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Legal Sidebar

Moody v. NetChoice, LLC: The Supreme Court Addresses Facial Challenges to State Social Media Laws

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On July 1, 2024, the Supreme Court vacated the judgments in two consolidated First Amendment challenges to state laws that regulate certain online platforms' moderation of user-posted content and remanded the cases for further proceedings. The courts of appeals that decided the two challenges had disagreed about how the First Amendment applies to the state-imposed content moderation restrictions under review. In *Moody v. NetChoice, LLC*, the Supreme Court held that neither court had analyzed the full scope of the laws' applications—as is required when, as in these cases, a party contends that a law is unconstitutional on its face. This Sidebar summarizes the *Moody* opinion and discusses related considerations for Congress.

Legal Background

The First Amendment

The First Amendment prohibits Congress and state governments from enacting laws that "abridg[e] the freedom of speech." Its protections can apply when a business creates its own speech. The amendment can also protect the "exercise [of] editorial discretion over the speech and speakers in [a] forum" when a private entity creates a forum to host others' speech.

The Supreme Court has applied the editorial-discretion-based reasoning to invalidate a law that would have compelled newspapers to print responses from candidates for political office if the newspapers published criticisms of the candidates. The Court has employed similar reasoning when holding that the First Amendment protects the rights of parade organizers to exclude a group of marchers who would "impart[] a message the organizers d[id] not wish to convey" and the rights of a privately owned utility company to exclude consumer-advocacy materials from a newsletter the company produced.

The Supreme Court has also recognized limits to the First Amendment's protection of speech hosts. The Court has held that a state could, without violating the First Amendment, compel the owner of a shopping center to allow high school students to distribute pamphlets and seek petition signatures in an area of the

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shopping center that is held open to the public. The Court has also ruled that Congress, when imposing conditions on the receipt of federal funds, could require that universities allow military recruiters the same access to their campuses as recruiters for nonmilitary employers. The Court has explained that, in these cases, the requirements to host others' speech did not affect the hosts' own expressive activity.

A judicial determination that a law restricts First Amendment rights does not necessarily mean the law is unconstitutional. Accordingly, if a court decides that a law regulates speech protected by the First Amendment, the court will usually go on to decide what standard should be used to evaluate whether the restriction is permissible. In some editorial discretion cases, the Supreme Court has simply declared that a government's intrusion into a private party's exercise of editorial functions renders the law invalid. In other cases, courts have applied "strict" or "intermediate" scrutiny to laws that reach protected speech. These two standards require a reviewing court to weigh the importance of the government's interest in regulating the speech at issue and the extent to which the regulation is tailored to that interest. Both standards are discussed in more detail in another CRS report.

Facial vs. As-Applied Challenges

When a party challenges a statute's constitutionality, the party may argue that the law is unconstitutional when applied to a specific set of facts or it may argue that the law is unconstitutional on its face, that is, in all of its possible applications. The first type of argument is an "as-applied" challenge. The second is a "facial" challenge.

The Supreme Court has called as-applied challenges—in which a party contends a law is unconstitutional when applied to the specific conduct the challengers have engaged in or want to engage in—"the basic building blocks of constitutional adjudication." Proving that a statute is unconstitutional as applied to the particular facts of a case can establish that the party challenging the statute should win the case, and the Court can be reluctant to create constitutional rules that are broader than required to address the particular facts before it. In many cases, therefore, litigants argue only that a law is unconstitutional as applied to their own conduct, and the Court decides only that question.

"A facial challenge is an attack on a statute itself as opposed to a particular application." The Court has said that facial challenges are more difficult to win than as-applied challenges. "To succeed in a typical facial attack," a challenger "would have to establish 'that no set of circumstances exists under which [the challenged law] would be valid,' or that the statute lacks any 'plainly legitimate sweep.'" In the First Amendment context, the Supreme Court has also recognized a second type of facial challenge, known as an "overbreadth" challenge. There, "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"

The line between as-applied challenges and facial challenges is not always bright. According to the Supreme Court, the distinction primarily "goes to the breadth of the remedy employed by the Court." When the party challenging a law seeks relief that reaches beyond its own "particular circumstances"—such as seeking to have a law declared unconstitutional for parties that are not before the court—the challenging party "must . . . satisfy [the] standards for a facial challenge to the extent of that reach."

Moody's Procedural History

In *Moody*, the Supreme Court decided two First Amendment challenges brought by NetChoice, LLC, and the Computer & Communications Industry Association (collectively, "NetChoice"). One challenged Florida's S.B. 7072. The other challenged Texas's H.B. 20.

