Nos. 22-277 & 22-555

In the Supreme Court of the United States

ASHLEY MOODY, ET AL.,
Petitioners,

v.

NETCHOICE, LLC, ET AL.,
Respondents.

NETCHOICE, LLC, ET AL.,
Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Eleventh Circuits

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *City of Pleasant Grove v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003), or for amicus, *e.g.*, *Carson v. Makin*, 142 S. Ct. 1987 (2022). The ACLJ is concerned both with government control of communications media and with the ideological totalitarianism of many of the tech titans. This brief aims to provide a strong cautionary note about the dangers lying on both sides of this case.

SUMMARY OF ARGUMENT

Three overarching principles should inform this Court's analysis of these cases. First, the discriminatory exclusion of speech or speakers based on viewpoint is not *ipso facto* constitutionally protected free speech. To hold otherwise would be to equip a host of online giants to establish ideological totalitarianism over vast and important swaths of daily life. Second, government control over media platforms also raises the specter of imposed ideological conformity. Aside from government requiring viewpoint-neutral access (as with telephone and mail service), this Court should

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[1]No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

be very wary of empowering government to superintend private social media platforms. Third, quite different rules apply when the private entity is defined by a mission with ideological elements. Government has no authority to impair such an entity's capability to maintain mission focus and integrity.

ARGUMENT

I. THIS CASE PRESENTS ENORMOUS RISKS ON BOTH SIDES.

The constitutional issues before the Court are in crucial ways quite novel. "These activities native to the digital age have no clear ancestral home within our First Amendment precedent." Pet. App. 121a (Southwick, J., concurring and dissenting). It is essential that this Court get it right – or, perhaps more important, that this Court not get it *wrong*.

At issue in this pair of cases is, on one hand, the power of the social media titans to exclude, shadow ban, or downgrade disfavored actors and ideas (potentially including amicus and its clients) and, on the other hand, the danger of government meddling with private speech platforms (illustrated by the Biden Administration's manipulation of social media). This is therefore an immensely important case. This amicus brief aims to flag some of the concerns on both sides.

There is an attractiveness to the idea of dismissing both petitions as improvidently granted and thereby leaving both sides in suspense, with an incentive to self-limit. Were *either* side to win a definitive victory,

that might remove a large part of the current motivation – legal uncertainty – for self-restraint in exercising control over speech on the Internet. Assuming this Court will resolve the cases on the merits, however, amicus highlights the following dangers.

A. Danger in a Victory for NetChoice

Consider first the implications of a victory for the tech titans. Social media moguls have downplayed or disavowed accusations of viewpoint discrimination. *E.g.,* "Mark Zuckerberg defends Facebook in 'trending' bias controversy," *CBS News* (May 13, 2016) ("Zuckerberg defended his company against accusations of political bias, saying Facebook does not censor conservative topics"); "Google chief denies political bias claims," *BBC* (Dec. 11, 2018); John Bowden, "Twitter CEO Jack Dorsey: I 'fully admit' our bias is 'more left-leaning,'" *The Hill* (Aug. 18, 2018) ("Dorsey went on to insist that his company only polices behavior on the platform, not content"). Whether the moguls' protestations ring true or not, things could and likely would change dramatically if these tech titans were to *win* in this Court.

NetChoice argues that the First Amendment protects their exclusion of speech and speakers from their platforms, calling it "editorial discretion," *e.g.,* Pet. at 3 (No. 22-555). But no government is entitled to review "editorial discretion"; under that characterization, the tech titans can exclude speech and speakers for no better reason than because the moguls disagree with the speaker's viewpoint. If

NetChoice were to win on that ground, then these social media titans would be free to go wild (or more likely, aggressively tilt the field while *pretending* to be restrained). In other words, the censorship of unwelcome viewpoints from social media platforms would likely become much more aggressive and much more frequent. That censorship would aim, under current conditions, to suppress morally traditional, culturally or politically conservative, historically Christian, pro-life, or other viewpoints that disrupt or depart from the regnant narrative. (And, of course, should a cultural and political shift in the echelons of power come about, the censorship could operate in the opposite direction.)

