

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 ASHLEY MOODY, ATTORNEY GENERAL OF)
4 FLORIDA, ET AL.,)
5 Petitioners,)
6 v.) No. 22-277
7 NETCHOICE, LLC, DBA NETCHOICE,)
8 ET AL.,)
9 Respondents.)
10 - - - - -

11
12 Washington, D.C.
13 Monday, February 26, 2024

14
15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:04 a.m.

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| 1 | C O N T E N T S | |
| 2 | ORAL ARGUMENT OF: | PAGE: |
| 3 | HENRY C. WHITAKER, ESQ. | |
| 4 | On behalf of the Petitioners | 4 |
| 5 | ORAL ARGUMENT OF: | |
| 6 | PAUL D. CLEMENT, ESQ. | |
| 7 | On behalf of the Respondents | 62 |
| 8 | ORAL ARGUMENT OF: | |
| 9 | GEN. ELIZABETH B. PRELOGAR, ESQ. | |
| 10 | For the United States, as amicus | |
| 11 | curiae, supporting the Respondents | 113 |
| 12 | REBUTTAL ARGUMENT OF: | |
| 13 | HENRY C. WHITAKER, ESQ. | |
| 14 | On behalf of the Petitioners | 154 |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 22-277, Moody versus NetChoice.

Mr. Whitaker.

ORAL ARGUMENT OF HENRY C. WHITAKER
ON BEHALF OF THE PETITIONERS

MR. WHITAKER: Mr. Chief Justice, and may it please the Court:

Internet platforms today control the way millions of Americans communicate with each other and with the world. The platforms achieved that success by marketing themselves as neutral forums for free speech. Now that they host the communications of billions of users, they sing a very different tune. They now say that they are, in fact, editors of their users' speech, rather like a newspaper. They contend that they possess a broad First Amendment right to censor anything they host on their sites, even when doing so contradicts their own representations to consumers.

But the design of the First Amendment is to prevent the suppression of speech, not to

1 enable it. That is why the telephone company
2 and the delivery service have no First Amendment
3 right to use their services as a choke point to
4 silence those they disfavor.

5 Broadly facilitating communication in
6 that way is conduct, not speech, and if
7 Verizon asserted a First Amendment right to
8 cancel disfavored subscribers at a whim, that
9 claim would fail no less than the claimed right
10 to censorship failed in *Pruneyard versus Robins*
11 and *Rumsfeld versus FAIR*.

12 Social networking companies too are in
13 the business of transmitting their users'
14 speech. Their users are the ones who create and
15 select the content that appears on their sites.
16 The plat -- the -- the platforms, indeed,
17 disavow responsibility for that conduct in their
18 terms of service. The platforms do sort and
19 facilitate the presentation of user speech. But
20 this Court just last term, in *Twitter versus*
21 *Taamneh*, and the platforms themselves in
22 *Gonzalez versus Google* describe those tools as
23 little more than passive mechanisms for
24 organizing vast amounts of third-party content.

25 The platforms do not have a First

1 Amendment right to apply their censorship
2 policies in an inconsistent manner and to censor
3 and deplatform certain users.

4 I welcome your questions.

5 JUSTICE THOMAS: Counsel, it would
6 seem that this case is a facial challenge, and
7 to some extent, it relies on the overbreadth
8 doctrine, but that seems to be an odd fit since
9 Respondent represents virtually all of the
10 platforms and that it would be easy enough for a
11 platform who's affected to bring an as-applied
12 challenge.

13 Would you comment on that or at least
14 address the fact that this is a facial
15 challenge?

16 MR. WHITAKER: Certainly, Your Honor.
17 I do think that's a very significant aspect of
18 this case. It comes to the Court on a facial
19 challenge, which means that the only question
20 before the Court is whether the statute has a
21 plainly legitimate sweep.

22 I actually don't understand them, Your
23 -- Your Honor, to -- to be making an overbreadth
24 challenge, which, as I understand it, would --
25 would rely on the effects on third parties. As

1 I understand it, they're principally relying on
2 the -- effects on their members. If they were
3 bringing an overbreadth challenge, they would --
4 they would have to show various third-party --

5 JUSTICE THOMAS: Well, I think -- how
6 would they do that on -- when they haven't shown
7 that there are no -- there's no way that this
8 statute can be applied that's consistent with
9 the Constitution? Have they met that?

10 MR. WHITAKER: They -- they certainly
11 have not, Your Honor. I mean, and -- and we --
12 we think the -- the statute has, indeed, a
13 plainly legitimate sweep.

14 And, certainly, there are a number of
15 the platforms that are open to all comers and
16 content, much like a traditional common carrier.
17 And just -- just as a traditional common
18 carrier, consistent with the First Amendment,
19 would be subject to hosting requirements,
20 non-discrimination requirements, so too we think
21 that the platforms that satisfy that
22 characterization, which are a number of them,
23 absolutely would give this statute a plainly
24 legitimate sweep.

25 JUSTICE SOTOMAYOR: Can -- can I --

1 this is such a odd case for our usual
2 jurisprudence. It seems like your law is
3 covering just about every social media platform
4 on the Internet, and we have amici who are not
5 traditional social media platforms, like
6 smartphones and others who have submitted amici
7 brief, telling them that readings of this law
8 could cover them.

9 This is so, so broad, it's covering
10 almost everything. But the one thing I know
11 about the Internet is that its variety --
12 variety is infinite. So at what point in a
13 challenge like this one does the law become so
14 generalized, so broad, so unspecific, really,
15 that you bear the burden of coming in and
16 telling us what exactly the sweep is and telling
17 us how there is a legitimate sweep of virtually
18 -- or -- or a meaningfully -- a swath of cases
19 that this law could cover but not others?

20 MR. WHITAKER: Well -- well, let me,
21 Your --

22 JUSTICE SOTOMAYOR: Where -- when does
23 the burden shift to the state, when it write --
24 when it writes a law so broad that it's
25 indeterminate?

1 MR. WHITAKER: I don't think so, Your
2 Honor. I still think it is their burden, as the
3 plaintiffs challenging an action of a sovereign
4 state legislature, to show that the law lacks a
5 plainly legitimate sweep.

6 But let me just say a word about the
7 -- the breadth of the law. The -- the
8 legislature did define the term "social media
9 platform," which is part of what triggers the
10 law's application, but -- but that -- the
11 breadth of that definition, which -- which
12 wouldn't cover every single website, it -- it
13 would -- it would cover certain large websites
14 with large revenues and subscribers and the --
15 and -- and the like, but the breadth of the law,
16 apart from that definition, is significantly
17 narrowed by the fact that the substantive
18 provisions of the law are regulating websites
19 that host user-generated content. That's what
20 the substantive provisions of the statute apply
21 to.

22 JUSTICE SOTOMAYOR: So let me talk
23 about Etsy. Etsy is a marketplace like -- if --
24 I'm going to try to analogize it to physical
25 space, which I think in this area is a little

1 crazy because it -- yes, in some ways, this is
2 like an online bookstore or online magazines,
3 online newspaper, online whatever you want to
4 call it, an online supermarket, but it's not
5 because, even though it has infinite space, it
6 really doesn't because viewers, myself included,
7 or users can't access the millions of things
8 that are on the Internet and actually get
9 through them and pick the things we want because
10 there's too much information. So we're limited
11 by human attention spans. So are they.

12 So our theories are a little hard, but
13 let's look at Etsy. Etsy is a supermarket that
14 wants to sell only vintage clothes, and so it is
15 going to and does limit users' content. It's a
16 free marketplace, it's open to everyone, but it
17 says to the people who come onto its marketplace
18 we only want this kind of product.

19 They're going to have to censor.
20 They're going to have to take people off.
21 They're going to have to do all the things that
22 your law say they can't do without all of these
23 conditions.

24 Why is that? Why should we be
25 permitting and under what level of scrutiny

1 would we be looking at this broad application of
2 this law that affects someone who all they want
3 to do is sell a particular kind of product and
4 they have community standards and they tell you
5 that you -- they don't want you to curse, they
6 don't want you to talk politics, they don't want
7 you to do whatever, all they want you to do is
8 sell your product. But, if they're a public
9 marketplace, which they are, they're selling to
10 the public, this law would cover them.

11 MR. WHITAKER: I think that's right,
12 Your Honor, but -- but again let me just say a
13 word about how the law might apply to Etsy.

14 First of all, it wouldn't regulate the
15 goods Etsy is offering. What our law regulates
16 is the moderation of user-generated content. So
17 it would only apply to Etsy to the extent that
18 they -- and -- and I'm not -- I'm not sure to
19 what extent it actually would apply to Etsy. I
20 guess it would apply somewhat, but I guess
21 people are uploading user-generated conduct in
22 connection with the sale of goods. And that's
23 the conduct that it would regulate. It doesn't
24 limit what goods Etsy can -- can limit its
25 marketplace to.

1 Let me just say a word about that. It

2 --

3 JUSTICE SOTOMAYOR: Well, it opens it
4 up for sale of goods and it tells its users --

5 MR. WHITAKER: Well --

6 JUSTICE SOTOMAYOR: -- don't, please,
7 speak about politics because that's not what our
8 marketplace is about.

9 MR. WHITAKER: And --

10 JUSTICE SOTOMAYOR: That's viewpoint
11 discrimination. This falls under a whole lot of
12 your listings and bans and disclosure
13 requirements.

14 Why are we imposing that on something
15 like this?

16 MR. WHITAKER: Well -- well, in
17 Pruneyard versus Robins, Your Honor, this --
18 this Court held that the State of California
19 could regulate the speech-hosting activity of a
20 shopping mall which was hosting speech as an
21 incident to --

22 JUSTICE SOTOMAYOR: But not inside the
23 stores. We said that they could come, but if
24 they go inside the store, we didn't say anything
25 that free speech -- that someone could stand --

1 stand on a platform in the middle of the store
2 and scream out their political message.

3 We said the common areas, where we're
4 permitting others to speak, we're going to let
5 this particular speaker speak anything he or she
6 wants. That's why I'm afraid of all of these
7 common law rules that you're trying to analogize
8 to.

9 MR. WHITAKER: Well -- well -- well,
10 Your Honor, I do think Etsy is similar insofar
11 as it is, in fact, hosting speech and some
12 expression as an incident to some other
13 commercial enterprise. And I think that, if
14 anything, makes Etsy's speech interests even
15 weaker than the -- the social --

16 JUSTICE SOTOMAYOR: I've monopolized
17 your --

18 CHIEF JUSTICE ROBERTS: Counsel, you
19 began your presentation talking about concerned
20 about the power, market power and ability of the
21 social media platforms to control what people
22 do, and your response to that is going to be
23 exercising the power of the state to control
24 what goes on on the social media platforms.

25 And I wonder, since we're talking

1 about the First Amendment, whether our first
2 concern should be with the state regulating
3 what, you know, we have called the modern public
4 square?

5 MR. WHITAKER: Well, I think you
6 certainly should be concerned about that, Your
7 Honor. What -- what I would say is -- is that
8 the -- the kind of regulation that the State of
9 Florida is imposing is one that is familiar to
10 the law. When you have businesses that have
11 generally opened their facilities to all comers
12 and content, this is the way that traditional
13 common carrier has worked -- regulation has
14 worked for centuries.

15 If you were an innkeeper and you held
16 yourself out as open to the public, you could
17 indeed be permitted to act in accordance with
18 that voluntarily chosen business model. So I
19 certainly think the Court should proceed
20 carefully, but one thing the Court, I think,
21 it's important to keep in mind is that there is
22 an important First Amendment interest precisely
23 in ensuring that large powerful businesses like
24 that that have undertaken to host massive
25 amounts of speech and have the power to silence

1 those speakers, the state has an interest, a
2 First Amendment interest, in promoting and
3 ensuring the free dissemination of ideas.

4 CHIEF JUSTICE ROBERTS: Is there any
5 aspect of social media that you think is
6 protected by the First Amendment?

7 MR. WHITAKER: Yes, Your Honor. I
8 can -- I can certainly imagine platforms that
9 would be subject to this law that would have --
10 would indeed have First Amendment rights. I
11 mean, we point out in our brief that when -- we
12 think that if you had a -- an Internet platform
13 that, indeed, had a platform-driven message, was
14 selective on the front end, Democrats.com, I
15 think that would be a very different kind of
16 analysis compared to a company like Facebook or
17 YouTube, who is in the business of just
18 basically trying to get as many eyeballs on
19 their site as possible.

20 JUSTICE KAGAN: But why is it
21 different? You -- you know, when we talked --
22 when we had the parade case, we said they don't
23 have a lot of rules, but they have some rules,
24 and we're going to respect the rules that they
25 do have. Even though they let a lot of people

1 come in, they don't let a few people come in,
2 and that seems to be quite important to them.

3 And similarly here, I mean, Facebook,
4 YouTube, these are the paradigmatic social media
5 companies that this law applies to, and they
6 have rules about content. They say, you know,
7 you can't have hate speech on this site. They
8 say you can't have misinformation with respect
9 to particular subject matter areas.

10 And they seem to take those rules and
11 -- I mean, you know, somebody can say maybe they
12 should enforce them even more than they do, but
13 they do seem to take them seriously. They have
14 thousands and thousands of employees who are
15 devoted to enforcing those rules.

16 So why aren't they making content
17 judgments, not quite as explicit as the -- the
18 kind in your hypothetical, but definitely
19 they're making content judgments about the kind
20 of speech that they think they want on the site
21 and the kinds of speech that they think is
22 intolerable.

23 MR. WHITAKER: Well -- well, there's a
24 lot -- lot in there, Your Honor. May -- maybe I
25 can start with the Hurley case. I mean, I -- I

1 think what -- what was going on in Hurley, I
2 think, is that you had a parade that was --

3 JUSTICE KAGAN: Could -- could you --
4 maybe just start with the more general question.

5 MR. WHITAKER: Sure -- sure -- sure --
6 for sure.

7 JUSTICE KAGAN: I mean, I'm happy for
8 you to talk about Hurley. I don't want to, you
9 know, get in your way.

10 MR. WHITAKER: I'll start wherever you
11 want. It's your time, not mine, Your Honor.
12 So, yeah. So, certainly, the more -- the
13 broader question about rules of the road and the
14 like.

15 Common carriers have always conducted
16 their businesses subject to general rules of
17 decorum. I think the fact that the platforms
18 have these general rules of decorum, the fact
19 remains that upwards of 99 percent -- for all
20 that content moderation, that's really a product
21 of the fact that they have so -- they host so
22 much content. But the fact remains that 99 --
23 upwards of 99 percent of what goes on the
24 platforms is basically passed through without
25 review.

