

# Policy Backgrounder: Supreme Court Hears Arguments on State Social Media Laws

March 7, 2024

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The Supreme Court heard arguments in two cases focusing on social media content moderation arising from laws that Texas and Florida passed in 2021. Industry groups are challenging the laws for interfering with the platforms' First Amendment protection for editorial discretion.

- The laws each impose requirements that social media companies provide individual justifications for each content moderation decision; Florida's law additionally prohibits platforms from "deplatforming" (banning) candidates for political office or giving content they (or their campaigns) place on a social media site a lower priority compared to other content.
- Pointing to a lack of clear evidence in the record, some Justices indicated they would likely avoid a sweeping decision, which could also mean rejecting that idea that social media falls neatly into Supreme Court precedents related to newspapers or other types of cases on free speech. Instead, the Justices insisted on better defining the relevant terms and scope of activities that these laws would impact.
- Some Justices also focused on what they see as inconsistent arguments from industry in several First Amendment cases and cases relating to Section 230 of the Communications Act, enacted in 1996. In those cases, industry has argued that their content curation algorithms are their own protected speech but have also argued that the algorithms are merely "neutral tools" to disseminate third-party speech.
- A decision is expected by June 2024. It appears likely that the Court will remand the cases for further consideration in the lower courts, asking those courts to build a stronger evidentiary record and providing instructions as to the scope of social media activities that are protected under the First Amendment – an outcome the US Solicitor General supports.

## Arguments at the Supreme Court

On February 26, the Supreme Court heard oral arguments in the cases of [NetChoice v. Paxton](#) and [Moody v. NetChoice](#) over the constitutionality of laws enacted in Texas and Florida, respectively, that would regulate how social media companies control content on their sites.

The Texas and Florida legislatures enacted their laws in 2021, in response to concerns over alleged [censorship](#) of [conservative](#) views. The [Florida law](#) imposes requirements that social media companies provide individual justifications for each content moderation decision and also prohibits those companies from engaging in certain types of moderation, including "[deplatforming](#)" (banning) political candidates from the sites. The [Texas law](#) also regulates how and in what situations the companies can moderate content, including a similar requirement to explain content moderation decisions.

In both cases, co-plaintiffs [NetChoice](#) and the [Computer and Communications Industry Association](#) (CCIA), which represent Alphabet, Meta, and X, among other digital platforms, won preliminary

injunctions in Federal district courts to halt enforcement of the statutes. In subsequent appeals, the [Fifth Circuit](#) vacated the Texas injunction, while the [Eleventh Circuit](#) affirmed in part, and vacated in part, the Florida injunction.

At issue in each case is whether the Texas and Florida laws violate the First Amendment protections of tech companies, which have [called](#) the laws “an extraordinary assertion of governmental power over expression that violates the First Amendment in multiple ways.” The Court’s decision could also redefine the application of [Section 230](#) of the Communications Act, enacted as part of the [1996 Communications Decency Act](#), which gives online platforms broad immunity from liability for user-generated content on their sites.

NetChoice and CCIA argue that platforms have a right to moderate content on their sites—a crucial business practice to keep the platforms attractive to users and advertisers. They believe the state laws violate the platforms’ First Amendment speech rights by limiting their exercise of editorial discretion, noting that the laws require platforms to disseminate virtually all speech, no matter how blatantly or repeatedly the content violates a website’s published terms of service applicable to all users. NetChoice points to past Supreme Court First Amendment decisions in cases related to [newspapers](#) and [parades](#), in which the Court recognized First Amendment protection of the right to editorial judgement.

Texas and Florida, however, rely on a different line of cases that hold there is no First Amendment right to choose not to host someone else’s speech, including rulings on common spaces such as [shopping malls](#) and [college campuses](#). The states describe social media platforms as the new “digital public square” and maintain that their laws do not violate the First Amendment, on the theory that the laws promote the platforms hosting free speech. Instead, the states propose a difference between social platforms (which curate millions of user posts and interactions) and a newspaper (which publishes its own content). This distinction, along with the Supreme Court precedents selected by the states, they argue, suggests that these laws regulate platforms’ *conduct*, rather than speech.

The states also assert that platforms are “common carriers” (similar to utilities such as telephone companies) and use this to justify imposing a basic requirement that the carrier platforms not discriminate against users in providing their services. Finally, the states argue that their laws’ provision that platforms must provide individual explanations about their content-moderation decisions is consistent with the 1985 *Zauderer* Supreme Court [decision](#) holding that states can require companies to disclose “purely factual and uncontroversial information.”

Industry rebutted that there is no tradition of treating a private party that publishes speech as a common carrier. But even if there were, industry argues that the laws are not traditional common carrier regulations. The groups also [challenged](#) the constitutionality of the requirement that platforms provide individual explanations for each editorial decision, noting that this requires platforms to “speak” (when they have a First Amendment right not to speak) and that it imposes a “massive burden” given the volume of postings on their sites, therefore limiting platforms’ ability to exercise editorial discretion.