Moreover, if NetChoice's First Amendment argument prevails, that may also mean that user-powered[2] online[3] retailers like e-Bay and Amazon have a constitutional right to discriminate on the basis of viewpoint in excising selected products or users from their listings (e.g., pro-life t-shirts, pro-family books, pro-Trump or pro-DeSantis swag).[4] If social media

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[2]To the extent an online retailer itself selects the merchandise rather than operating as a conduit for any and all private sellers, a different analysis would apply. The retailer would then be generating the content, rather than acting as a passive channel.

[3]Brick-and-mortar retailers are a different matter. Every product they offer entails actual and opportunity costs, so exercising "editorial" judgment over inventory is essential.

[4]Amazon and e-Bay are already doing this. *E.g.,* Allum Bokhari, "Amazon Censors 'Killing Free Speech' Documentary About Censorship," *Breitbart* (June 22, 2020); Virginia Allen, "Based on False Assumption, Amazon Still Censoring Book on

titans that are essentially distributors (not creators) of the products of third parties possess a *speech* right to discriminate against certain uses and users, as NetChoice contends, then presumably the Internet sales titans that analogously acts as a pass-through can assert the same *speech* right.

Moreover, if the exclusion of certain parties and their offerings, because of the viewpoint of their messages, is itself protected free speech even for a service provider that is otherwise open to all, then email providers (such as Google with gmail, or Outlook) can also suspend users for taking the "wrong" side of an issue or spreading "misinformation" on a hot-button topic. Having an email address is essential to countless daily modern activities, and suspension of that account can mean anything from major inconvenience to the loss of contacts and data, plus the disruption of ongoing interactions and transactions. Under NetChoice's argument, email access would be at the mercy of the provider's ideological proclivities.

But that is not all. Online platforms now constitute "what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). And this trend will doubtless continue. The rise of artificial intelligence

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Transgenderism," *Daily Signal* (Jan. 9, 2022); Jeffrey A. Trachtenberg, "Dr. Seuss Books Deemed Offensive Will Be Delisted From eBay," *Wall Street Journal* (Mar. 4, 2021).

(AI) and virtual reality (VR) or augmented reality (AR) presents the prospect of immersing the populace even more heavily into a tech-controlled environment. Allison Gasparini, "Stanford researchers are using artificial intelligence to create better virtual reality experiences," *Stanford News* (Nov. 12, 2021). Given how easily people have come to be dependent upon cell phones for communicating, navigating the physical world, and transacting business, it is easy to predict a world of people almost constantly straddling a virtual world by wearing headsets or using special "smart" glasses or contact lenses, Jay MacDonald, "Smart contacts coming with AR, health monitoring and more," *All About Vision* (Jan. 29, 2020). In other words, the online world will, as a practical matter, at least partially merge with physical reality.

This Court has embraced the "fundamental principle of the First Amendment . . . that all persons have access to places where they can speak and listen," *Packingham*, 582 U.S. at 104, such as sidewalks and parks. "The Court has sought to protect the right to speak in this spatial context." *Id.* And "today," that "spa[ce]" includes "cyberspace." *Id. Compare Marsh v. Alabama*, 326 U.S. 501, 503-09 (1946) (applying First Amendment to premises "accessible to and freely used by the public in general," even though "the title to the property belongs to a private corporation"). Logically, then, if courts can *require* government actors *not* to interfere with access to this communicative realm, then it would seem reasonable that courts can *allow* government actors to ensure that "all persons have access."

> It would be strange indeed, . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Associated Press v. United States, 326 U.S. 1, 20 (1945).

Indeed, if tech titans who claim no mantle of ideological identity (compare *infra* §I(C)) were to win constitutional authority to expel from "their" worlds anyone whose viewpoint they find distasteful, this would give those titans the power, not just to shun and silence disfavored speakers, but to impose *de facto banishment* from huge swaths of community life.[5] If

[5]For an analogy to the material world, imagine a wealthy entity or individual who buys up open spaces and walkways and creates "YourSpace." The parks and paths are attractive and open to all . . . except that the owner reserves the right to expel, and

"the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium," *Packingham*, 582 U.S. at 105, then this Court must likewise exercise "extreme caution" before setting in constitutional cement a right to banish people from "cyberspace . . . and social media in particular," a realm which is now the "most important place[]," not just for "the exchange of views," *id.* at 104, but for the conduct of daily economic and social life.