1 Yes, they have spam filters on the
2 front end and the like, and that's not uniquely
3 --

4 JUSTICE KAGAN: But -- but that
5 1 percent seems to have gotten some people
6 extremely angry. You know, the 1 percent that's
7 like we don't want --

8 MR. WHITAKER: Well --

9 JUSTICE KAGAN: -- anti-vaxxers on our
10 site --

11 MR. WHITAKER: Sure.

12 JUSTICE KAGAN: -- or we don't want
13 insurrectionists on our site.

14 I mean, that's what motivated these
15 laws, isn't it? And that's what's getting
16 people upset about them --

17 MR. WHITAKER: Right.

18 JUSTICE KAGAN: -- is that other
19 people have different views about what it means
20 to -- to provide misinformation as to voting and
21 things like that, and, you know, that's the
22 point. There are some sites that can say this
23 kind of talk about vaccination policy is good
24 and some people can say it's bad, but it's up to
25 the individual speakers.

1 MR. WHITAKER: The fact that some
2 people are angry about the content moderation
3 policies doesn't show that is their speech.
4 And -- and my friends talk about their
5 advertisers. Well, we don't know whether the
6 advertisers think it's their speech or whether
7 they just disagree with the speech. And their
8 advertisers and people who are angry with speech
9 don't get a heckler's veto on Florida's law.

10 But even more broadly than that, I
11 mean, we know that mere -- the -- the fact that
12 a hosting decision is ideologically charged and
13 causes controversy can't be the end of the game
14 because I think Rumsfeld versus FAIR would have
15 had to come out the other way then, because, in
16 Rumsfeld, certainly, the law schools there felt
17 very strongly that the military were being
18 bigots and they didn't want them on campus.

19 And yet this Court did not look to the
20 ideological controversy surrounding those
21 decisions. Instead, it looked at objectively
22 whether the law schools were engaged in
23 inherently expressive conduct.

24 CHIEF JUSTICE ROBERTS: Well, it
25 looked at what -- the fact that the schools were

1 getting money from the federal government, and
2 the federal government thought: Well, if
3 they're going to take our money, they have to
4 allow -- allow military recruiters on the
5 campus. I don't think it has much to do with
6 the issues today at all.

7 MR. WHITAKER: Well -- Mr. Chief
8 Justice, it's difficult for me to argue with you
9 very much about what Rumsfeld versus FAIR means.

10 (Laughter.)

11 MR. WHITAKER: But let me just take a
12 crack because, I mean, I -- I think, as I -- as
13 I read your opinion for the Court, you didn't
14 rely, actually, on the funding aspect of the
15 case to reach the conclusion that what was going
16 on there was not First Amendment protected
17 conduct. You were willing to spot them that
18 this -- the -- the question would be exactly the
19 same if it were a direct regulation of speech as
20 opposed to a funding condition.

21 So I absolutely think that the
22 analysis in that case directly speaks to this.
23 And just -- just --

24 JUSTICE KAVANAUGH: Can I -- can I ask
25 you about a different precedent, about what we

1 said in Buckley? And this picks up on the Chief
2 Justice's earlier comment about government
3 intervention because of the power of the social
4 media companies.

5 And it seems like, in Buckley, in
6 1976, in a really important sentence in our
7 First Amendment jurisprudence, we said that "the
8 concept that [the] government may restrict the
9 speech of some elements of our society in order
10 to enhance the relative voice of others is
11 wholly foreign to the First Amendment...". and
12 that seems to be what you responded with to the
13 Chief Justice.

14 And then, in Tornillo, the Court went
15 on at great length as well about the power of
16 then newspapers, and the Court said they
17 recognized the argument about vast changes that
18 place in a few hands the power to inform the
19 American people and shape public opinion and
20 that that had led to abuses of a -- bias and
21 manipulation. The Court accepted all that but
22 still said that wasn't good enough to allow some
23 kind of government-mandated fairness, right of
24 reply or anything.

25 So how do you deal with those two

1 principles?

2 MR. WHITAKER: Sure -- sure, Justice
3 Kavanaugh. Well, first of all, if you -- if you
4 agree with me with our front-line position that
5 what is being regulated here is conduct, not
6 speech, I don't think you get into interests and
7 scrutiny and all that. I do think that the law
8 advances the -- the First Amendment interests
9 that I mentioned, but I think the -- the -- the
10 -- that interest, the interest that our law is
11 serving, if you did get to a point in the
12 analysis that required consideration of those
13 interests, our interests --

14 JUSTICE KAVANAUGH: Do you agree then,
15 if speech is involved, that those cases mean
16 that you lose?

17 MR. WHITAKER: No, I don't agree with
18 that, and -- and the reason I don't agree with
19 that is because the interests that our laws --
20 serve are -- are legitimate, and -- and it's --
21 and it's hard because different parts of the law
22 serve different interests. But I think the one
23 that -- that sounds in the -- in your concern
24 that is most directly implicated would be the
25 hosting requirement applicable to journalistic

1 enterprises.

2 So one provision of the law says that
3 the platforms cannot censor, shadow ban, or
4 deplatform journalistic enterprises based on the
5 content of their publication or broadcast. And
6 that serves an interest very similar to the
7 interest that this Court recognized as
8 legitimate in Turner when Congress imposed on
9 cable operators a must-carry obligation for
10 broadcasters.

11 And -- and just as a broadcaster --
12 and -- and what the Court said was there was not
13 just a legitimate interest in promoting the free
14 dissemination of ideas through broadcasting, but
15 it was a -- indeed a -- a compelling interest, a
16 -- a highly compelling interest. And so I think
17 the journalistic enterprise provision serves a
18 -- that very similar issue.

19 But there are also other interests
20 that our law serves. For example, the
21 consistency provision, Your -- Your Honor, is
22 really a consumer protection measure. It --
23 it's sort of orthogonal to all that. The
24 consistency provision, which is really the heart
25 of our law, just says to the -- the platforms:

1 Apply your content moderation policies
2 consistently. Have whatever policies you want,
3 but just apply them consistently.

4 JUSTICE KAVANAUGH: Could the
5 government apply such a policy to publishing
6 houses and printing presses and movie theaters
7 about what they show? Bookstores, newsstands?

8 MR. WHITAKER: No, no --

9 JUSTICE KAVANAUGH: In other words, be
10 consistent in what kinds of content you exclude?
11 Could that be done?

12 MR. WHITAKER: I -- I -- I don't think
13 so, Your Honor.

14 JUSTICE KAVANAUGH: And why not?

15 MR. WHITAKER: Well -- well, I think
16 that there is -- is -- the consumer -- here, the
17 -- the social media platforms, their terms of
18 service, their content moderation policies are
19 really part of the terms under which they are
20 offering their service to users. I don't think
21 that that really -- that that paradigm really
22 fits in what Your Honor is -- is talking about.

23 So -- but I -- but, look, we agree, we
24 certainly agree that a newspaper, a book in a
25 bookstore is engaging in inherently expressive

1 conduct. And our whole point is that these
2 social media platforms are not like those. And
3 why are --

4 JUSTICE JACKSON: But doesn't it
5 depend on exactly what they're doing? I mean, I
6 -- I guess the hard part for me is really trying
7 to understand how we apply this analysis at the
8 broad level of generality that I think both
9 sides seem to be taking here.

10 I mean, you say what -- what is being
11 regulated here is conduct, not speech. Well, I
12 guess maybe if you're talking about Facebook's
13 news -- news feed feature. But there are lots
14 of other things that Facebook does that -- you
15 know, that might be speech, but then there might
16 be other things that Facebook does that doesn't
17 qualify as speech.

18 So don't we have to, like, drill down
19 more in order to really figure out whether or
20 not things are protected?

21 MR. WHITAKER: Actually, I don't think
22 so. I think that that -- that precise ambiguity
23 strongly favors our position, Your Honor,
24 because, in the posture of this facial
25 challenge, all you need to look at is whether

1 there are at least some activities --

2 JUSTICE JACKSON: No, but that's --
3 no, no, no. I guess what I'm saying is you
4 mentioned the Pruneyard case or the FAIR case,
5 excuse me. I mean, we didn't say that law
6 schools, you know, as a categorical matter are,
7 you know, always engaged in unprotected speech.
8 We looked at the particular thing. This was a
9 fair and, you know, the law school was saying,
10 we don't want these certain entities in it.

11 I hear you suggesting that we can just
12 say, you know, Facebook is a common carrier and,
13 therefore, everything it does qualifies as
14 conduct and not speech. And I don't think
15 that's really the way we've done this in our
16 past precedents. So can you speak to that?

17 MR. WHITAKER: Sure -- sure.
18 Certainly, that's not what we're saying, Your
19 Honor. I -- I completely agree with you that
20 it's very important to isolate what conduct the
21 particular -- each particular provision of the
22 law is regulating.

23 JUSTICE JACKSON: Not the law, the
24 entity. What is the entity doing?

25 MR. WHITAKER: Well --

1 JUSTICE JACKSON: Like we have to do

2 --

3 MR. WHITAKER: Sure.

4 JUSTICE JACKSON: -- an intersection
5 of what the law says they can't do and what in
6 particular they are doing, right?

7 MR. WHITAKER: Well, and I guess the
8 right level of generality and the general -- the
9 level of generality that's sufficient, I think,
10 to conclude that the law has a plainly
11 legitimate sweep is we are talking about the --
12 the social networking companies' activities in
13 -- in content-moderating user-uploaded content.
14 That -- that, I think, is the relevant activity,
15 and -- and that is what -- that is -- that
16 activity --

17 JUSTICE JACKSON: All right. So what
18 do you do about -- what do you do with LinkedIn
19 has a virtual job fair and it has some rules
20 about who can be involved. That seems to map
21 on, I would think, to the FAIR case. Is that
22 what you're saying?

23 MR. WHITAKER: Well, I -- I -- I don't
24 -- I don't think so. I don't think it would map
25 on to our theory in this case because it sounds

1 like to me, and I'm not totally aware of all the
2 facts of LinkedIn there, but --

3 JUSTICE JACKSON: Yeah.

4 MR. WHITAKER: -- if I understand --

5 JUSTICE JACKSON: I think that's a
6 problem in this case.

7 MR. WHITAKER: Well --

8 JUSTICE JACKSON: We're not all aware
9 of the facts --

10 MR. WHITAKER: Well --

11 JUSTICE JACKSON: -- of what's
12 happening.

13 MR. WHITAKER: -- exactly. And I -- I
14 think that that -- that is one of the -- the --
15 the -- the reasons why this -- this facial
16 challenge is -- has been very confusing to
17 defend, because we kind of don't -- we kind of
18 don't know what to defend against.

19 JUSTICE GORSUCH: Mr. Whitaker, on --
20 on that score, so we have some -- in a facial
21 challenge, we have a bit of a problem because
22 different legal principles apply in different
23 factual circumstances, and there are many
24 different defendants or plaintiffs here, sorry,
25 with different services. So that -- that's a

1 complicating feature on a -- on a facial
2 challenge.

3 But here's another one for you: What
4 about Section 230, which preempts some of this
5 law? How much of it? And how are we to account
6 for that complication in a facial challenge?

7 MR. WHITAKER: Well --

8 CHIEF JUSTICE ROBERTS: Why don't you
9 answer the question, then we'll move on.

10 JUSTICE GORSUCH: Briefly. Yeah.

11 MR. WHITAKER: Well -- well -- well, I
12 -- I think that the Court should answer the
13 question presented, I guess.

14 JUSTICE GORSUCH: But how can we do
15 that without looking at 230?

16 MR. WHITAKER: Well, because I -- I --
17 I don't -- I don't think that there's any --
18 some of this was briefed at the -- at the cert
19 stage, Your Honor. I don't think that the --
20 the Section 230(c) preemption -- (c)(2)
21 preemption question is really going to dispose
22 of the case. You know, the district court
23 actually reached the Section 230 issue but
24 concluded that it still had to reach the
25 constitutional issue anyway.

1 JUSTICE GORSUCH: I -- I'll get back
2 to this in my turn. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas, anything further?

6 JUSTICE THOMAS: Mr. Whitaker, the --
7 could you give us sort -- your best explanation
8 of what you perceive the speech to be in this
9 case or allege to be in this case?

10 MR. WHITAKER: Well -- well, as I
11 understand their contention, it's -- it's the --
12 this idea that the platforms, in having content
13 moderation policies, are somehow creating a
14 welcoming community, I guess. It seems to me,
15 at that level of generality, that can't really
16 be a cognizable message -- that seems to me more
17 like a tautology than -- than a message.
18 Basically, we want the people on our sites that
19 we want.

20 And -- and -- and I think, at that
21 level of generality, certainly, the Pruneyard
22 case would have to come out the other way
23 because, in Pruneyard, the mall certainly wanted
24 to ban leafleting because it wanted to create a
25 certain environment, and yet this Court said

1 that they did not have a -- a First Amendment
2 right to do that.

3 JUSTICE THOMAS: I -- I think what I
4 was more interested in is, you know, we're
5 talking -- we're using broad terms like "content
6 moderation," and throughout the briefs, you have
7 "shadow banning," "deprioritizing," and all
8 sorts of things.

9 And I -- I guess, with these facial
10 challenges, I always have a problem that we
11 don't -- we're not talking about anything
12 specific. In an as-applied challenge, at least
13 we know what's in front of us and what your
14 interpretation or at least the state's
15 interpretation of its law is in that case. Now
16 we're just speculating as to what the law means.

17 So I'm just trying to get more of a --
18 more specificity as to what the speech is in
19 this case. They are censoring as far as I can
20 tell, and I don't know of any protected --
21 speech interests in censoring other speech, but
22 perhaps there is something else.

23 MR. WHITAKER: Well, I don't think
24 that they do have a -- certainly not a speech
25 interest. I mean, at -- at most, I think that

1 they would have some interest in the
2 inherently -- allegedly inherently expressive
3 conduct of speech. You know, that way of
4 looking at it I take it my friends from the
5 United States agree with. But we do not think
6 they have a message in censoring and
7 deplatforming users from the sites any more than
8 the law schools in FAIR had a message in booting
9 military recruiters off campus.

10 JUSTICE THOMAS: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Alito?

12 JUSTICE ALITO: Did the plaintiffs
13 raise content -- I -- I'm sorry -- overbreadth
14 below?

15 MR. WHITAKER: No -- no, Your Honor.
16 I'm not a -- I -- I -- I -- I can't -- I
17 couldn't find the word "overbreadth" in any of
18 their pleadings.

19 JUSTICE ALITO: Where in the record
20 would -- should I look to find a list of all of
21 the platforms that are covered by the Florida
22 statute?

23 MR. WHITAKER: Well -- well, Your
24 Honor, I'm afraid that doesn't appear in the --
25 in the record because I think that the -- the

1 platforms were fairly cagey about which of their
2 members they thought the statute applied to.
3 The -- the record only contains three
4 platform-specific declarations: Etsy, Facebook,
5 and YouTube.

