No. 22-277

In the Supreme Court of the United States

ATTORNEY GENERAL, STATE OF FLORIDA, ET AL.
Petitioners,
v.
NETCHOICE, LLC, D.B.A. NETCHOICE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. Florida's petition asks this Court to review the Eleventh Circuit's judgment invalidating much of its social-media regulation law as inconsistent with the Free Speech Clause of the First Amendment.

Respondents acquiesce in the granting of the petition. They agree (at 31) that the "importance of the issues at stake" merit certiorari. They also agree (at 32) that there is a "clear circuit split." And they are in accord (at 32) that "[r]eview now is particularly important because several other states are primed to follow Florida's lead."

Respondents, to their credit, do not hide the ball. They boast (at 32–33) that the First Amendment arguments that the Eleventh Circuit accepted—and that the Fifth Circuit rejected—would invalidate not only Florida's law, but also similar laws enacted or proposed by New York, California, and dozens of other states seeking to prevent abuses by social-media companies. Respondents' constitutional assault on broad swaths of the work of the people's elected representatives on both sides of the political spectrum on a critical social issue warrants this Court's review.

2. Despite respondents' acquiescence, they and two amici propose expanding the questions presented. This Court should decline to do so.

The Eleventh Circuit invalidated under the First Amendment portions of Florida's law, S.B. 7072, that seek to prevent social-media companies from unfairly silencing the speech of others. *See* Pet. 4–8. Florida's question presented appropriately focuses this Court's review on whether that decision is correct. *See* Pet. i.

The Eleventh Circuit also, however, upheld certain portions of Florida's law imposing disclosure requirements on social-media companies. *See* Pet. App. 66a–67a (summarizing its ruling in a helpful table).

Respondents (at i) reformulate the questions presented to encompass not only the portions of S.B. 7072 that the Eleventh Circuit invalidated, but also the portions that it upheld: their question asks whether "S.B. 7072 complies with the First Amendment." But the fact that respondents may "restate the questions presented . . . does not give them the power to expand the questions presented." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 279 n.10 (1993). That is especially so given that respondents' expanded question would ask the Court to enlarge the judgment—a request appropriate for a cross-petition, not a respondent brief. *See* Stephen M. Shapiro *et al.*, Supreme Court Practice § 6.35, 6-132–33 (11th ed. 2019).

Respondents have also separately cross-petitioned to ask the Court to expand the scope of these proceedings to encompass the broader question stated in their response to the certiorari petition. *See* No. 22-393. As Florida explains in its brief in opposition to that cross-petition, however, the Court should not do so. The Eleventh Circuit's decision to uphold portions of S.B. 7072 is not independently worthy of certiorari and has not generated any splits in the lower courts. The important point here, however, is that whether the question presented should be expanded should be resolved by deciding whether to grant the cross-petition, not through the reformulated question presented of respondents' brief.

3. Some amici propose that this Court add a new question presented to address whether the parts of S.B. 7072 that the Eleventh Circuit invalidated are preempted by 47 U.S.C. § 230. *See* Gonzalez Br. 7–20; Morrison Br. 7–8. The court of appeals declined to address that question given its conclusion that those provisions are unconstitutional. *See* Pet. App. 17a n.4. Amicus Reynaldo Gonzalez also suggests (at 7) that the Court should "vacate the decision of the court of appeals and remand with instructions" for the court to address the section 230 issue.

Those proposals are unsound. The Court does not grant, vacate, and remand cases in light of nothing. *See Lawrence v. Chater*, 516 U.S. 163, 166–68 (1996) (per curiam) (explaining the Court's GVR practice). The Court also ordinarily does not address questions absent "a reasoned conclusion . . . from the Court of Appeals." *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1652 n.4 (2017). Should the Court grant certiorari, respondents would be free, if they wish, to urge section 230 preemption as an alternative ground for affirming the judgment, without the need to alter the questions presented. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38–39 (1989).

Contrary to Gonzalez's suggestion (at 7–11), the canon of constitutional avoidance is no reason to move front and center the section 230 question lurking in the background of this case. There is no circuit split on that question, while there is one on the questions the petition presents. In any event, it is unlikely that amicus' proposal would obviate the need to reach the constitutional questions. *See Hagans v. Lavine*, 415 U.S. 528, 547 (1974) (avoidance applies when there is

a "dispositive nonconstitutional ground"); *Otto v. City of Boca Raton*, 981 F.3d 854, 871 (11th Cir. 2020) (declining to apply avoidance when a "preemption claim [wa]s not dispositive"). The most Gonzalez can say (at 11) is that "some of the provisions" of Florida's law may be preempted. That is consistent with the district court's decision, which held several parts of S.B. 7072 preempted, but had to decide the First Amendment question anyway. *See* Pet. App. 82a–92a.

The merits of the preemption issue reinforce that deciding it is unlikely to avoid the constitutional questions. Gonzalez's principal argument (at 12–17) is that some parts of Florida's law conflict with section 230(c)(2)(A), which provides that a platform may not "be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the [platform] considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." As this is a "facial preemption challenge," the platforms must show that "no set of circumstances exists under which the [statute] would be valid." *NCTA—The Internet & Television Ass'n v. Frey*, 7 F.4th 1, 17 (1st Cir. 2021) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). But there are numerous circumstances when both S.B. 7072 and subsection (c)(2)(A) can be applied. For example, if a platform sought to censor conduct in bad faith, subsection (c)(2)(A) would not apply, *see* 47 U.S.C. § 230(c)(2)(A) (requiring "good faith"), and Florida law could therefore impose liability. And it is precisely bad faith activity that Florida's law targets. *See* Fla. Stat. § 501.2041(9) (providing that S.B. 7072 does not apply to the extent "inconsistent with" section 230).

4. One amicus proposes that the Court direct the parties to brief whether S.B. 7072 violates the Commerce Clause. Morrison Br. at 7–17. But that issue is not in the case. This case arises from respondents' motion for a preliminary injunction. Pet. App. 68a. Respondents did not seek a preliminary injunction on their Commerce Clause claim, and the district court understandably did not address that issue, Pet. App. 79a–93a (not discussing the Commerce Clause). Nor did the court of appeals, which is not surprising because it lacked appellate jurisdiction to address matters not addressed in the preliminary-injunction order. *See* 28 U.S.C. § 1292(a)(1); *Janvey v. Alguire*, 647 F.3d 585, 603 (5th Cir. 2011). This Court should not address the Commerce Clause issue, either.

CONCLUSION

The Court should grant the petition for a writ of certiorari to decide the questions Florida has presented.

Respectfully submitted.

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