## Indications of the Court’s Direction

During oral arguments, several Supreme Court Justices voiced frustration with the decision of NetChoice and CCIA to litigate the cases as pre-enforcement facial challenges. Because the laws were enjoined before taking effect, no lower court has interpreted the laws for the Court to consider, nor does evidence exist of the impacts of the laws on the companies. Justice Clarence Thomas [underscored](#) his concern in making a sweeping ruling with such limited information, “[w]ith these facial challenges, I always have a problem that . . . we’re not talking about anything specific. In a [later] challenge, at least we know what’s in front of us and what your interpretation or at least the state’s interpretation of its law is in that case. Now we’re just speculating as to what the law means.”

A clear majority of Justices pressed both parties for failing to answer to whom the laws apply, what activities they regulate, and what burdens they impose on the platforms. That led the Justices to [appear](#) favorable towards the states' argument that industry groups have attempted to use the current cases as an opportunity to gain broader, favorable principles related to their First Amendment protections. When NetChoice lawyer Paul Clement tried to pin the thin record as Florida's fault, Justice Samuel Alito [responded](#) that it was his client's own strategy to bring a facial challenge (instead of the less burdensome "as-applied" challenge once a statute is in effect) that resulted in the current case before the Court.

The Court appeared to reject the plaintiffs' arguments that social media clearly falls within the precedent set for other industries, expressing concern that any analogy could adequately compare to the breadth of each social media companies' activities, the variety within the industry, the sheer size of the platforms, and the significant power that these companies can hold. Instead, the Justices sought greater clarity on what activities fall under the term "content moderation" and whether all activities should be seen as exercising "editorial discretion." The Justices also appeared skeptical of the states' argument that social media platforms are common carriers. Justice Amy Comey Barrett [noted](#) she was open to the idea that services like email are like common carriers, but she also did not find the analogy convincing because "[e]ven each of these platforms has different functionalities within it." The Justices' hesitation to accept the parties' broad generalizations show that the Court will likely avoid a broad ruling at this time.

Some Justices also focused on what they see as inconsistencies in how the platforms and trade associations have explained their activities in First Amendment cases compared to Section 230 cases. The question in Section 230 cases (the law that gives platforms broad immunity from liability) relates to whether social media companies' methods of curating and arranging content causes a harm that is distinct from the harm produced by the challenged user content itself. In those cases, the companies have [aggressively argued](#) that Section 230 should prohibit lawsuits that would require content moderation (for instance, removing certain types of posts, such as those promoting hate speech) on the ground that the platforms are using "neutral tools" to disseminate third-party speech. However, in these Supreme Court cases and other First Amendment challenges, the same companies argue that their content curation is instead viewpoint-based and cannot be regulated because of the First Amendment's protection for speech.

Some Justices were also wary that if both the industry's First Amendment and Section 230 arguments were to prevail, it would provide immunity both from civil suits brought by harmed individuals and from regulations meant to prevent those harms. As Justice Neil Gorsuch [summarized](#) NetChoice's argument, "[s]o it's speech for the purposes of the First Amendment, your speech, your editorial control, but when we get to Section 230, your submission is that that isn't your speech?" This extended line of questioning indicates that some Justices may be willing to narrow the scope of companies' overexpansive Section 230 interpretations – but that is likely a matter for a future Supreme Court case.

Given the complex issues the cases present, some Justices' concerns that the cases may not be ripe for decision, and the rapid evolution of technology, it appears most [likely](#) that the Court will vacate and remand the cases for further consideration at the lower courts, providing instructions on the aspects of the cases that require more development before the Court can rule and how the cases should proceed.

In her [submission to the Court](#), Solicitor General Elizabeth Prelogar welcomed this approach but also requested that the Justices provide the lower courts guidance about the scope of social media activities that are protected under the First Amendment. Her suggestion that all activities related to the curation of content are inherently expressive (and thus protected under the First Amendment) is narrower than NetChoice's request for an industry-wide immunity but is also the kind of broad principle that NetChoice hopes would result from this litigation. While some Justices are hesitant to take bold steps before the evidentiary record before the Court is further developed, other Justices – including Justices Barrett, Elena Kagan, and Sonia Sotomayor – seemed [amenable](#) to the Solicitor General's suggestion.

## Conclusion

In a separate case, *Murthy v. Missouri*, the Court will consider whether the Federal government applied pressure on social media companies to [influence](#) content moderation decisions with respect to Covid-19 information and election integrity. In that case, scheduled for arguments on March 18, the Justices will consider whether and to what extent government officials can communicate with social media companies about their content-moderation policies. The Administration will [argue](#) that the government's actions were legal collaborations with companies helping to flag violations of platforms' policies and halt the spread of misinformation and disinformation.

*NetChoice v. Paxton* and *Moody v. NetChoice* have the potential to be landmark cases that could have implications for the internet, free speech, and the legal landscape governing digital platforms. However, the Justices' skepticism as to whether the cases are fully ripe for a sweeping decision suggests the Courts will, at least for now, take a more nuanced approach to addressing the First Amendment rights of both the platforms and political candidates. Both liberal and conservative Justices signaled that they would prefer to have a more developed record about how the law would operate, raising the strong possibility that the cases will eventually return to the Supreme Court – and that the extent of platforms' rights to engage in content moderation will remain undecided in this election year.

## About the Authors

[John Gardner](#) is Vice President, Public Policy at the Committee for Economic Development, the public policy center of The Conference Board.

[Mitchell Barnes](#) is a Senior Economic Policy Analyst at the Committee for Economic Development, the public policy center of The Conference Board.

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