6 So that -- that's part of the problem
7 in this case, is that we -- we -- we don't have
8 a sense of -- it -- the record has not been
9 fully developed to answer that question, so
10 we're kind of litigating in the dark here.

11 And this was litigated on a
12 preliminary injunction at breakneck speed
13 without the -- the State having a chance to take
14 discovery, and that's part of the reasons why
15 some of these questions are difficult to answer.

16 JUSTICE ALITO: Well, I'll ask Mr.
17 Clement that argument -- that question too.

18 As to the platforms that are covered,
19 where in the record would I look to find a list
20 of all of the functions that those platforms
21 perform?

22 MR. WHITAKER: I'm not aware in the
23 record, Your Honor, of a -- an all-encompassing
24 list of all the functions the platforms perform.
25 There certainly are, as I mentioned, three

1 platform-specific declarations, also some more
2 general declarations that talk about some of
3 their -- their members more generally, but it's
4 not sort of all in one place.

5 I apologize, Your Honor.

6 JUSTICE ALITO: Does your law cover
7 any websites that primarily or even exclusively
8 engage in non-expressive conduct?

9 MR. WHITAKER: I think it does cover
10 websites that engage in primarily non-expressive
11 conduct. I mean, we would -- we would
12 characterize the social networking platforms as
13 engaging in primarily non-expressive conduct
14 in -- in -- insofar as they are hosting speech,
15 just like a traditional common carrier is not
16 engaged in -- in expressive conduct in
17 transmitting the communications of its
18 subscribers. And we do think our law would
19 apply to certainly the -- the largest -- at a
20 minimum, the largest social networking
21 platforms.

22 JUSTICE ALITO: What is the right
23 standard for a facial challenge if we think that
24 your law implicates a -- a -- a portion, a
25 percentage of expressive conduct and a portion

1 of non-expressive conduct?

2 How should we analyze that?

3 MR. WHITAKER: I think that you would
4 -- that -- so the -- there's a -- there's --

5 JUSTICE ALITO: So we need a -- we
6 need a numerator and a denominator there, I
7 think. What -- what would they be?

8 MR. WHITAKER: Well, I -- I don't
9 think there isn't -- that the standard would
10 have a numerator and a denominator. Actually,
11 Your Honor, in this context, we would view it as
12 the question being whether the statute has a
13 plainly legitimate sweep without the need to
14 compare applications.

15 As I understand this Court's
16 precedents, the numerator/denominator comparison
17 would be something you would do if there were an
18 overbreadth claim in this case, but I don't
19 understand my friends to be making an
20 overbreadth claim. Maybe they'll say something
21 different, but I could not find the word
22 "overbreadth" in their -- in their pleadings.
23 In the Texas case, they do have a footnote
24 suggesting that they made an overbreadth claim
25 in the alternative.

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

4 Justice Kagan?

5 JUSTICE KAGAN: I -- I just wanted to
6 sort of understand your position, and I want to
7 narrow this to the paradigmatic social media
8 companies' sort of news feed postings, Facebook,
9 YouTube, Twitter/X.

10 So suppose that -- that I say -- just
11 take this as a given, all right? You can argue
12 with the facts, but don't.

13 (Laughter.)

14 JUSTICE KAGAN: Suppose that I say,
15 for the most part, all these places say we're
16 open for business. Post whatever you like and
17 we'll host it.

18 But there are exceptions to that and
19 clearly content-based exceptions, which the
20 companies take seriously. So let's say they say
21 there we think that misinformation of particular
22 kinds is extremely damaging to society --
23 misinformation about voting, misinformation
24 about certain public health issues -- and so too
25 we think that hate speech or bullying is

1 extremely problematic.

2 And so we are going to enforce rules
3 against this. They're only going to apply to a
4 small percentage of the things that people want
5 to post. For the most part, they're open for
6 business. But we are serious about those
7 content-based restrictions. All right?

8 So, in that world, why isn't that a --
9 a -- you know, a -- a -- a classic First
10 Amendment violation for the state to come in and
11 say, we're not allowing -- going to allow you to
12 enforce those sorts of restrictions even though,
13 you know, you're basically -- it's -- it's like
14 an editorial judgment, you're excluding
15 particular kinds of speech?

16 MR. WHITAKER: Well -- well, Your
17 Honor, I think, if you -- I take your -- your
18 hypo to be assuming that it's -- it's First
19 Amendment protected activity, and I think that
20 what you would do in that instance, you would
21 have to run intermediate scrutiny -- under
22 Turner. And -- and the analysis regrettably --

23 JUSTICE KAGAN: So you -- don't say
24 what -- what I take it to be First Amendment
25 activity. I mean, that -- do you take it to be

1 First Amendment activity?

2 MR. WHITAKER: No, no. That's our
3 whole point. I mean, again --

4 JUSTICE KAGAN: Even though they're
5 saying, yeah, we're -- we -- we have -- we -- we
6 are a big forum for lots of messages but not for
7 those kinds of messages. We want to exclude
8 those kinds of messages.

9 Why isn't that First Amendment, a
10 First Amendment judgment?

11 MR. WHITAKER: I mean, I -- I -- I
12 think it's very -- the -- the Court held
13 otherwise, I think, in Pruneyard because, there,
14 there was an editorial policy against leafleting
15 too. And, again, I don't buy --

16 JUSTICE KAGAN: No, that was just
17 about leafleting and the mall owner didn't have
18 any expressive views. I'm taking as a given
19 that these -- that -- that YouTube or Facebook
20 or whatever has expressive views, there are
21 particular kinds of expression defined by
22 content that they don't want anywhere near their
23 site.

24 MR. WHITAKER: But -- but I think,
25 Your Honor, you still would have to look at the

1 objective activity being regulated, namely,
2 censoring and deplatforming, and ask whether
3 that expresses a message.

4 And because they host so much content,
5 an objective observer is not going to readily
6 attribute any particular piece of content that
7 appears on their site to some decision to either
8 refrain from or to censor or deplatform. And
9 that makes --

10 JUSTICE KAGAN: Do you think so as to
11 this -- here, this is a real-world example.
12 Twitter users one day woke up and found
13 themselves to be X users and the content rules
14 had changed and their feeds changed, and all of
15 a sudden they were getting a different online
16 newspaper, so to speak, in a metaphorical sense
17 every morning, and a lot of Twitter users
18 thought that was great, and a lot of Twitter
19 users thought that was horrible because, in
20 fact, there were different content judgments
21 being made that was very much affecting the
22 speech environment that they entered every time
23 they opened their app.

24 MR. WHITAKER: Your Honor, that
25 does -- respectfully, that -- that does not

1 answer whether they have a message in their
2 censorship any more than, you know, the -- the
3 -- I'm sure people objected, again, quite
4 strenuously to the fact that the law schools
5 were permitted to interview on campus. I'm sure
6 people wanted to ban leafleting in the -- at the
7 mall in Pruneyard. And -- and that does not
8 give them a message.

9 And that -- I think the reason for
10 that is, if they are not carefully selecting the
11 content in the newspaper, they don't have a
12 message in the existence, in the mere existence,
13 of the content on the site.

14 JUSTICE KAGAN: Thank you, General.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 JUSTICE GORSUCH: I just wanted to
18 give you a chance to finish up on the Section
19 230 point. I think it's Section 6 of your law
20 that says that the law is not enforceable to the
21 extent it conflicts with Section 230.

22 MR. WHITAKER: Sure, sure -- sure.

23 JUSTICE GORSUCH: So why wouldn't we
24 analytically want to address that early on in
25 these proceedings, whether in this Court or a

1 lower court?

2 MR. WHITAKER: Well -- well, the law
3 --

4 JUSTICE GORSUCH: And does that
5 complicate our attempt to --

6 MR. WHITAKER: Sure.

7 JUSTICE GORSUCH: -- resolve things in
8 a facial challenge?

9 MR. WHITAKER: Sure -- sure, Your
10 Honor. And I think the -- the reason is -- is
11 because the law is not facially at least
12 preempted under -- under 230(c)(2), which
13 principally regulates takedowns.

14 One reason for that is we -- we
15 understand 230(c)(2) not to sanction
16 viewpoint-based content moderation under the
17 rubric of otherwise objectionable. And there's
18 a very nice article that Professor Volokh has on
19 this in the -- in the Journal of Free Speech Law
20 where he lays this out. And we obviously
21 haven't briefed this, Your Honor.

22 The second point I would make about
23 Section 230(c)(2) is that it only applies to
24 good-faith content moderation, so to the extent
25 our law prohibits them from engaging in

1 bad-faith content moderation, that is absolutely
2 not preempted by 230(c)(2).

3 And one way to understand their
4 constitutional claims in this case, because they
5 have an expansive view of Section 230(c)(2), is
6 that they are in essence asserting a
7 constitutional right to engage in bad-faith
8 content moderation because they already have the
9 right to engage in a lot of moderation of
10 illicit content under 230(c)(2) as long as they
11 do so in good faith.

12 JUSTICE GORSUCH: Okay. And -- and
13 then just to follow up on Justice Kagan's line
14 of questioning, you've analogized to common
15 carriers and telegraphs in particular.

16 Why is that an apt analogy here, do
17 you think?

18 MR. WHITAKER: I think it's an apt
19 analogy, Your Honor, because the -- the -- the
20 principal function of a social media site is to
21 enable communication, and it's enabling willing
22 speakers and willing listeners to talk to each
23 other.

24 And it's true that the posts are more
25 public, but I don't think that Verizon would

1 gain any greater right to censor simply because
2 it was a conference call. I don't think that
3 UPS or FedEx would gain a greater right to
4 censor books because it was a truckload of books
5 as opposed to one book.

6 And so that -- the analogy is indeed
7 apt. And -- and so there's been talk of market
8 power. Market power is not an element, I think,
9 of traditional common carrier regulation, and,
10 indeed, some entities that are regulated as
11 common carriers, like cellphone providers,
12 operate in a fairly competitive market.

13 JUSTICE GORSUCH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

16 JUSTICE KAVANAUGH: In your opening
17 remarks, you said the design of the First
18 Amendment is to prevent "suppression of speech."
19 And you left out what I understand to be three
20 key words in the First Amendment or to describe
21 the First Amendment, "by the government."

22 Do you agree "by the government" is
23 what the First Amendment is targeting?

24 MR. WHITAKER: I do agree with that,
25 Your Honor, but I don't agree that there is no

1 First Amendment interest in allowing the
2 people's representatives to promote the free
3 exchange of ideas. This Court has recognized
4 that as a legitimate First Amendment interest in
5 the Turner case and all the way going back to
6 the Associated Press case when --

7 JUSTICE KAVANAUGH: Well, in the
8 Turner case, the intervention was, the Court
9 emphasized, unrelated to the suppression of
10 speech, the antitrust-type intervention there.
11 So I'm not sure when it's related to ensuring
12 relative voices are balanced out or there's
13 fairness in the speech or balance in the speech,
14 that that is covered by Turner.

15 Do you agree with that?

16 MR. WHITAKER: No, I don't agree with
17 that, Your Honor. Our -- our -- our interest
18 and our law --

19 JUSTICE KAVANAUGH: What did Turner
20 mean by "unrelated to" the suppression of
21 speech?

22 MR. WHITAKER: Well -- well, we don't
23 view our law as advancing interests that are
24 related to the suppression of speech. We think
25 that the interests, for example, in protecting

1 journalistic enterprises from being censored,
2 from -- from MSNBC being censored because an
3 Internet platform doesn't like a broadcast it
4 showed on -- on its station the other day, that
5 -- that is just an interest in preventing from
6 being silenced. It's not an equalizing
7 interest. It's giving them a chance.

8 JUSTICE KAVANAUGH: On the editorial
9 control point, you really want to fight the idea
10 -- and I understand -- that editorial control is
11 the same thing as speech itself. And you've
12 emphasized Pruneyard over and over again.

13 But we have a whole other line of
14 cases, as you're aware, of course, Hurley, PG&E,
15 Tornillo, Turner, which emphasize editorial
16 control as being fundamentally protected by the
17 First Amendment.

18 And I understood the line between
19 Pruneyard on the one hand and those cases on the
20 other to be whether you were involved in a
21 speech, communications business, as opposed to a
22 shopping center owner, which is the other side
23 of the line.

24 Can you respond to those cases?

25 MR. WHITAKER: Sure. I guess I don't

1 dispute the general principle of editorial
2 control. I just don't think that this -- that
3 the social media platforms are engaged in
4 editorial control.

5 And, again, the -- the -- the
6 recruiters -- the law schools, excuse me, in
7 Rumsfeld versus FAIR argued that they were
8 exercising editorial control when they booted
9 military recruiters off campus and invoked
10 Tornillo explicitly. And this Court had none of
11 it.

12 So the Court does need to draw a line,
13 I think, between a selective speech host that is
14 exercising editorial control and a speech host
15 like a common carrier or like the mall in
16 Pruneyard that can indeed be regulated in
17 prevent -- in being prevented from silencing its
18 customers.

19 JUSTICE KAVANAUGH: On the selective
20 speech host point, I think you've made the point
21 to Justice Kagan that they don't eliminate much
22 speech. But didn't we deal with that in Hurley
23 as well and say that the mere fact that the
24 parade organizer usually took almost all comers
25 was irrelevant to the First Amendment interests

1 in essentially editorial control over who
2 participated in the parade?

3 MR. WHITAKER: Yeah, and I -- and I --
4 and I guess I think Hurley, Your Honor, really
5 turned more on the fact that what was the
6 activity there was a St. Patrick's Day parade
7 with a particular expressive purpose, and so
8 perhaps the -- the -- the -- it -- it could
9 still be expressive and be a little bit more
10 lenient.

11 But I would note that this Court in
12 Hurley did -- in rejecting the conduit argument,
13 relied on the fact that there was front-end
14 selection of -- of the members of the parade,
15 that the -- the parade committee -- the
16 committee that was responsible for it was doing
17 front-end selection. So I do think Hurley fits
18 our theory.

19 But I also think that selectivity is
20 totally relevant to who is the speaker. And I
21 -- and we -- we analogize in our brief to the
22 government speech cases where this Court has
23 made that exact point in a variety of cases,
24 such as *Matal versus Tam* and *Shurtleff*. And
25 what you have said is that if the government is

1 not exercising a ton of control over the speech
2 that comes into a forum, it is not speaking and
3 it can't censor. That's what this Court held in
4 Shurtleff the --

5 JUSTICE KAVANAUGH: Thank -- thank
6 you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: Mr. Whitaker, I have
10 a question about this editorial control because,
11 really, when it comes to platforms that are the
12 traditional social media platforms like YouTube,
13 Instagram, you know, TikTok, Twitter/X, it all
14 rides -- it all turns on editorial control.