NetChoice's Challenge to Florida's S.B. 7072

Florida's S.B. 7072 imposes restrictions on any information service, system, internet search engine, or access software provider that enables access by multiple users to a computer server, is organized as a legal entity, does business in Florida, and satisfies certain specified user- or revenue-based thresholds. Thus, while the litigation about the law emphasized the limitations it imposed on social media platforms, the law applied more broadly. NetChoice challenged restrictions that generally fall into two categories: content moderation restrictions and individualized-explanation requirements.

The Supreme Court's analysis in *Moody* focused on the content moderation restrictions. Those provisions limit the ability of covered platforms to delete content, make content less visible to other users, or ban users. Under S.B. 7072, platforms may not "deplatform" a political candidate or deprioritize a candidate's or "journalistic enterprise's" posts. They must "apply censorship, deplatforming, and shadow banning standards in a consistent manner," and they cannot change the rules or terms that apply to users more than once every 30 days. *Deplatforming* occurs when a platform bans a user for at least 14 days. *Shadow banning* occurs when a platform deletes a user's content or makes the account's content less visible to other users.

Before S.B. 7072 took effect, NetChoice sued, alleging that the content moderation provisions, on their face, violate the First Amendment. The U.S. Court of Appeals for the Eleventh Circuit affirmed a preliminary injunction barring enforcement of the content moderation provisions while NetChoice's challenge is litigated. The court held that the provisions likely "trigger[] First Amendment scrutiny because [S.B. 7072] restricts social-media platforms' exercise of editorial judgment." It decided that the challenged provisions likely fail constitutional scrutiny because they lack a "substantial or compelling interest that would justify [the provisions'] significant restrictions on platforms' editorial judgment."

NetChoice's Challenge to Texas's H.B. 20

Texas's H.B. 20 applies to social media platforms with more than 50 million monthly active users in the United States. The law defines social media platforms as public websites or applications that enable users to create accounts and communicate for the primary purpose of posting user-generated information. Internet service providers, email providers, and websites "that consist primarily of news, sports, entertainment, or other" content that is not user generated are excluded from the definition.

As with Florida's law, H.B. 20 limits when covered platforms may delete or restrict access to user-posted content. Subject to enumerated exceptions, covered platforms are prohibited from censoring a user's content based on viewpoint or the user's geographic location in Texas. *Censor* is defined to mean "block[ing], ban[ning], remove[ing], deplatform[ing], demonetiz[ing], de-boost[ing], restrict[ing], deny[ing] equal access or visibility to, or otherwise discriminat[ing] against expression."

Again, NetChoice challenged H.B. 20's content moderation provisions on their face and asked a court to enjoin their enforcement before the law took effect. The U.S. Court of Appeals for the Fifth Circuit denied the request. Expressly disagreeing with the Eleventh Circuit's reasoning about Florida's law, the Fifth Circuit held that Texas's content moderation provisions do not likely implicate First Amendment rights. According to the Fifth Circuit, NetChoice was seeking to assert a "right to censor what people say" that is not protected by the First Amendment. In the alternative, the court held that, even if the law restricted protected expression, it is a content- and viewpoint-neutral law—so subject to intermediate scrutiny—and Texas's interest in protecting the free exchange of ideas is sufficiently important to satisfy that standard.

The Supreme Court's Decision

The Supreme Court vacated the judgments of both the Fifth and Eleventh Circuits, but it did not conclusively resolve whether the content moderation provisions under review violate the First Amendment.

The Supreme Court's Reasons for Vacating the Appeals Courts' Decisions

The Supreme Court vacated the Fifth and Eleventh Circuits' decisions because, in its view, "neither Court of Appeals properly considered the facial nature" of NetChoice's challenges.

Justice Kagan authored the majority opinion for the Court. In its analysis, the Court reiterated the legal standards it has applied to facial challenges and emphasized that those standards "ma[ke] facial challenges hard to win." In First Amendment cases like NetChoice's, the Court explained, "the question is whether 'a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" The Court then concluded that the case records before it were not sufficiently developed to determine whether the unconstitutional applications of S.B. 7072 and H.B. 20 substantially outweigh its constitutional ones. Throughout the litigations, the parties had focused their arguments on "whether a state law can regulate the content-moderation practices used in Facebook's News Feed (or near equivalents)." S.B. 7072 and H.B. 20, however, "appear to apply beyond Facebook's News Feed and its ilk"—potentially sweeping in direct messaging services, online marketplaces, and payment services, among other platforms. To perform a "proper facial analysis," the Court said, it would need "to assess the state laws' scope" and "the laws' full range of applications," and then compare "the constitutionally impermissible and permissible" applications. Because the Court could not assess that full range of applications from a record that concentrated only on applications to newsfeed-like services, it remanded the cases for the lower courts to perform that assessment.

