride-share companies, dating apps, payment service providers, to email and chat applications — and the First Amendment that will have implications for nearly all online operators.

The genesis of the cases are a set of 2021 Texas and Florida laws seeking to prevent internet companies, including social media platforms, from moderating user content or otherwise preventing users from accessing their services. While the provisions differed, each contained content-moderation restrictions on how platforms display user content to the public.

Both laws also contained individualized-explanation provisions, which required the platforms to give individualized reasons to the user for the platform's content-moderation choice.

NetChoice, an internet trade association that represents members such as YouTube and Facebook, brought facial challenges to both laws on First Amendment grounds, essentially arguing that these two laws were censorship in of themselves. Focusing on the YouTube homepage and Facebook News Feed, district courts in both states agreed NetChoice was likely to succeed on the merits of their facial attack and entered preliminary injunctions preventing the laws from going into effect.

The states appealed. The Eleventh Circuit agreed with the lower court and upheld the injunction. The Fifth Circuit, on the other hand, disagreed and reversed the preliminary injunction. The Supreme Court

granted certiorari.

In the majority opinion made up of both liberal and conservative justices, Justice Elena Kagan wrote that "[t]o the extent that social media platforms create expressive products, they receive the First Amendment's protection."[2]

The First Amendment "works for social media platforms as it does for others,"[3] like newspapers with opinion columns, organizations hosting parades, and utility companies with newsletters. As such, government regulations that require a private actor to "alter the content of the compilation"[4] of messages that it expresses in its forum must withstand strict scrutiny to survive the First Amendment.

On this front, the government's interest in diversity of thought online, or in balancing the speech market, was not legitimate enough to withstand even intermediate review, never mind strict scrutiny. In an ominous prediction for the Fifth Circuit, the majority concluded that the Texas law would likely violate the First Amendment as applied to Facebook's News Feed and YouTube's homepage.[5]

And while Justices Samuel Alito, Clarence Thomas and Neil Gorsuch's concurring opinion critiqued the majority for issuing guidance[6] on the Texas law, they too agreed that some social media platforms or activities may deserve First Amendment protection.

So what does this mean for any website, online product, service or application other than the Facebook News Feed and the YouTube homepage? In the rest of this article, we hope to impress onto you why there are actually a lot more questions to answer after the NetChoice decision than have been addressed.

Court leaves (mostly) unanswered the questions of what an "expressive compilation" is and what types of platforms create it.

The majority and concurring opinions all left unanswered the question of what social media platforms and what activities count as "expressive compilations" for the purposes of First Amendment protection.

The majority was careful to limit this nonbinding analysis only to Facebook's News Feed and YouTube's homepage.[7] And most of the court, even the concurring justices, seemed to agree that online operators that manage feeds likely qualify for the same editorial discretion protection under the First Amendment as speakers and outlets in the physical world: There is no internet carveout, no bigness carveout, and no modern-marketplace-of-ideas carveout which changes the First Amendment rules for online operators with feeds compared to everyone else.

But the justices also seemed to agree that "[n]ot every potential action taken by a social media company will qualify as expression protected under the First Amendment."[8] So what about everyone else other than Facebook and YouTube and other platform functions or features where the online operator may perform similar curatorial activities?

On this, Justice Alito's concurrence provides a glimpse into what some of the court may be thinking. While even he agreed that sites and applications that have feeds or that rank products or curate reviews may qualify for protection, he cast doubt on just how far First Amendment protection could go.

Justice Alito observed that while some online operators curate content, others just carry content; i.e., they engage in little to no content moderation either because they are direct message or chat services

like WhatsApp or Gmail, or because the companies themselves disclaim curation or have an open forum business model, such as Parler and Reddit.[9]

Justice Alito opined that sites that are "passive receptacles" or "dumb pipes" for others' speech, or that merely "emit what they are fed" and engage in no moderation such as Parler and Reddit, are likely not entitled to First Amendment protection.[10]

There is a wide-open sea between online operators that manage feeds on one end, and, say, email or chat services on the other. We expect this to be a key battleground on remand and in the lower courts going forward. Online operators — even chat applications and email services — should be keenly aware of what editorial choices and decisions they are making, from editing and curating or deleting user reviews, banning user accounts or privileges, to how products and information are displayed or ranked.

Is it in your business plan and part of your company mission statement to be a "passive receptacle?" If not, you may want to consider where and how you can curate speech. And companies should map and know exactly where their user-generated content is.

Online operators should also take this opportunity to revisit their terms of use or community guidelines and standards to identify what kind of user content, if any, is subject to moderation, curation and/or removal.

Commercial versus noncommercial activity of a platform may matter.

Related to the question of what is expressive activity, both Justices Thomas and Alito made distinctions in their concurrences between commercial and noncommercial speech, or commercial and political interests.

For example, Justice Alito stated that "X's content is more political than Yelp's, and Yelp's content is more commercial than X's" and that this "difference may be significant for First Amendment purposes."[11]

We find this a curious distinction because social media platforms inherently engage in commercial functions for profit; the fact that Yelp's services may have a more direct benefit to commerce than X's seems to be beside the point, and strained given the abundance of marketing content on X.

Companies would be wise to consider what their core functions and value propositions are, as well as the nature of their content. Is Airbnb's content commercial, or about building a community of like-minded global travelers? Is Hinge's content commercial, or about users finding love and enduring relationships?