15 It seems to me that one distinction
16 between this and FAIR is that, here, these
17 companies are speech hosts, right? I mean, the
18 law schools in FAIR were hosting job fairs for
19 this purpose, like online recruiting. They
20 weren't gathering together a whole bunch of
21 people and saying, here, present your ideas,
22 present your posts. I mean, these social media
23 companies are hosting speech.

24 So why isn't that more like a
25 newspaper in Tornillo?

1 MR. WHITAKER: It -- it is -- it is
2 different, Your Honor, but -- but I think that
3 that's why we've -- we've leaned on -- also on
4 the common carrier analogy, I -- which I think
5 reflects that a -- a speech -- you can't just
6 say it's a speech host and go home because, if
7 that were true, Verizon could censor. Excuse
8 me.

9 JUSTICE BARRETT: Well -- well, put
10 aside common carrier for one second and just
11 pretend -- just put common carrier to the side.
12 Just tell me why this doesn't look like the same
13 kind of editorial control we see newspapers
14 exercise.

15 MR. WHITAKER: Because the platforms
16 do not review -- it -- it is a strange kind of
17 editor, Your Honor, that does not actually look
18 at the material that is going on its
19 compilation. I mean, in Twitter versus Taamneh,
20 the platforms told you that they didn't even
21 know that ISIS was on their platform and doing
22 things. And it is a strange kind of editor that
23 does not even know that -- the material that it
24 is editing.

25 JUSTICE BARRETT: Is it because it's

1 not humanized? I mean would -- "humanized," not
2 human eyes. Is it because it could be an
3 algorithm that says, you know, we want to have,
4 as Justice Kagan was pointing out, terms of
5 service, we want to have this kind of site. You
6 know, or -- or -- or some say that, for example,
7 TikTok might have boosted pro-Palestinian speech
8 and reduced -- reduced pro-Israel speech.

9 That's a viewpoint, right? And if you
10 have an algorithm do it, is that not speech?

11 MR. WHITAKER: Well, it -- it -- it
12 might be, Your Honor, but -- but, again, in --
13 in -- in Twitter and Gonzalez, the -- the -- the
14 platforms told you that the algorithms were
15 methods of organizing -- neutral methods of
16 organizing the speech, much like the Dewey
17 decimal system.

18 JUSTICE BARRETT: Well, that's not
19 what they're saying here. So let's -- let's
20 assume that what they're saying here, that
21 they're organizing it, you know, in ways that
22 reflect preferences, that are expressive of
23 their terms and conditions.

24 In that event, do you think it would
25 be editorial control in a First Amendment sense?

1 MR. WHITAKER: No. And -- and I think
2 it's important to separate the organize -- and I
3 agree with Justice Jackson that it's important
4 to separate the various functions -- the
5 organizing function from the hosting function.
6 And this is a point that Professor Volokh has
7 made in his -- in -- in his article that we
8 cite.

9 I mean, the -- if it -- simply because
10 they -- they are required to host certain
11 speech, it -- that does not actually
12 meaningfully prevent -- prevent them from
13 organizing that speech. So I think the Court
14 has to separate out regulation of the
15 organization from simply preventing them from
16 censoring.

17 And the reason, Your Honor, it is
18 different from a newspaper, I think, is two
19 principal points. First, we've been talking a
20 lot about selection, but, second, space
21 constraints. Space constraints are something
22 that this Court in FAIR and in Tornillo relied
23 on as one factor that is relevant. And the
24 social media companies have -- don't have any
25 space constraints, which means that a

1 requirement to host an additional piece of -- of
2 content is a -- a relatively less restriction
3 over --

4 JUSTICE BARRETT: Well, let me just
5 interrupt you there. I mean, Justice Sotomayor
6 pointed out that even though there may not be
7 physical space constraints, there are the -- the
8 -- the constraints of attention, right? They
9 have to present information to a consumer in
10 some sort of organized way and that there's a
11 limited enough amount of information that the --
12 the consumer can absorb it.

13 And don't all methods of organization
14 reflect some kind of judgment? I mean, could
15 you tell -- could Florida enact a law telling
16 bookstores that they have to put everything out
17 by alphabetical order and that they can't
18 organize or put some things closer to the front
19 of the store that they think, you know, their
20 customers will want to buy?

21 MR. WHITAKER: I think, first --
22 first, let me just take a step back because one
23 of the problems here is we don't have any
24 information in this record on their algorithms.
25 It's very difficult for us to piece -- pick

1 apart what exactly the algorithms are doing.
2 You certainly could imagine, I think, to be --
3 you know, to be candid, an algorithm that could
4 be expressive.

5 As far as we can tell, if the
6 algorithms work, though, in the manner that this
7 Court described them in *Twitter versus Taamneh*,
8 they look more like neutral ways to reflect user
9 choice, and I don't think there's expression in
10 that.

11 Now you can imagine a different kind
12 of algorithm. If an algorithm -- if it were
13 possible to have an algorithm that made a
14 website look like a newspaper, that would be
15 different. But, again, I think the Court -- the
16 -- the question of organization is analytically
17 too distinct from -- from the separate question
18 of whether they can be regulated in their
19 hosting and censorship.

20 JUSTICE BARRETT: Okay. So your
21 argument that it's not expressive entirely
22 depends on the hypothesis that the sorting and
23 feed functions are solely some sort of neutral
24 algorithm that's designed to user preference and
25 that they reflect no kind of policy judgment

1 based on the platform itself?

2 MR. WHITAKER: No. No, not at all,
3 actually, Your Honor, because I think that
4 preventing them from censoring does not
5 meaningfully pre -- pre -- preclude them from
6 organizing.

7 If they're required to carry a piece
8 of content, they can organize it however they
9 want generally. I mean, there are prohibitions
10 on shadow banning and the like, but they can
11 generally organize it however they want. So a
12 prohibition on censorship and deplatforming is
13 not, I think, a meaningful interference with
14 organizing.

15 But -- but, again, on -- on
16 algorithms, I would just stress that this is
17 a -- a facial challenge. We don't have any
18 particular information on what exactly their --
19 the content of their algorithms are. And so I
20 think the only question there is whether there's
21 a possible state of the world under which the
22 algorithms are non-expressive.

23 JUSTICE BARRETT: Okay. Let me just
24 ask you one last question. It's about the
25 facial challenge aspect of this.

1 So Florida's law so far as I can
2 understand it is very broad, and we're talking
3 about the classic social media platforms, but it
4 looks to me like it could cover Uber, it looks
5 to me like it could cover just Google search
6 engines, Amazon Web Service, and all of those
7 things would look very different.

8 And, you know, Justice Sotomayor
9 brought up Etsy. It seems to me that they're
10 arguing -- now Etsy has a feed recommended for
11 you, right, but it also just has shops for
12 handmade goods that you can get. It looks a lot
13 more like a brick-and-mortar marketplace or flea
14 market, you know, than, you know, a place for
15 hosting speech. Okay?

16 So, if this is a facial challenge and
17 Florida's law indeed is broad enough to cover a
18 lot of this conduct which is farther away from
19 expression than these standard social media
20 platforms, why didn't you then in your brief
21 kind of defend it by pointing out, look, there's
22 all this other stuff that's perfectly fine that
23 Florida covers. We don't want, you know, some
24 person who wants to sell their goods on Etsy to
25 be suppressed because it's, you know, stuff --

1 handmarked -- handmade goods that express a
2 political view, for example.

3 MR. WHITAKER: I think we did defend
4 the application of our law to Etsy, and I think
5 I've -- I've defended that from -- from the
6 lectern, but -- but -- but I don't think you
7 need to be with me on --

8 JUSTICE BARRETT: But, I mean,
9 pointing out, I mean, I can -- I can sit here
10 and think of all kinds of applications of this
11 law that really wouldn't hit expression, but --
12 but I -- I just don't understand you to have
13 been defending the law in that way --

14 MR. WHITAKER: Well --

15 JUSTICE BARRETT: -- as opposed to
16 countering the argument that the -- the
17 platforms are not engaged in expression.

18 MR. WHITAKER: We're -- we're --
19 we're -- we're making both arguments, Your
20 Honor, to be clear. As I was -- as I was
21 discussing with Justice Sotomayor, we view Etsy
22 as not having a significant expressive interest
23 in applying its policy -- its content moderation
24 policies.

25 JUSTICE BARRETT: So is that enough to

1 just make this whole thing fail, I guess, is my
2 question. If -- if --

3 MR. WHITAKER: Yes, I think it is.

4 JUSTICE BARRETT: -- if we agree with
5 you that Etsy, it's fine for it to apply to, or
6 Uber, it's fine, you know, Amazon Web Services,
7 if we agreed with you with all that, is that
8 enough to just say, well, then this facial
9 challenge can't succeed?

10 MR. WHITAKER: Yes, because that would
11 give the law a plainly legitimate sweep, and
12 that's all the Court needs to -- to address here
13 to reject the facial challenge.

14 JUSTICE BARRETT: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

17 JUSTICE JACKSON: So I feel like
18 there's a lot of indeterminacy in this set of
19 facts and in this circumstance, as Justice Alito
20 tried to, I think, illuminate with his
21 questions. We're not quite sure who it covers.
22 We're not clear exactly how these -- these
23 platforms work.

24 One of the things I wanted to give you
25 the chance to address is the lack of clarity

1 about what the statute necessarily means.
2 You've given a couple of -- you -- you've talked
3 about the consistency provision, for example,
4 and you've represented what you think it means,
5 but we don't have a state court determination
6 interpreting that provision, do we?

7 MR. WHITAKER: You do not, Your Honor.
8 In fact, the -- the -- the law was not allowed
9 to go into effect, so the Florida courts have
10 not had an opportunity to construe this statute
11 at all.

12 And I think that counsels strongly in
13 favor of rejecting the facial challenge because
14 this Court has considered in Washington State
15 Grange case the -- the fact that the state
16 courts have not had an opportunity to construe a
17 state law that's being attacked on its face as
18 -- as a reason to reject a facial challenge.

19 JUSTICE JACKSON: Can I ask you, do
20 you think this statute could be susceptible to
21 multiple interpretations? I mean, I can imagine
22 even the consistency provision, you know, well,
23 what does it mean that they have to do this
24 consistently? They have to apply the same
25 standards, or it has to substantively result in

1 the same level of preference? I could imagine
2 there you -- you could interpret that both more
3 narrowly or broadly.

4 MR. WHITAKER: There -- there
5 certainly may be some interpretive questions,
6 Your Honor. On that point, I don't think there
7 is any -- any ambiguity. And let me just read
8 to you what the consistency provision says. It
9 says, "a social media platform must apply
10 censorship, deplatforming, and shadow banning
11 standards in a consistent manner among its users
12 on the platform."

13 And the censorship, deplatforming, and
14 shadow banning standards are the things that the
15 social media company must under a separate
16 provision of the law publicly disclose, which
17 was a disclosure requirement that the Eleventh
18 Circuit upheld.

19 JUSTICE JACKSON: Yes, I understand.

20 MR. WHITAKER: But --

21 JUSTICE JACKSON: I mean, I -- I
22 appreciate that Florida's position is that our
23 law is perfectly clear, but I -- I --

24 MR. WHITAKER: Well -- well -- well,
25 but I think that that -- that that language I

1 just read to you I think makes clear that the
2 baseline for comparison is not some abstract
3 notion of fairness.

4 JUSTICE JACKSON: All right. Well,
5 let me ask you this about that, all right? So
6 let's assume we get to the point we disagree
7 with you about whether or not expressive
8 activity is covered and we're actually applying
9 or trying to determine which standard applies,
10 that is, you know, level of scrutiny.

11 What I'm a little confused about is
12 how we evaluate, for example, the 30-day
13 restriction with respect to determining whether
14 it's content-based or content-neutral. I
15 appreciate that on its face it doesn't
16 particularly -- you know, it doesn't point to a
17 particular type of content -- content, but I
18 suppose it's applied in reference to content,
19 right?

20 MR. WHITAKER: Well, the --

21 JUSTICE JACKSON: I mean, that -- that
22 restriction is a regulated entity can only
23 change its rules, terms, and engagements once
24 every 30 days. But we would have to look at
25 what it was before and what it is now to

1 determine if there's a change. So is that a
2 content-based restriction or not?

3 MR. WHITAKER: Certainly not. I mean,
4 the -- you know, this Court held a couple terms
5 ago in the City of Austin case just that simply
6 because a regulation requires consideration of
7 content doesn't -- doesn't make it
8 content-based. And there's nothing on the face
9 of that provision that targets any particular
10 message of the platforms.

11 And -- and -- and I think just to --
12 just to zoom out a little bit on the 30-day
13 provision, I mean, that provision is really an
14 adjunct to the -- the consistency provision as I
15 understand it, and -- and the point of it is
16 that it wouldn't do much good to require the
17 platforms to apply their policies consistently
18 if they could just sort of constantly change
19 them. And -- and that, I think, is the point --

20 JUSTICE JACKSON: I understand. But,
21 in the application of even the consistency
22 provisions, to determine whether they're not
23 doing it consistently, aren't we also looking at
24 content to some extent? I mean, I'm just --

25 MR. WHITAKER: Well --

1 JUSTICE JACKSON: -- it's -- I -- I
2 think it's not necessarily as easy as it might
3 seem to determine whether or not these
4 provisions are actually content-based or
5 content-neutral.

6 MR. WHITAKER: Well, again, I -- I --
7 I don't think the fact that it requires
8 consideration of -- of content makes it
9 content-based. I think you would look at
10 whether that -- it's targeting some kind of a
11 message of the platform, and there's nothing on
12 the face of the 30-day provision that does that,
13 Your Honor.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Clement.

18 ORAL ARGUMENT OF PAUL D. CLEMENT
19 ON BEHALF OF THE RESPONDENTS

20 MR. CLEMENT: Mr. Chief Justice, and
21 may it please the Court:

22 Florida's effort to level the playing
23 field and to fight the perceived bias of big
24 tech violates the First Amendment several times
25 over. It interferes with editorial discretion.

1 It compels speech. It discriminates on the
2 basis of content, speaker, and view -- and
3 viewpoint. And it does all this in the name of
4 promoting free speech but loses sight of the
5 first principle of the First Amendment, which is
6 it only applies to state action.

7 Florida defends its law, as you've
8 heard this morning, principally by insisting
9 that there's no expressive activity being
10 regulated. That blinks reality. This statute
11 defines the targeted websites in part by how big
12 their audience is. It regulates the content and
13 display of particular websites, and it tries to
14 prevent my clients from censoring speakers and
15 content.