The logic this Court embraced in *Associated Press* applies here as well. NetChoice's members

> are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. . . . The fact that the [tech titan] handles [expressive posts] while others handle food does not . . . afford the [tech titan] a peculiar constitutional sanctuary[.]

326 U.S. at 7.

* * *

China already has a social credit score system, which both governmental *and private* entities implement. Katie Canales & Aaron Mok, "China's

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even bar going forward, anyone whom the owner deems "too far out" in his or her ideas. If a pedestrian's speech is the reason for expulsion, does that mean the owner is simply "editing" or "curating"? Or is this right-to-exclude better viewed as discrimination or censorship *not protected* by the First Amendment and therefore *subject to government regulation* (assuming compliance with any other pertinent constitutional limits on government action)?

'social credit' system ranks citizens and punishes them with throttled internet speeds and flight bans if the Communist Party deems them untrustworthy," *Business Insider* (Nov. 28, 2022) ("potential punishable offenses include spending too long playing video games, wasting money on frivolous purchases, and posting on social media"). That system exerts pressure upon the populace to comply with the dictates of the credit-scorers. In a world in which private online platforms handle many essentials – buying and selling, banking, working, communicating, arranging for travel – it is a recipe for disaster to empower those platforms to cancel or disable citizens because they have voiced viewpoints which the platform's agents deem unacceptable. That would be the privatization of tyranny.[6]

B. Danger in a Victory for Government

On the other hand, if the government wins the right to regulate private media platforms, a similar risk of ideological totalitarianism arises. Consequently, any victory for the government would have to be very sharply limited, namely, to the authority to impose a requirement of *neutrality of access*. Otherwise, such power in the hands of government runs the great risk of metastasizing into global censorship of disfavored viewpoints.[7]

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[6]And, of course, private tech moguls have no political accountability. They cannot be voted out of office, and the occasional buyout by an Elon Musk is the exception, not the rule.

[7]The Biden Administration's eager efforts to deter "disinformation" illustrate the reality of this temptation. Jill

In particular, government agents must not be allowed to impose standards that (1) impose status-based differentiation or (2) lend themselves to vague, subjective judgments, such as "consistency," "fairness," or "completeness." Rules based on speaker identity or content, and rules incorporating subjective standards, too easily equip government authorities to distort the communicative landscape. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content"); *Smith v. Goguen*, 415 U.S. 566, 575 (1974) ("the most meaningful aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement"); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 823 (1984) (Brennan, J., dissenting) ("subjective" judgments make it "too easy for government to enact restrictions on speech for . . . illegitimate reasons and to evade effective judicial review").

By contrast, the much more hands-off approach the government takes to such modalities as phone, mail, and email presents none of the dangers of ideological distortion. Ensuring that *everyone can communicate* or send material *on equal terms* is the opposite of tilting the playing field.

Goldenziel, "The Disinformation Governance Board Is Dead. Here's The Right Way To Fight Disinformation," *Forbes* (May 18, 2022). Indeed, the very notion of "disinformation" is suspect. As one commentator noted, "In practice, combating disinformation simply becomes a stand-in for combating things that we don't like. It's not about facts." Shadi Hamid, *Twitter* (June 25, 2023), https://twitter.com/shadihamid/status/1673136832807305216.

C. Danger in Failing to Heed the Special Place of Mission-Oriented Entities: the Role of Transparency and the Need to Cabin *CLS v. Martinez*

The foregoing analysis takes as a given that the platform in question does not publicly assert a particular viewpoint. A platform like Facebook or Google does not define itself as Leftist, pro-abortion, anti-traditional family, and so forth; hence, an access neutrality rule vis-à-vis ideologies is not inconsistent with the platform's nature. A very different analysis applies when the platform has a *mission-based identity*. Government imposition of a neutrality requirement cannot constitutionally apply to mission-based entities, such as those which identify expressly as environmental, pro-fossil fuel, conservative, progressive, Christian, pro-Israel, etc. A neutrality of access rule in such a case would be destructive of the entity's ability to define and preserve its core mission.