In light of the concurring opinions, the answer may affect the level of First Amendment protection a company is entitled to.

What about artificial intelligence? A Big Tech carveout may not actually exist.

The court also leaves open how much technology social media companies can use in their editorial decision-making process without sacrificing First Amendment protections.

Justice Amy Coney Barrett, in her concurring opinion, raised these issues crisply: "[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"?[12]

Or, Justice Barrett asked, "[w]hat if a platform's owners hand the reins to an AI tool and ask it simply to remove 'hateful" content?'"[13] Justice Alito expressed the same concerns, asking whether content moderation performed by artificial intelligence was an expressive decision and worthy of First Amendment protection.[14]

While neither Justice Barrett nor Alito suggest an answer, instead posing the questions for future litigants to debate and courts to decide, they both inferred that there may be a "tipping point" at which reliance on large language models and algorithms transforms the compilation from expressive to automated. For Justice Barrett, the tipping point may be where the technology "attenuates the connection between content-moderation actions … and human beings … deciding for themselves" what to express on the platform.[15]

Amid the ongoing AI revolution, companies may have to grapple with existential decisions — either continue to use AI and potentially incur government intrusion into content moderation, or forgo AI to secure ongoing First Amendment protection at the cost of innovation, growth and, perhaps, market share.

Add to the mix companies whose fundamental business model and value proposition would be harmed if they did not curate content, or whose operations would come to a standstill if they had to put up bespoke sites in every state with a content moderation law.

And how can online operators actually heed Justice Alito's advice and avoid being a "dumb pipe" without resorting to technology? Is it even possible to curate — as opposed to just carry — online content without relying on bigger technology and AI tools?

One of the tensions that arises in the opinions is the difference between big and small tech. Do the concerns around AI mean that only lower-tech, small online companies that don't use AI deserve First Amendment protection?

We must remember the two primary applications at issue in the case: Facebook News Feed and YouTube homepage, potentially two of the largest, most sophisticated and AI dependent products and services on the internet. If, as the majority suggested, Facebook News Feed and YouTube homepage are expressive compilations, are the concurring justices' concerns regarding AI moot, or is it a mandate for the Fifth Circuit to get under the hood of Meta's and YouTube's algorithms on remand?

Despite the majority making clear there is no Big Tech carveout and that even compilations in the virtual world are worthy of First Amendment protection, the concurring opinions demonstrate that that proposition may rest on shaky grounds where AI in involved.

Questions remain about the intersection of Communications Decency Act Section 230 and the First Amendment.

Finally, what does the decision mean for Section 230 of the Communications Decency Act?

While NetChoice challenged the laws on First Amendment grounds, there was discussion during oral arguments about the intersection between Section 230 and the First Amendment. By way of review,

Section 230 immunizes websites and platforms from liability for content provided by their users.

The good Samaritan clause of Section 230 permits platforms to remove user content that they find objectionable, even if that user's speech is otherwise protected by the First Amendment.

Last year, in Gonzalez v. Google,[16] the court left open the question of whether algorithmic content moderation — whether in terms of determining what content is surfaced on a site, or even what is suppressed and removed — falls within Section 230. But for years online operators have assumed that the more automated their editorial decision, the more likely that curation will garner Section 230 protection.

The court's NetChoice decisions may turn that assumption on its head, at least with respect to First Amendment protection. It may pan out that the Texas and Florida laws, or future laws similar thereto, may require social media platforms to host content that they otherwise would have been able to remove under Section 230.

Looking Forward

In conclusion, after the NetChoice decisions we anticipate First Amendment protection of social media platforms will become a very fact-dependent exercise.

On remand, NetChoice will have to develop a robust record: They will have to explain who their members are, what their businesses are and how they do it, where they have user-generated content and how they moderate it, and what AI tools, if any, are used.

Will NetChoice ultimately lose their facial attack on the laws? It may.

While we think a reasonable extension of the court's analysis from, say, the Facebook News Feed to the LinkedIn main feed is likely appropriate, we expect the courts of appeal will find at least some other online activities nonexpressive. This in and of itself is likely to usher in a whole spate of copycat content moderation laws and successive rounds of litigation.

The high court certainly has not seen the last of user-generated content moderation cases.

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[1] Moody v. NetChoice LLC, 630 U.S. ___ (2024).

[2] NetChoice, 630 U.S. ___ at slip op. at 2.

[3] Id. at slip op. at 4.

[4] Id. at slip op. at 18.

[5] See id at slip op. at 20.

[6] NetChoice, 630 U.S. ___, ___ (Alito, J., concurring in vacating the judgment at 1).

[7] NetChoice, 630 U.S. ___ (slip op. at 10).

[8] NetChoice, 630 U.S. ___, ___ (Jackon, J., concurring in vacating the judgment at 1).

[9] NetChoice, 630 U.S. ___, ___ (Alito, J., concurring in vacating the judgment at 23, FNs 22, 27, 29).

[10] Id. at 23.

[11] Id. at 25.

[12] NetChoice, 630 U.S. ___, ___ (Barrett, J., concurring in vacating the judgment at 2).

[13] Id.

[14] NetChoice, 630 U.S. ___, ___ (Alito, J., concurring in vacating the judgment at 31).

[15] NetChoice, 630 U.S. ___, ___ (Barrett, J., concurring in vacating the judgment at 3).

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