16 If you are telling the websites that
17 you are -- that they can't censor speakers, you
18 can't turn around and say you're not regulating
19 expressive activity. It's all over this law.
20 And that brings it squarely within the teaching
21 of *Tornillo*, *PG&E*, and *Hurley*.

22 All three of those cases teach that
23 you cannot have the forced dissemination of
24 third-party speech and they reject
25 considerations of market power, misattribution,

1 or space constraints. And Reno and 303 Creative
2 make clear those principles are fully applicable
3 on the Internet.

4 Indeed, given the vast amount of
5 material on the Internet in general and on these
6 websites in particular, exercising editorial
7 discretion is absolutely necessary to make the
8 websites useful for users and advertisers. And
9 the closer you look at Florida's law, the more
10 problematic the First Amendment problems become.

11 It singles out particular websites, in
12 plain violation of Minneapolis Star. Its
13 provisions that give preferences to political
14 candidates and to edit -- and -- and to
15 journalistic enterprises are content-based in
16 the extreme.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: Mr. Clement, if the
19 government did what your clients are doing, or
20 -- would that be government speech?

21 MR. CLEMENT: So it might be
22 government speech, but I think it would be
23 unconstitutional government speech, which is to
24 say, when the government -- I mean, you know,
25 obviously, you have government speech cases, but

1 when what the government's doing is exercising
2 editorial discretion to censor some viewers or
3 some speakers and not others, I think that
4 plainly violates the First Amendment.

5 And I think that's essentially the
6 thrust of this Court's decision in the Manhattan
7 Community Cable case against Halleck, which is
8 that in this area, looking for state action is
9 absolutely critical. There are things that the
10 -- if the government does, is a First Amendment
11 problem and if a private speaker does, we
12 recognize that as protected activity.

13 JUSTICE THOMAS: So --

14 JUSTICE JACKSON: Mr. Clement, you --
15 oh, sorry.

16 JUSTICE THOMAS: -- can you give me
17 one example of a case in which we have said the
18 First Amendment protects the right to censor?

19 MR. CLEMENT: So I don't know that the
20 Court used that particular locution, Justice
21 Thomas, but I think that is the thrust of
22 Hurley, that is the thrust of PG&E, that is the
23 thrust of Tornillo. In all of those cases, a
24 private party did not want to convey and
25 disseminate the speech of a third party. And in

1 every case, the government said, no, we have
2 some really good reason here why this private
3 party has to disseminate the message of a third
4 party. And --

5 JUSTICE THOMAS: I've been fortunate
6 or unfortunate to have been here for most of the
7 development of the Internet.

8 (Laughter.)

9 JUSTICE THOMAS: And on the argument
10 under Section 230 has been that you're merely a
11 conduit, which it -- exact -- that was the case
12 back in the '90s and perhaps the early 2000s.

13 Now you're saying that you are engaged
14 in editorial discretion and expressive conduct.
15 Doesn't that seem to undermine your Section 230
16 arguments?

17 MR. CLEMENT: With respect, Justice
18 Thomas, I mean, obviously, you were here for all
19 of it. I wasn't here for all of it. But my
20 understanding is that my clients have
21 consistently taken the position that they are
22 not mere conduits. And Congress, in passing
23 Section 230, looked at some common law cases
24 that basically said, well, if you're just a pure
25 conduit, that means that you're free from

1 liability. But, if you start becoming a
2 publisher, by keeping some bad conduct out --
3 content out, then you no longer have that common
4 law liability protection.

5 And as I understand 230, the whole
6 point of it was to encourage websites and other
7 regulated parties to essentially exercise
8 editorial discretion to keep some of that bad
9 stuff out of there, and as a result, what
10 Congress said is -- they didn't say: And you're
11 still a conduit if you do that. No, it said:
12 You shouldn't be treated as a publisher, because
13 Congress recognized that what my clients were
14 doing would, in another context, look like
15 publishing, which would come with the kind of
16 traditional defamation liability, and they
17 wanted to protect them against that precisely to
18 encourage them to take down some of the bad
19 material that, if these laws go into effect,
20 we'd be forced to convey on our websites.

21 JUSTICE JACKSON: Mr. Clement, can I
22 ask you about the facial nature of this?
23 Because my understanding is that, to strike down
24 this statute as facially unconstitutional, we
25 would have to conclude that there's no possible

1 way for this law to govern these entities and
2 their conduct.

3 So, first, do I have the standard
4 right?

5 MR. CLEMENT: With all due respect, I
6 don't think so.

7 JUSTICE JACKSON: Okay.

8 MR. CLEMENT: In the First Amendment
9 context, as my friend was indicating, the
10 question is whether or not the statute has a
11 plainly legitimate sweep. So it's not the
12 Salerno, if there's one little application
13 somewhere, that's enough to save the statute.

14 JUSTICE JACKSON: But, I mean, whose
15 burden is that? I thought it was your burden to
16 say that this statute, in almost all of its
17 applications or in most or a substantial number
18 or something, would be unconstitutional in order
19 to get it facially stricken.

20 MR. CLEMENT: So two things, Your
21 Honor. I think our burden would be -- it would
22 be our burden to say that this statute doesn't
23 have a plainly legitimate sweep. In fact, it is
24 our position, and we did make this argument
25 below and succeeded, that this statute actually

1 has no constitutional application, and part of
2 that is because none of this statute, at least
3 none of the part that's in front of you today,
4 applies unless you are a covered website.

5 JUSTICE ALITO: Does the --

6 MR. CLEMENT: And the website --

7 JUSTICE JACKSON: But -- but wait. I
8 -- can I just -- I don't understand. I'm sorry.

9 You -- so no application, but we have
10 so many different applications of the law in
11 this situation precisely because it is so broad.
12 So how -- how can you say that?

13 MR. CLEMENT: Because the statute only
14 applies to websites that are a handful of
15 websites that meet the viewership threshold or
16 the total sales threshold.

17 And it's -- you know, it's not our
18 only argument, obviously, but one of our
19 arguments is you can't regulate expressive
20 activity in that kind of targeted way.

21 JUSTICE ALITO: Mr. Clement, does the
22 --

23 JUSTICE JACKSON: And those websites
24 only --

25 JUSTICE ALITO: -- does the Florida

1 law cover Gmail?

2 MR. CLEMENT: The -- the Florida law I
3 -- I -- I think by its terms could cover Gmail.

4 JUSTICE ALITO: All right. So does
5 Gmail have a First Amendment right to delete,
6 let's say, Tucker Carlson's or Rachel Maddow's
7 Gmail accounts if they don't agree with her --
8 his or her viewpoints?

9 MR. CLEMENT: They -- they might be
10 able to do that, Your Honor. I mean, that's
11 obviously not something that has been the square
12 focus of this litigation, but lower courts have
13 looked --

14 JUSTICE ALITO: Well, if they don't,
15 then how are we going to judge whether this law
16 satisfies the -- the requirements of either
17 Salerno or overbreadth?

18 MR. CLEMENT: So it's -- you know,
19 again, I think it's the plainly legitimate sweep
20 test, which is not synonymous with overbreadth,
21 but in all events, since this statute applies to
22 Gmail, if it applies at all, because it's part
23 of Google, which qualifies over the threshold,
24 and it doesn't apply to competing email services
25 that provide identical services, that alone is

1 enough to make every application of this statute
2 unconstitutional.

3 JUSTICE KAGAN: I mean, how could that
4 be?

5 JUSTICE ALITO: Does it apply to -- go
6 ahead.

7 JUSTICE KAGAN: How could -- how could
8 that be, Mr. Clement? It's not unconstitutional
9 to distinguish on the basis of bigness, right?

10 MR. CLEMENT: It -- it is when you're
11 regulating expressive activity. That's what
12 this Court said in Minneapolis Star. So the
13 statute in Minneapolis Star was unconstitutional
14 in all its applications. The statute --

15 JUSTICE KAGAN: If -- if you -- you're
16 saying, if -- if -- if there were no issue here
17 of -- that this is really a subterfuge, they
18 were trying to get at a certain kind of media
19 company that -- because of their views, and the
20 only issue was it's not worth it to regulate a
21 lot of small sites, you know, we -- we only want
22 to go after the big sites that actually have
23 many millions of users, you think that's a First
24 Amendment violation?

25 MR. CLEMENT: I do. The way you're

1 asking the question suggests you think that's a
2 harder case than the one I actually have before
3 you.

4 JUSTICE KAGAN: I -- I think it's a
5 little bit of an impossible case to say you
6 can't go after big companies under the First
7 Amendment.

8 MR. CLEMENT: All you have to do is go
9 after all the social website -- media websites
10 or all of the websites. You don't have to draw
11 these artificial distinctions that just so, you
12 know, coincidentally happen to coincide with the
13 websites that you think have a bias that you're
14 trying to correct. And just to remind you of
15 how the statute --

16 JUSTICE KAGAN: Right, but I took that
17 out of the -- the -- the -- the question. Let's
18 say that they weren't going after these
19 companies because of bias or because they
20 thought they had a slant. It was just, you
21 know, we're going after the biggest companies
22 because those are the companies with the biggest
23 impact and the most number of users. How -- how
24 -- how could that be a First Amendment
25 violation?

1 MR. CLEMENT: Because Minneapolis Star
2 says it is, because Arkansas Writers' Project
3 says it is, and because, if you actually got to
4 analyzing their so-called consumer protection
5 interest, the consumer protection interest would
6 be exactly the same for a website with 99
7 million global users as it would be with a
8 website with a hundred million global users.
9 And so I think there are red flags over all of
10 the distinctions drawn in the statute.

11 And then, if you look at the statute
12 more closely, I mean, my goodness, the political
13 candidates provision says that you can't have
14 posts about a political candidate. I can't
15 imagine anything more obviously content-based
16 than that. That's --

17 CHIEF JUSTICE ROBERTS: Counsel, is
18 there --

19 MR. CLEMENT: -- unconstitutional in
20 every one of its applications.

21 CHIEF JUSTICE ROBERTS: -- is there
22 any aspect of the service that -- provided on
23 the social platforms that is not protected under
24 the First Amendment or that is plainly valid
25 under the First Amendment?

1 MR. CLEMENT: I -- I think it's all
2 protected by the First Amendment. I mean,
3 obviously --

4 CHIEF JUSTICE ROBERTS: Direct mess --
5 direct messages?

6 MR. CLEMENT: I -- I -- I think direct
7 messages are protected under the First
8 Amendment. I think that the courts that have
9 looked at things like whether Gmail is a common
10 carrier have actually held that -- and there's a
11 case involving the RNC that has a specific
12 holding that Gmail is not a common carrier. I
13 think much of the logic of that would apply to
14 direct messaging.

15 Obviously, if this were a statute that
16 tried to address my clients only to the extent
17 that they operated a job board, this would be a
18 lot closer to FAIR and I might have a harder
19 case.

20 JUSTICE GORSUCH: So, Mr. Clement, the
21 government says your brief sometimes errs in
22 suggesting that conduit-type activity is always
23 expressive. And direct messages, Gmail, I -- I
24 take it your view then is that providers can
25 discriminate on the basis -- political views,

1 religious beliefs, maybe even race?

2 MR. CLEMENT: So, Justice Gorsuch, I
3 think you have to distinguish between two
4 things. One is sort of a status-based
5 discrimination, and the other is status as
6 speaker. And so I don't think that our clients
7 could discriminate and say you can't be on our
8 service, you can't even get access to our
9 service on the basis of race.

10 JUSTICE GORSUCH: No, there's -- but
11 -- but in how they use it and -- and their
12 speech.

13 MR. CLEMENT: So --

14 JUSTICE GORSUCH: I'm talking about
15 the content of their speech.

16 MR. CLEMENT: Yeah. I think, when it
17 comes --

18 JUSTICE GORSUCH: That it has
19 something to do with religion or politics or
20 race, you can editorialize and use that
21 editorial power to suppress that speech, right?

22 MR. CLEMENT: So I think that gets to
23 a very hard question. I think it would be
24 speech, but like I think it's the --

25 JUSTICE GORSUCH: So the answer is

1 yes, we can -- we can delete emails, we can
2 delete direct messages that we don't agree with
3 based on politics, religion, or race?

4 MR. CLEMENT: Probably not in
5 application, but I do think, look, a bookstore,
6 if it wants to have a display this month to
7 celebrate black history, can they limit that
8 display just to African American authors? I
9 think the answer is probably yes.

10 JUSTICE GORSUCH: And so it is here
11 too, right?

12 MR. CLEMENT: I -- I think the answer
13 is that there's at least First Amendment
14 activity going on there, and that -- and then
15 you would apply the equal protection clause to
16 it, and then you would decide whether or not
17 that's permissible or not. But, obviously, I
18 think this case involves editorial decisions at
19 its heart.

20 And one thing I just want to make
21 clear on the facial challenge point just so you
22 understand how this case came to be, as you
23 heard today, my friend's principal argument is
24 this doesn't cover expressive activity at all.

25 And in the lower court, when we sought

1 a preliminary injunction, they put all their
2 eggs in that basket and they specifically said,
3 look, we don't want to do intermediate scrutiny
4 at the preliminary injunction stage, so we
5 really only have an argument to resist this
6 preliminary injunction if you hold that this is
7 not expressive activity. And they did the same
8 thing in the Eleventh Circuit. There's a -- we
9 -- we have a footnote in our brief making it
10 clear on the pages exactly where they did this.

11 So they basically said: We either
12 want to win this on the threshold question that
13 this is not expressive activity, or we don't
14 want to get into the rest of it at this point.
15 We'll have some discovery and we'll have the
16 preliminary injunction and delay it.

17 JUSTICE ALITO: Mr. Clement --

18 JUSTICE BARRETT: Mr. Clement --

19 JUSTICE ALITO: -- does the -- does
20 the Florida law apply to Uber?

21 MR. CLEMENT: Its definition would
22 seem to apply to Uber, yes.

23 JUSTICE ALITO: So you've told us that
24 it's okay for your clients to discriminate on
25 the basis of viewpoint in the provision of email

1 services or in allowing direct messages,
2 messages from one Facebook user to another on --
3 on a private facility.

4 How about Uber discriminating on the
5 basis of viewpoint with respect to people that
6 its drivers will pick up?

7 MR. CLEMENT: So I -- I think the way
8 that --

9 JUSTICE ALITO: Is that okay?

10 MR. CLEMENT: I don't think that's
11 okay. I don't think Uber is interested in doing
12 that. I think the way the statute would apply
13 to Uber, just to make clear, is it really would
14 apply, like, on comments on the drivers or
15 comments section on something like that if Uber
16 wants to just sort of -- and -- and -- and Etsy,
17 I think it's the same way.

18 You know, Etsy has an ability for you
19 to put comments on the seller and whether they
20 did a nice job or a bad job. And Etsy doesn't
21 want certain comments on that, and they want to
22 clean that up to keep it to be a better place
23 for people to come and look at materials.