The First Amendment protects a religious body's "autonomy" regarding "decisions that are essential to the institution's central mission." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Secular groups enjoy the same constitutional right. *Boy Scouts v. Dale*, 530 U.S. 640, 648 (2000) (First Amendment protects "the ability of the group to express those views, and only those views, that it intends to express. Thus, freedom of association plainly presupposes a freedom not to associate"). Moreover, when a platform is transparent about its perspective, users cannot claim unfairness when the

platform works to maintain its organizational integrity. Thus, the concerns addressed *supra* § I(A) regarding tech totalitarianism do not apply (at least, absent a monopoly). And for the same reasons, government authority to ensure neutrality of access to such transparently ideological platforms, *compare supra* § I(B), would violate the Constitution.

In should be noted that one decision of this Court runs contrary to these important principles, namely, *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). In *CLS*, a government entity imposed the requirement that, as a condition of the benefits available to student clubs, every club must adopt a policy of indifferentism regarding religion and sexual behavior. *Id.* at 669-73. In other words, student groups were relegated to second-class status unless they in effect professed that a member's religious beliefs were irrelevant to the identity and effectiveness of a religious club, and that one's departure from traditional Christian sexual norms – and the consequent scandal – was irrelevant to the mission integrity of a Christian group.

If *CLS* is taken at face value, the present case is easier for the government's side. Obviously, if a government body can require a private entity to profess *adherence* to a deeply controversial policy position, even in the context of access to a speech forum, then *a fortiori* the government can require the operators of the forum itself to *allow* (without professed agreement) speech content they may regard as evil, misguided, or inimical to healthy living. But because *CLS* is so profoundly inconsistent with

broader, preexisting First Amendment principles – principles *CLS* did not purport to overturn – this Court should not rely upon *CLS* here, but rather should disavow its pernicious holding.

The policy requirement in *CLS* was not limited to participation in a particular, discretionary program – e.g., a student work camp project aimed at helping AIDS victims. Nor was the requirement limited to a small subset of the population – e.g., those applying for an assistantship position in the "diversity office" or campus chaplaincy. Instead, the rule was imposed upon the entire relevant universe – all students attending the state law school – as a condition of a standard, generally available benefit – forming a recognized club. Furthermore, the requirement was not directly linked to the program at issue: a policy on religion or sexual behavior generally has nothing to do with student club activities, and where such a policy might be relevant, it could as easily be completely counterproductive, indeed nonsensical – e.g., forcing a Jewish club to allow Muslim or Christian officers.

To the extent that *CLS* stands for the proposition that government has the power to impose ideological strings on benefits even when those strings are destructive of the recipient's mission integrity, *CLS* must be disavowed. To the extent that *CLS* says a government body – in that case, a law school, but by parity of reasoning also a municipality, a state, or the federal government – can extract a pledge of submission to the currently regnant ideology or else impose second-class status upon the population it governs, the *CLS* decision is deeply and fundamentally

inconsistent with liberty in general and free speech in particular.

At a minimum, *CLS* must be read as limited to its peculiar facts. The *CLS* Court observed that, while a Christian group bizarrely had to agree that its officers need not be Christian and need not profess to follow Christian norms, such a group could nevertheless adopt "generally applicable membership requirements unrelated to status or beliefs." *Id*. at 671 n.2 (internal quotation marks omitted). If these permissible "good-behavior," "attendance, [and] skill measurements" requirements, *id*., allow a club to maintain its identity and integrity – e.g., by treating profound ignorance or disregard of the club's Christianity-derived norms as a disqualifier – then *CLS* would stand only for the dangerous, but more narrow, proposition that clubs must *profess* indifference to their identity but may nevertheless *maintain* group mission coherence through conduct and skill requirements.

There is a vital distinction between government requiring purportedly nonpartisan, nonideological platforms like Google to provide access neutrality, on one hand, and government imposing such rules on mission-focused entities, on the other. The latter is plainly unconstitutional, and this Court should say so.

CONCLUSION

This Court should avoid both the Scylla of big tech totalitarianism and the Charybdis of government control of media, while preserving the constitutional right of expressly mission-focused entities to maintain their respective identities. In particular, this Court should, first, reject the idea that a private entity's viewpoint discrimination against third parties *ipso facto* represents constitutionally protected free speech. Second, this Court should reject any authority of government that would create similar dangers of ideological totalitarianism. And third, this Court should affirm that the First Amendment shields a ideologically mission-oriented entity from government interference with the maintenance of its core identity.

Respectfully submitted,

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