The Court's First Amendment Analysis

After explaining its decision to vacate and remand the cases, the Court wrote, "it is 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." The Court then responded to two points in the Fifth Circuit's analysis of H.B. 20. According to the Supreme Court, "the Fifth Circuit was wrong in concluding that Texas's restrictions on the platforms' selection, ordering, and labeling of third-party posts do not interfere with expression," and the Fifth Circuit was also "wrong to treat as valid Texas's interest in changing the content of the platforms' feeds."

On the first point, the Court said it has largely settled the framework for evaluating a First Amendment challenge to a law that requires private platforms "to carry and promote user speech that they would rather discard or downplay." The Court has "repeatedly held that" requiring a party to provide a forum for another's views implicates the First Amendment "if, though only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt." Applying these principles to "Facebook's and YouTube's main feeds"—the applications of the laws for which the Court did have a substantial record—the Supreme Court explained that, when those platforms "use their Standards and Guidelines to decide which third-party content" to "display, or how the display will be ordered and organized," the platforms "are making expressive choices" protected by the First Amendment.

The Court then explained that, because H.B. 20's content-moderation limitations restrict protected expression, a court would usually have to decide whether to apply strict or intermediate scrutiny to analyze their application to these feeds. In this case, though, the Court said the provisions would fail even

intermediate scrutiny because "the interest Texas asserts . . . in changing the balance of speech on the major platforms' feeds" is not the type of important or substantial interest that could justify restricting the platforms' expression under any level of scrutiny. According to the Court, a "State may not interfere with private actors' speech to advance its own vision of ideological balance," so Texas's interest in correcting perceived imbalances in the platforms' feeds "is not valid, let alone substantial."

The Concurring Opinions

Four Justices wrote separate opinions. Justice Barrett concurred with the majority and wrote separately to emphasize the varied nature of the covered platforms. Justice Jackson concurred with the judgment and in parts of the majority opinion, but questioned the majority's decision to opine on the constitutionality of the state laws' application to Facebook's and YouTube's main feeds. Justice Thomas and Justice Alito, in an opinion joined by Justices Thomas and Gorsuch, concurred in the judgment only and similarly disagreed with the majority's decision to address the merits. Justice Alito's opinion called the majority's application of First Amendment principles to Facebook's and YouTube's primary feeds "nonbinding dicta," meaning non-precedential statements that were not needed to support the decision reached by the Court.

Considerations for Congress

The Supreme Court's primary holding in *Moody* addresses how courts should analyze a claim that a statute, on its face, violates the Free Speech Clause of the First Amendment. Although Congress does not have the power to change the substance of the First Amendment's protections absent a constitutional amendment, Congress can legislate certain procedures to prescribe how judicial review of a facial challenge will proceed. For example, the Children's Internet Protection Act (CIPA) provides that "any civil action challenging the constitutionality" of the law "on its face" will be heard by a three-judge district court with direct appeal of the district court's decision to the Supreme Court. Congress could include similar procedural requirements in other laws that may be subject to facial challenges. Such procedural requirements would not, however, change the substantive standards for evaluating a facial challenge that the Supreme Court addressed in *Moody*.

Members of Congress have introduced bills that would regulate online content moderation, and the Supreme Court's opinion in *Moody* provides guidance about when the First Amendment applies to laws that regulate compilations of content. If this guidance is considered dicta, as Justice Alito suggested, the Court may not treat the reasoning as authoritative in future cases. Still, a majority of the Court determined that, when "Facebook and YouTube . . . make content-moderation choices in their main feeds," they are making expressive choices—and restricting those choices restricts protected expression. At the same time, the Court acknowledged that other online services, such as "transmitting direct messages," likely "involve different levels of editorial choice" and will therefore be subject to a different First Amendment analysis.

The *Moody* opinion also provides information about the types of legislative interests courts will consider valid when analyzing restrictions that do reach protected speech. The *Moody* Court held that Texas's asserted interest in H.B. 20—"changing the balance of speech on the major platforms' feeds"—is insufficient to satisfy constitutional scrutiny because the interest is both insubstantial and related to suppressing speech. The Court confirmed, however that "many possible interests relating to social media," such as "enforcing competition laws[] to protect . . . access" to platforms, could pass constitutional muster. Courts may look to these distinctions from *Moody* when evaluating the constitutionality of other legislative attempts to regulate online platforms.

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