24 So, when you think about the
25 applications of this statute to some of the

1 things that seem less obvious, it's really
2 focused on that expressive aspect of it.

3 But, obviously, the core of the
4 statute and the motivation for the legislation
5 and the examples that my friends from Florida
6 include in their own petition appendix are about
7 much more expressive activity by the YouTubes
8 and the Facebooks of the world, excluding
9 certain speakers, and they want to override that
10 classic editorial decision.

11 JUSTICE BARRETT: But, Mr. Clement,
12 that's cut -- one of the things that's hard for
13 me about this case is let's posit that I agree
14 with you about Facebook and YouTube and those --
15 those core social media platforms.

16 Don't we have to consider these
17 questions Justice Alito is raising about DMs and
18 Uber and Etsy because we have to look at the
19 statute as a whole? And, I mean, we don't have
20 a lot of briefing on this, and this is a
21 sprawling statute and it makes me a little bit
22 nervous.

23 I'm not sure I agree with you about
24 DMs and -- and Gmail, just it -- it's not
25 obvious to me anyway that that -- that they

1 would -- that they can't qualify as common
2 carriers.

3 MR. CLEMENT: Look, I agree, you don't
4 want to decide all of that today.

5 JUSTICE BARRETT: Yeah.

6 MR. CLEMENT: But this is not here on
7 sort of final judgment. It's here on a
8 preliminary injunction. And the question is,
9 you know, do you want this law with all of these
10 unconstitutional applications enforced by every
11 Floridian, so every -- these provisions are
12 enforced by an -- every Floridian being able to
13 go into court and get \$100,000 in civil
14 penalties.

15 Now do you want that completely
16 antithetical law to the First Amendment to go
17 into effect while we sort out all these anterior
18 questions, or do you want it to be put on hold
19 while we can litigate all of this stuff, and if
20 it turns out there's a couple of applications
21 that are okay or somebody wants, you know,
22 briefing just on the question of whether direct
23 mail is -- is a common carrier, all that --

24 JUSTICE KAVANAUGH: And --

25 JUSTICE BARRETT: But can we escape

1 that in this posture?

2 MR. CLEMENT: Absolutely you can
3 escape that in this posture. You affirm this
4 preliminary injunction which is in place. If
5 you want to, you can point to the clear
6 litigation judgment that Florida expressly made
7 below, which is we're not going to get into all
8 of that intermediate scrutiny stuff. We don't
9 want a record on that. We're going to put all
10 our eggs in the expressive activity basket, and
11 they could not have been more clear about that
12 below and in the Eleventh Circuit, and then you
13 say this law which has all of these First
14 Amendment problems, this wolf comes as a wolf,
15 we are going to put that on hold and then we can
16 sort out some of these tertiary questions.

17 JUSTICE ALITO: Well, if that's the
18 case, Mr. Clement, to what extent is it the --
19 is it the result of your own litigation
20 decisions? You could have brought an as-applied
21 challenge limited to the two platforms that you
22 want to talk about, Facebook and YouTube.

23 But, instead, you brought a facial
24 challenge, and you claim that it's also
25 susceptible to analysis under overbreadth. So

1 you had to -- to get a preliminary injunction,
2 you had to show you had a probability of success
3 on your facial or overbreadth challenge.

4 MR. CLEMENT: And we did in --

5 JUSTICE ALITO: You can't now shift
6 and say let's -- you know, it was a good
7 preliminary injunction because it's fine as
8 applied to the platforms I want to talk about,
9 and let's forget about all the other platforms
10 that might be covered.

11 MR. CLEMENT: Well, Justice Alito,
12 first of all, we -- we did all that and we won.

13 Second of all --

14 JUSTICE ALITO: Did you bring an
15 as-applied challenge?

16 MR. CLEMENT. No, we didn't bring an
17 as-applied challenge because we think this --

18 JUSTICE GORSUCH: So --

19 MR. CLEMENT: -- we think this --

20 JUSTICE GORSUCH: So --

21 MR. CLEMENT: -- statute is
22 unconstitutional in all its applications.

23 JUSTICE GORSUCH: Exactly. And so
24 you -- you -- you suggested it could be sorted
25 out on remand, but, on remand, it's still a

1 facial challenge, and -- and there is no --

2 MR. CLEMENT: It is still a facial
3 challenge, you're right.

4 JUSTICE GORSUCH: And so, again, you
5 think all of the applications are
6 unconstitutional, right?

7 MR. CLEMENT: I -- I do because the
8 definitions are problematic, the terms --

9 JUSTICE GORSUCH: So there's nothing
10 to sort out on remand. It's done. If -- if you
11 should prevail in this -- on a -- on a
12 preliminary injunction here, I mean, for
13 practical purposes, it's finished, and so there
14 is no opportunity to sort out anything on
15 remand.

16 MR. CLEMENT: There's the whole
17 merits. What we've shown is a likelihood of
18 success on the merits. We haven't won on the
19 merits yet.

20 JUSTICE GORSUCH: All or nothing.

21 JUSTICE JACKSON: Can -- can I try it
22 another way? I mean, I -- I asked you before
23 what was the standard, and now you're saying
24 that you think that all applications are
25 unconstitutional, which I think is your burden

1 to establish.

2 So, if we come up with some scenarios
3 in this context in which we can envision it not
4 being unconstitutional, why don't you lose?

5 MR. CLEMENT: First of all, that's not
6 the standard with all due respect. I mean, this
7 Court has never applied the Salerno standard in
8 a First Amendment case.

9 And this would be the worst First
10 Amendment case in this Court's history if you
11 started down that road because you can always
12 put in some provision into a statute that's
13 innocuous and then you say, well, there's a
14 couple of fine things in there.

15 You look at it section by section and
16 these sections are pernicious from a First
17 Amendment standard, can't have content about a
18 political candidate. There's no constitutional
19 application to that.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Just so I understand precisely, your
23 position is that the only issue before us is
24 whether or not the speech that is regulated
25 qualifies as -- not to beg the question -- the

1 expression that's before us is not speech?

2 MR. CLEMENT: I -- I think that's one
3 way to put it. Obviously, you have two
4 questions presented. You're going to be able to
5 decide whatever you think is fairly included in
6 those questions presented.

7 I'm just pointing out that as an
8 artifact of the way my friend's litigated this
9 case, you do not have a record on everything
10 that might be interesting for intermediate
11 scrutiny, and it's not my fault. It is based
12 precisely on their representations to the courts
13 below that they did not want to get into the
14 intermediate scrutiny thing, they wanted to tee
15 up the expressive activity issue.

16 CHIEF JUSTICE ROBERTS: If -- if the
17 appropriate standard is not Salerno, could you
18 articulate what you think is the appropriate
19 standard?

20 MR. CLEMENT: I think the -- the
21 appropriate standard is whether the First
22 Amendment -- the statute that implicates the
23 First Amendment has a plainly legitimate sweep.

24 CHIEF JUSTICE ROBERTS: Thank you.
25 Justice Thomas?

1 JUSTICE THOMAS: Could you again
2 explain to me why, if you win here, it does not
3 present a Section 230 problem for you?

4 MR. CLEMENT: If we win here, we avoid
5 Section 230 problems, I think, Your Honor, and
6 the reason is that 230 is a protection against
7 liability. It's a protection against liability
8 because Congress wanted us to operate as
9 publishers, and so it -- it -- it wanted us to
10 exercise editorial discretion, and so it gave us
11 liability protection.

12 But liability protection and First
13 Amendment status don't go hand in hand. I don't
14 think the parade organizer in Hurley was
15 responsible for the parade floats that go --
16 went into its parade. Historically, newsstands
17 and others aren't responsible for the materials.

18 So -- so I don't think you have to
19 sort of say it's one or the other. I mean, I
20 think the 230 protection stands alone.

21 JUSTICE THOMAS: So what is it that
22 you are editing out that fits under Section 230?

23 MR. CLEMENT: So, in some of these --
24 I mean, it depends on -- you know, in -- in some
25 cases, it is terrorist material. In other

1 cases, it's kids that are telling other kids,
2 hey, you should do this Tide POD challenge. In
3 some cases, it's kids that are encouraging other
4 kids to commit suicide.

5 There's a whole bunch of stuff that we
6 think is, you know, offensive within the terms
7 of 230 that we're exercising our editorial
8 discretion to take out.

9 JUSTICE THOMAS: Well, but 230 does
10 not necessarily touch on offensive material. It
11 -- it touches on obscene, lewd, lascivious,
12 filthy, excessively violent, harassing, or
13 otherwise objectionable. Do you think --

14 MR. CLEMENT: It's that last one.
15 (Laughter.)

16 JUSTICE THOMAS: Well --

17 MR. CLEMENT: I mean, we could have a
18 fine debate about, you know, the -- you know,
19 the last, you know, sort of -- you know, how
20 much of that --

21 JUSTICE THOMAS: Right.

22 MR. CLEMENT: -- you -- you sort of --
23 you know, what -- what -- what's the Latin for
24 that, or the company you keep and all of that.
25 I mean, we could have that fine debate in some

1 other case, but we would certainly take the
2 position that we're protected in those judgments
3 under 230.

4 JUSTICE THOMAS: Well, I think you'd
5 make that, the ejusdem doctrine, do a lot of
6 work. But let's put that aside.

7 Tell me again exactly what the
8 expressive conduct is that, for example, YouTube
9 engages in when it -- it -- it -- or, I'm sorry,
10 Twitter deplatforms someone. What is the
11 expressive conduct and to whom is it being
12 communicated?

13 MR. CLEMENT: So, when they, you know,
14 let's say deplatform somebody for violating
15 their terms of use or for continuing to post
16 material that violates the terms of use, then
17 they are sending a message to that person and to
18 their broader audience that that material --

19 JUSTICE THOMAS: How would you know
20 someone's been deplatformed? Is there a notice?

21 MR. CLEMENT: Typically, you do get a
22 notice of that, and there's a provision --

23 JUSTICE THOMAS: No, I mean the
24 audience, the other people.

25 MR. CLEMENT: Well, they're going to

1 see that they're not there anymore. They're no
2 longer in their feed --

3 JUSTICE THOMAS: Well, but the --

4 MR. CLEMENT: -- and, presumably --

5 JUSTICE THOMAS: -- the message could
6 be they didn't want to be there anymore.
7 They're tired of it. They're exhausted.

8 MR. CLEMENT: Well, and -- and -- and
9 here's the thing. I mean, you know, that --
10 that -- that message is then going to be carried
11 over in -- you know, this isn't just about who
12 gets excised from the platform. It's all about
13 what material people see on their individualized
14 sort of -- you know, when they tap into Facebook
15 or Twitter or -- or -- or YouTube.

16 And what they're not going to see is
17 they're not going to see material that violates
18 the terms of use. They're not going to see a
19 bunch of material of -- that -- that glorifies
20 terrorism. They're not going to see a bunch of
21 material that glorifies suicide.

22 JUSTICE THOMAS: Is there any
23 distinction between action or editing that takes
24 place as a result of an algorithm as opposed to
25 an individual?

1 MR. CLEMENT: I -- I don't think so,
2 Your Honor. These algorithms don't spring from
3 the ether. They are essentially computer
4 programs designed by humans to try to do some of
5 this editorial function and is --

6 JUSTICE THOMAS: Well, but what do you
7 do with a deep-learning algorithm which teaches
8 itself and -- and has very little human
9 intervention?

10 MR. CLEMENT: You -- you still had to
11 have somebody who kind of created the universe
12 that that algorithm is going to look at.

13 JUSTICE THOMAS: So who's speaking
14 then, the algorithm or the person?

15 MR. CLEMENT: I -- I -- I think, the,
16 you know, the question in these cases would be
17 that Facebook is speaking, that YouTube is
18 speaking, because they're the ones that are
19 using these devices to run their editorial
20 discretion across these massive volumes.

21 And the reason they're doing this,
22 and, of course, they're supplementing it with
23 lots and lots of humans as well, but the reason
24 they have to use the algorithms, of course, is
25 the volume of material on these sites, which

1 just shows you the volume of --

2 JUSTICE THOMAS: Okay.

3 MR. CLEMENT: -- editorial discretion.

4 JUSTICE THOMAS: Yeah, and, finally --
5 I'm sorry to keep going, Mr. Clement -- exactly
6 what are they saying?

7 MR. CLEMENT: So --

8 JUSTICE THOMAS: What is the algorithm
9 saying? I don't know. I'm not on any, you
10 know. But what is it saying?

11 MR. CLEMENT: It's saying --

12 JUSTICE THOMAS: Is it a consistent
13 message? What -- I mean, usually -- when we had
14 Hurley, the -- it was their parade and they
15 didn't want certain people in their parade. You
16 understood that.

17 What are they saying here?

18 MR. CLEMENT: They are saying things
19 like Facebook doesn't want pro-terrorist stuff
20 on our site.

21 JUSTICE THOMAS: I didn't -- I --
22 we're not talking about terrorists here.

23 MR. CLEMENT: Well --

24 JUSTICE THOMAS: Those aren't --
25 terrorists aren't complaining about it.

1 MR. CLEMENT: Well, I -- I -- I think,
2 actually, we are talking about terrorism here
3 because I think, if these laws go into effect --

4 JUSTICE THOMAS: But I thought that
5 was a crime. I mean, under -- they -- the -- as
6 I understood Florida, they said that they --
7 they -- one provision in the Act says they --
8 nothing that's inconsistent with Section 230.
9 It seems to me that it is consistent with
10 Section 230.

11 MR. CLEMENT: So, Your -- Your Honor,
12 it is -- you know, there are things like, if --
13 if you have a video on how to build a bomb to
14 blow up, you know, a church or something, maybe
15 that's prohibited by sort of, you know, the --
16 that -- that kind of illegality provision. But,
17 if there's something glorifying the attacks of
18 October 7, and one of these companies wants to
19 keep that off of the sites, or is there
20 something on there that they want to -- that
21 sort of glorifies sort of, you know -- sort of
22 incredibly thin teenage bulimia and they want to
23 keep that off their site, they -- they have the
24 right to do that. And that's an important
25 message.

1 And just like in Hurley, the message
2 that they are sending is a message about what
3 they exclude from their -- their forum.

4 CHIEF JUSTICE ROBERTS: Justice Alito?

5 JUSTICE ALITO: There's a lot of new
6 terminology bouncing around in these cases, and
7 just out of curiosity, one of them is "content
8 moderation." Could you define that for me?

9 MR. CLEMENT: So, you know, look,
10 content moderation to me is just editorial
11 discretion. It's a way to take the -- the --
12 the -- all of the content that is potentially
13 posted on the site, exercise editorial
14 discretion in order to make it less offensive to
15 users and advertisers.

16 JUSTICE ALITO: Is it -- is it
17 anything more than a euphemism for censorship?
18 Let me just ask you this. If somebody in 1917
19 was prosecuted and thrown in jail for opposing
20 U.S. participation in World War I, was that
21 content moderation?

22 MR. CLEMENT: So, if the government's
23 doing it, then content moderation might be a
24 euphemism for censorship. If a private party is
25 doing it, content moderation is a euphemism for

1 editorial discretion. And there's a fundamental
2 difference between the two.

3 JUSTICE ALITO: For editorial
4 discretion, are you affirmatively saying --
5 never mind. No -- no further questions.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 JUSTICE SOTOMAYOR: Mr. Clement, I'm
9 -- I'm now sort of trying to take all of this
10 in, and I think that I came into this very
11 differently than you have. I came into this
12 thinking there are different functionalities by
13 websites. So some host news, like the news feed
14 in Facebook. Some host -- like Justice Barrett
15 was talking about and others, Gmail or -- where
16 they're just letting people contact each other,
17 direct messaging.

18 And I was thinking that since I think
19 rightly this law seems to cover all of that,
20 that it's so broad, how -- but that it might
21 have some plainly legitimate sweep, it might be
22 okay to require direct messaging to give you
23 notice, to be consistent, to pay attention to --
24 to 30-day registration. Some of these
25 provisions might be okay for those functions.

1 But you're saying to me that's not
2 true. Can you articulate very succinctly why
3 you think, at this stage on a facial challenge,
4 that we can say there is no plainly legitimate
5 sweep, that this particular law, after we sort
6 it all out below, will still survive?

7 Now I think the court below said --
8 and you try to take that out from Justice
9 Kagan's answer -- maybe I don't want to, okay,
10 is it because this law was passed with viewpoint
11 discrimination in mind? That's what the court
12 below said.

13 MR. CLEMENT: The -- the -- the court
14 below said that. And that would be a sufficient
15 basis to take out the whole law.

16 The law is also shot through with
17 content-based provisions. I think that's enough
18 to take out the whole law. It also -- the
19 entire law, every provision we challenge is
20 speaker-based in its limited reach.

21 And what this Court's cases clearly
22 say, including NIFLA, which my recollection is
23 was a facial challenge, says that when you look
24 at speaker-based distinctions, you can then open
25 the lens a little bit and see if those

1 speaker-based provisions are infused with
2 viewpoint discrimination or other discriminatory
3 influences.

4 And if you do that here -- I mean, you
5 don't have to get past the governor's official
6 signing statement to say -- to understand that
7 -- the restrictions on this statute. I mean,
8 you know, it -- it's one thing to say, well,
9 they're only getting the big companies. But,
10 when the governor is telling you we're going
11 after the viewpoints of the -- of the Silicon
12 Valley oligarchs, then all of the sudden,
13 limiting it to the biggest companies starts to
14 tell you that this is targeted like a laser beam
15 at the companies that they don't like the
16 editorial discretion that was being exercised.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

18 JUSTICE KAGAN: I mean, let me ask the
19 -- the -- the same kind of question in a
20 different way. Suppose that, instead of this
21 law, you -- you -- you had a law that was
22 focused, it excluded the kind of curated news
23 feeds, where your argument about editorial
24 discretion sort of leaps out.

25 So this law didn't touch those. But

1 it said, you know, with respect to Gmail and
2 direct messaging and Venmo and Dropbox and Uber,
3 with respect to all of those things, a site
4 could not discriminate on the basis of
5 viewpoint, just as maybe a site couldn't
6 discriminate on the basis of race or sex or
7 sexual orientation or what have you. So it just
8 added viewpoint to the list.

9 Wouldn't that be all right?

10 MR. CLEMENT: I -- I actually don't
11 think it would be all right because all of those
12 things are still in the expressive business.
13 And I also think --

14 JUSTICE KAGAN: Well, do you think
15 that -- you know, suppose it didn't say
16 viewpoint; it just said you can't discriminate
17 on the basis of, you know, all the usual
18 protected characteristics. Is -- is that all
19 right?

20 MR. CLEMENT: That would probably be
21 all right, but it wouldn't save the whole
22 statute from being --

23 JUSTICE KAGAN: Well, so this is just
24 on this statute. You -- you know, it's just --
25 it's a -- it's a statute about -- it excludes

1 YouTube and Facebook, and -- you know, the
2 Facebook news feed.

3 MR. CLEMENT: Right.

4 JUSTICE KAGAN: But it's just direct
5 messaging, Venmo, all of those kinds of things.
6 And it just said, you -- you know, we're not
7 going to let you exclude on the basis of race
8 and sex and we're also not going to let you
9 exclude people on the basis of viewpoint.

10 MR. CLEMENT: So, I mean, the first
11 part of that statute I don't think my clients
12 would even challenge. I mean, whether there's
13 an abstract First Amendment right to have the
14 black authors table for black history month --

15 JUSTICE KAGAN: And also on the basis
16 of viewpoint.

17 MR. CLEMENT: When -- when you throw
18 viewpoint into there, then I think, I -- you
19 know, I'd have to ask my clients whether they'd
20 challenge that statute. But, obviously, that's
21 not the -- the -- the -- the statute we have
22 here.

23 And if you think about --

24 JUSTICE KAGAN: I guess what I'm
25 saying is in part it is the statute you have

1 here.

2 MR. CLEMENT: I -- I -- I --

3 JUSTICE KAGAN: And that's -- and --
4 and -- and -- and that gives you your plainly
5 legitimate sweep, because all it's saying is
6 that when you run a service where you're not
7 speaking, unlike in Facebook feed, where your
8 editorial discretion argument is good because
9 the -- the -- the platform is engaged in speech
10 activities.

11 Well, when you're running Venmo,
12 you're not engaged in speech activities. And
13 so, when a state says to you, you know what, you
14 have to serve everybody, irrespective of whether
15 you like their political opinions or not, then
16 it seems you have a much less good argument, but
17 this statute also says that, doesn't it?

18 MR. CLEMENT: Not really, Justice
19 Kagan. And I think we're in danger of losing
20 sight of the actual statute. So let me take you
21 to Petition Appendix 97A and the definition of
22 "censor" used in the statute.

23 It says, "censor includes any action
24 taken by a social media platform to delete,
25 regulate, restrict, edit, alter, inhibit the

1 publication or republication of, suspend a right
2 to post, remove, or post an addendum to any
3 content or material posted by a user. The term
4 also includes actions to inhibit the ability of
5 the user to be viewable or to interact with
6 another user of the social media platform."

7 Censor is all about the expressive
8 activity. Post-prioritization is all about it.
9 It specifically talks about a news feed, a feed,
10 a view, search results, and they give
11 essentially political candidates and
12 journalistic enterprises a right to sort of
13 non-discrimination, so they're going to pop up
14 there even though, like, I have no interest in
15 politics, I just want to look at, you know,
16 feeds about Italian bicycles, and I'm still
17 going to get these Florida politicians popping
18 in there? That's what this statute does.

19 And then you go through, shadow ban.
20 Shadow ban's not about any of the things you're
21 talking about. Shadow ban is all about content.
22 And then we go to journalistic enterprises.
23 They get pride of place.

24 Then we talk about
25 post-prioritization. That's all about how you

1 display the content. So like may -- maybe the
2 30-day provision, you could sort of say that,
3 well, that applies to, like, Uber, but even
4 then, if Uber wants to change its comment
5 policies because all of a sudden, you know, they
6 did one thing to try to, you know, deal with one
7 set of issues and then a problem comes up and
8 there's a whole bunch of, like, people using the
9 comments in a really rude way, like, why
10 couldn't they change their editorial policy on
11 the -- on the comments? I just don't understand
12 it.

13 And then all of the duty-to-explain
14 provisions. The duty-to-explain provisions are
15 all driven by decisions to exclude conduct --
16 content. And that happens a billion times a
17 quarter at YouTube. So that's a crushing blow.
18 It has nothing to do with some of the other
19 things you're talking about.

20 JUSTICE KAGAN: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: Can I just pick up
25 on the word "censorship" because I think it's

1 being used in lots of different ways.

2 So, when the government censors, when
3 the government excludes speech from the public
4 square, that is obviously a violation of the
5 First Amendment.

6 When a private individual or private
7 entity makes decisions about what to include and
8 what to exclude, that's protected generally
9 editorial discretion, even though you could view
10 the private entity's decision to exclude
11 something as "private censorship."

12 MR. CLEMENT: Absolutely. That was
13 the whole thrust of this Court's decision in
14 Halleck. And I suppose the Hurley case might
15 have been a completely different case if that
16 was an official City of Boston parade and the
17 City of Boston decided to exclude the group.

18 The whole reason that case came down
19 the way it did unanimously is because it was a
20 private organization exercising its First
21 Amendment right to say we don't want GLIB in our
22 parade.

23 JUSTICE KAVANAUGH: How does -- how
24 does 303 fit into that?

25 MR. CLEMENT: Well, I think 303 is

1 just further evidence that, you know -- I mean,
2 you know, obviously, I think 303, where 303 is
3 most relevant is that, you know, Colorado in
4 that case tried to rely on FAIR, much the way my
5 friends here rely on FAIR, and this Court made
6 clear in 303 Creative, no, it doesn't work that
7 way. You know, this is expressive activity.

8 And -- and -- and so -- you know, and
9 -- and the fact that my friend's best case is
10 FAIR, I think, just shows how radical this
11 statute is, because this targets expressive
12 activity in its core.

13 If the Solomon amendment said to the
14 law schools, you have to give the military equal
15 time in the classroom, I think the case would
16 have been 9/0 the other way. And that's
17 essentially what the -- what -- what Florida is
18 trying to do here.

19 JUSTICE KAVANAUGH: And then, on the
20 procedural posture, I think this is important to
21 try to understand what's exactly before us, and
22 you've gotten questions on this, but I want to
23 nail it down for my -- my benefit, which is you
24 said that they came in and opposed a PI solely
25 on the ground that what was involved here was

1 not expressive activity or speech but, instead,
2 conduct.

3 Is that accurate?

4 MR. CLEMENT: That -- that -- that's
5 accurate. It came up in the context of how much
6 discovery we were going to have before we had
7 the preliminary injunction hearing, and in that
8 context, the State says, look, we -- we're going
9 to sort of, you know, kind of rest on this kind
10 of threshold question, as my friend said, and
11 that we'll limit discovery on both sides and
12 then, in the Eleventh Circuit, it was even more
13 clear because, in the Eleventh Circuit, the
14 position of the State of Florida was like, we're
15 not going to really engage on intermediate
16 scrutiny at all. We're -- we -- we're putting
17 all our eggs in the expressive eggs basket.

18 JUSTICE KAVANAUGH: So, if we think
19 that the statute does target expressive activity
20 in some respects and we affirm in this case,
21 what is left to Justice Gorsuch's question?
22 What's left to happen -- that just means it
23 can't go in place for the next year or two until
24 a final judgment. What -- what will happen in
25 the litigation?

1 MR. CLEMENT: So there'll be
2 litigation on the merits. I don't even think
3 we're past the point where we could amend, so if
4 this Court tells us we sure better have an
5 as-applied challenge in there, I suppose we
6 could do that.

7 But the point is the litigation will
8 go on. There will be discovery. Unless --
9 unless Florida decides at that point that the
10 writing's on the wall and it tries to pass a
11 more narrow statute, but, otherwise, there would
12 be discovery, there would be, you know,
13 essentially, the whole nine yards. But, in --
14 in the interim, I -- and -- and, you know, I
15 just can't emphasize enough particularly that
16 \$100,000 civil penalty provision.

17 JUSTICE KAVANAUGH: All that's before
18 us then is what should happen in the interim
19 before final judgment and it comes back to us
20 potentially a year or two from now. Should it
21 be in effect or not be effect until it comes
22 back to us?

23 MR. CLEMENT: Yeah.

24 JUSTICE KAVANAUGH: Correct?

25 MR. CLEMENT: If it comes back to you.

1 Yes.

2 JUSTICE KAVANAUGH: If it came back to
3 us or it goes to the court of appeals. And what
4 will happen -- I mean, you've alluded to it, but
5 what will happen in that year, do you think?
6 Because I don't think we've heard much about
7 exactly what you're concerned about.

8 In other words, you're very concerned
9 about this. That's obvious. But what -- what
10 are the specifics of that?

11 MR. CLEMENT: Well, I -- I mean,
12 honestly, if this statute goes into effect, we'd
13 sort of have to fundamentally change our
14 business models, and I think each company is
15 going to make their own judgment about how
16 they'd come into compliance.

17 I think, you know, part of the irony
18 here is that as to one of -- you know, they --
19 they say this is going to promote speech, but --
20 but they allow us to discriminate on the basis
21 of content as long as we do it consistently.

22 So, you know, what -- what we might do
23 in the interim, at least some of these companies
24 might do is, you know, just, like, well, let's
25 do only puppy dogs at least in Florida until we

1 can get this straightened out because that's the
2 one way that -- because, you know, these same
3 companies are getting hammered by people that
4 say we're not doing enough to keep material
5 that's harmful to children off of these sites.

6 And yet these laws make it impossible
7 for us to keep material that's -- that's harmful
8 to children off of our sites unless we take so
9 much material off of our sites that nobody can
10 say that we're not being inconsistent or not
11 discriminating. And in Texas, it's viewpoint
12 discrimination.

13 JUSTICE KAVANAUGH: Could you just say
14 a word about the word "consistency," what you
15 think that entails?

16 MR. CLEMENT: I have no idea. And one
17 of the other cases -- you know, arguments we
18 have in this case, it's just not part of the
19 preliminary injunction you have before us is a
20 vagueness challenge.

21 And I think, when you're targeting
22 editorial discretion, to put a consistency
23 requirement -- I mean, if you tried to tell The
24 New York Times to be -- I mean, I don't -- I
25 haven't met anybody who thinks The New York

1 Times is a hundred percent consistent in its
2 editorial policy.

3 But, if you put a state action
4 requirement that they editorialize consistently
5 or somebody can sue them for \$1,000 or the state
6 can haul them into court, I think that would be
7 the most obvious First Amendment violation in
8 the world.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: I have a practical
13 question. So let's assume that I agree with you
14 about YouTube and Facebook feeds, news feeds,
15 but that I don't want to say that Facebook
16 Marketplace or Gmail or DMs are not within the
17 statute's plainly legitimate sweep.

18 If I -- if I asked you the question
19 can you still win, I know that you'll say yes,
20 but how would it -- how would we write that
21 opinion given the standard --

22 MR. CLEMENT: Well, I -- I --

23 JUSTICE BARRETT: -- without having to
24 canvass whether all of those things would be
25 within the plainly legitimate sweep?

1 MR. CLEMENT: I -- honestly, I'm not
2 sure -- well, I'm not sure you could reach that
3 result without definitively holding that that
4 stuff is within the plainly legitimate sweep of
5 the statute. You don't have the record for that
6 in part because of litigation decisions that
7 were made by the State of Florida. So I think
8 what you would do is you would affirm the
9 preliminary injunction, and then you would
10 perhaps lament the fact that the record here is
11 somewhat stunted, and then you would make clear
12 that there might be a possibility to modify the
13 preliminary injunction on -- on remand.

14 Now, at that point, I think, when the
15 lower court sort of sees all the details about
16 how these things actually operate, they might
17 not have the same skepticism that you're
18 starting with. But I think there's lots of ways
19 to write the decision that keeps the -- you --
20 you know, and, again, what's -- what's in place
21 right now is a preliminary injunction for the
22 benefit of my clients.

23 So people that haven't sued yet, I
24 mean, you know, the statute in theory could
25 apply to them. But my clients have the benefit

1 of a preliminary injunction while this
2 litigation goes forward. And, obviously,
3 anything this Court says in its opinion that
4 suggests what the future course of that
5 litigation should be, you know, is -- is going
6 to be powerfully, you know, effective in terms
7 of how this case gets litigated in the district
8 court.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

12 JUSTICE JACKSON: So, Mr. Clement, I
13 just want to push back for a minute on the
14 private versus public distinction. I mean, I --
15 I think we agree that the government couldn't
16 make editorial judgments about who can speak and
17 what they can say in the public square.

18 But what do you do with the fact that
19 now, today, the Internet is the public square?
20 And I appreciate that these companies are
21 private companies, but if the speech now is
22 occurring in this environment, why wouldn't the
23 same concerns about censorship apply?

24 MR. CLEMENT: So two reasons, Your
25 Honor. I mean, one is I -- I really do think

1 that censorship is only something the government
2 can do to you. And if it's not the government,
3 you really shouldn't label it "censorship."
4 It's just a category mistake.

5 But here's the second thing: You
6 would worry about this if websites, like the
7 cable companies in Turner, had some sort of
8 bottleneck control where they could limit your
9 ability to go to some other website and engage
10 in speech. So, if the way websites worked was
11 somehow that if you signed up for Facebook, then
12 Facebook could limit you to only 19 other
13 websites and Facebook could dictate which 20
14 websites you saw, then this would be a lot more
15 like Turner.

16 But, as this Court said in Reno in
17 1997, when it was confronted with an argument
18 about the then-fresh Turner decision, this Court
19 basically said the Internet is like the opposite
20 of Turner. You know, there's so much
21 information out there, the -- it's so relatively
22 easy to have a new website come on and, like,
23 reality tells us that, right? You know, like, X
24 is not what Twitter was, and TikTok came out of
25 nowhere. And --

1 JUSTICE JACKSON: All right. I think
2 I get your point.

3 MR. CLEMENT: Yeah.

4 JUSTICE JACKSON: Let me just ask you
5 about the illegitimate sweep point.

6 So what is illegitimate about a
7 government regulation that attempts to require
8 these companies to apply consistently their
9 procedures? I don't -- I guess I don't
10 understand why the enforcement of sort of
11 antidiscrimination principles is illegitimate.

12 MR. CLEMENT: So consistency when what
13 is being regulated -- as a -- as a government
14 mandate when what is being regulated is
15 expressive activity is, I think, a clear First
16 Amendment violation. And I don't think -- I
17 mean, you know, some of these judgments are very
18 tricky judgments. You know, okay, well, we --
19 we're going to -- we're going to take some of
20 the stuff sort of celebrating October 7 off, but
21 we want to have some --

22 JUSTICE JACKSON: All right. What
23 about a straightforward one, right? I
24 understood that one of these was no candidate
25 can be deplatformed. That seems pretty

1 straightforward.

2 MR. CLEMENT: Right. And I think it's
3 straight --

4 JUSTICE JACKSON: Right, and so why
5 isn't that enforcing antidiscrimination
6 principles with no candidate -- if somebody is a
7 candidate for office, they can't be
8 deplatformed?

9 MR. CLEMENT: So that means they can't
10 be deplatformed no matter how many times they
11 violate my client's terms of use, no matter how
12 horrible their conduct, no matter how
13 misrepresenting they are in their speech. We
14 still have to carry it and not just have to
15 carry it, but under this statute, we have to
16 give it pride of place.

17 And it doesn't take much to register
18 as a candidate in Florida. And so this gives a
19 license to anybody, even if there is, you know,
20 somebody who's only going to poll, you know,
21 2 percent in their local precinct, they can post
22 anything they want, they can cause us to
23 fundamentally change our editorial policies and
24 have to ignore our -- our terms of use where --

25 JUSTICE JACKSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 General Prelogar.

4 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
5 FOR THE UNITED STATES, AS AMICUS CURIAE,
6 SUPPORTING THE RESPONDENTS

7 GENERAL PRELOGAR: Mr. Chief Justice,
8 and may it please the Court:

9 The First Amendment protects entities
10 that curate, arrange, and present other people's
11 words and images in expressive compilations. As
12 this Court's cases have -- has held, those
13 principles cover newspaper editors, parade
14 sponsors, and web designers. It also covers
15 social media platforms. Those platforms shape
16 and present collections of content on their
17 websites, and that inherently expressive
18 activity is protected by the First Amendment.

19 That doesn't mean, though, that every
20 business that transmits speech can claim First
21 Amendment protection for that conduct. For
22 example, telephone and delivery companies that
23 carry speech from point A to point B aren't
24 shielded by the First Amendment when they
25 provide that service. But that's because

1 they're not producing any expression of their
2 own. It's not because there's some kind of
3 common carrier or communications company
4 exception to the First Amendment.

5 None of this is to say that social
6 media platforms are immune from government
7 regulation. And governments at every level
8 obviously have an important interest in
9 facilitating communication and the free exchange
10 of ideas. But, in promoting that interest,
11 governments have to stay within the bounds of
12 the First Amendment. And these state laws which
13 restrict the speech of the platforms to enhance
14 the relative voice of certain users don't
15 withstand constitutional scrutiny.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: Normally, you are
18 defending regulations. But are you -- if -- if
19 -- if the U.S. Government did exactly what these
20 Petitioners -- Respondents are doing, would that
21 be government speech?

22 GENERAL PRELOGAR: So, if I'm
23 understanding the hypothetical correctly,
24 Justice Thomas, if you're suggesting that the
25 government itself would open a forum and allow

1 users to post messages on that, you know, I
2 think that that would implicate First Amendment
3 principles because the -- because the government
4 might create -- be creating something like a
5 public forum where it would itself be bound by
6 the Constitution.

7 I don't think that that would all
8 necessarily qualify as the government's own
9 speech.

10 JUSTICE THOMAS: But --

11 GENERAL PRELOGAR: But the critical
12 difference here, of course, is that these
13 platforms are private parties. They're not
14 bound by the First Amendment as an initial
15 matter.

16 JUSTICE THOMAS: The -- Mr. Clement
17 said the difference is that if the government
18 does it, it is censoring. If a private party
19 does it, it is -- I forget -- content
20 moderation. These euphemisms bypass me
21 sometimes. But -- or elude me. The -- do you
22 agree with that distinction?

23 GENERAL PRELOGAR: Yes. I mean, the
24 -- the critical difference is that, as Justice
25 Kavanaugh observed, the government's bound by

1 the First Amendment. And so, if it were to, for
2 example, dictate what kind of speech has to
3 appear and in what order, you know, that -- that
4 could create a First Amendment violation.

5 But, here, it's the private platforms
6 themselves that are making that expressive
7 choice. And -- and our recognition here is that
8 they're creating their expressive -- their own
9 expressive product in doing so.

10 JUSTICE THOMAS: Now --

11 GENERAL PRELOGAR: These are websites
12 that are featuring text elements, speech
13 elements, photos, videos, and the platforms,
14 which are private parties not bound by the
15 Constitution, are deciding how they want that to
16 look, what content to put on it and in what
17 order. That's an inherently expressive
18 activity.

19 JUSTICE THOMAS: What are they saying?

20 GENERAL PRELOGAR: So it depends on
21 the platform, the -- the various value judgments
22 that are embodied in its content moderation
23 standards, you know. The -- the -- I think
24 there's a wide variety in the kind of content
25 that the platforms deem objectionable, the --

1 the kind of content they think might be harmful
2 or will drive away users and advertisers.
3 There's no one single message that each platform
4 is conveying.

5 But I guess, if you wanted to look at
6 the lowest common denominator, you know, at the
7 very least, it seems like their content
8 moderation policies embody a judgment of this is
9 material we think might be of interest to our
10 users or that the users will find interesting
11 and -- and worthy of looking at.

12 So it's a lot like the parade in
13 Hurley in that circumstance, where the Court
14 specifically said maybe you're lenient, you let
15 a lot of content in, you can't identify a single
16 discernable message from the parade as a whole,
17 but there is still the baseline of the parade
18 sponsors signaling this is something that's
19 worthy of looking at in my parade.

20 JUSTICE GORSUCH: General, you -- you
21 indicate in your brief that NetChoice sometimes
22 errs by suggesting that the dissemination of
23 speech is always expressive activity. And I
24 just wonder how we're supposed to deal with that
25 fact if I agree with you in this facial

1 challenge context and particularly when many of
2 the platforms, while reserving the right to
3 prohibit various kinds of posts, most of which
4 are consistent with Section 230, also say and
5 guarantee users "a right to express their ideas
6 and opinions freely." I'm quoting from one of
7 them. And even if the platform disagrees and
8 they say that they "do not endorse and are not
9 responsible" -- again, I'm quoting from some of
10 these terms of service -- sure sounds a lot like
11 conduit, doesn't it?

12 GENERAL PRELOGAR: So I think there is
13 a big difference between a pure conduit, the
14 kind of company that is, you know, quite
15 literally engaged in carrying speech,
16 transmitting it, whether that's across the
17 telephone wires or via telegraph or on a
18 delivery truck like UPS and FedEx, a big
19 difference between that kind of conduct --
20 conduit and what the platforms are doing here,
21 because they're not just literally facilitating
22 users' ability to communicate with other users.
23 Instead, they're taking that and arranging it
24 and excluding it.

25 JUSTICE GORSUCH: But some of them are

1 promising that they're not going to interfere,
2 and they're promising you get to express your
3 views freely and openly, and they're promising
4 that they -- that -- and they're representing,
5 rather, that your views don't represent theirs
6 and everybody understands that.

7 And those -- those are their terms of
8 service. And -- and this is a facial challenge
9 again, and I'm -- I -- I -- I just think
10 separating the wheat from the chaff here is
11 pretty difficult.

12 Can you help us with that?

13 GENERAL PRELOGAR: Sure. And, you
14 know, I think looking at their terms of service,
15 I -- it's certainly true that many of the
16 platforms have generally indicated that they
17 welcome a wide variety of views, but it would be
18 incorrect to say that they're holding themselves
19 out as forums for all possible speech.

20 Those same terms of service contain
21 the kind of editorial policies that are at issue
22 here. And the -- the state laws are narrowly
23 targeted on the kind of speech the platforms
24 want to include. So --

25 JUSTICE GORSUCH: Yes, I --

1 GENERAL PRELOGAR: -- it wouldn't be
2 implicated in --

3 JUSTICE GORSUCH: -- I acknowledge
4 that their terms of service also include the --
5 the right to exclude certain -- certain speech,
6 but those are usually like the Section 230
7 things, the way they discuss it, the lewd,
8 lascivious, obscene, the blah, blah, blah, and
9 after that, they do seem to promise a whole lot
10 of latitude.

11 And when you look at classic common
12 carriers, it's very similar. It's -- they don't
13 give up the right to exclude certain -- certain
14 activities or speech that might be detrimental
15 to their business or that might be otherwise
16 regulated. That -- that holds true for
17 telegraphs. It holds true for telephones even.

18 But, beyond that, bare minimum,
19 they're open to all comers, and that seems to be
20 how a lot of them are representing themselves to
21 the public at least.

22 GENERAL PRELOGAR: The key difference,
23 though, with common carriers, the -- the kinds
24 of industries that have traditionally been
25 regulated, those in the transportation sector,

1 railroads, some of the communications companies
2 and so forth, is that they're not creating any
3 kind of expressive speech product in providing
4 their service, and so government regulation that
5 says don't discriminate based on content --

6 JUSTICE GORSUCH: Well, the telegraph
7 companies argued just the opposite back in the
8 day --

9 GENERAL PRELOGAR: But I think that
10 those claims failed --

11 JUSTICE GORSUCH: -- and they lost.

12 GENERAL PRELOGAR: -- because,
13 although they are transmitting the messages,
14 they aren't themselves creating any speech on
15 the side.

16 JUSTICE GORSUCH: Oh, they said they
17 were. They -- they -- in fact, they curated a
18 lot of the speech or tried to, including
19 political speech which they didn't agree with.

20 GENERAL PRELOGAR: I think it's wrong
21 to call that curation. It's certainly true they
22 tried to adopt certain discriminatory
23 policies --

24 JUSTICE GORSUCH: Well, whatever --
25 whatever euphemism one wishes to choose.

1 GENERAL PRELOGAR: But they weren't
2 taking that speech out and putting it into a
3 compilation that's expressive. That's the
4 difference here.

5 JUSTICE GORSUCH: On -- on that --

6 GENERAL PRELOGAR: This is a -- a --

7 JUSTICE GORSUCH: Okay, okay. So --

8 GENERAL PRELOGAR: Yeah.

9 JUSTICE GORSUCH: -- if they're not --
10 if the -- if the expression of the user is
11 theirs because they curate it, where does that
12 leave Section 230? Because the protection
13 there, as I understood it -- and Justice Thomas
14 was making this point -- was that Section 230
15 says we're not going to treat you as publishers
16 so long as you are not -- it's not your
17 communication "in whole or in part" is what the
18 definition says.

19 And if it's now their communication in
20 part, do they lose their 230 protections?

21 GENERAL PRELOGAR: No, because I think
22 it's important to distinguish between two
23 different types of speech. There are the
24 individual user posts on these platforms, and
25 that's what 230 says that the platforms can't be

1 held liable for.

2 The kind of speech that we think is
3 protected here under the First Amendment is not
4 each individual post of the user but, instead,
5 the way that the platform shapes that expression
6 by compiling it, exercising this kind of
7 filtering function, choosing to exclude none of
8 those things above --

9 JUSTICE GORSUCH: Let -- let me
10 interrupt you there, I'm sorry, but -- but I
11 understand it's not their communication in
12 whole, but it's -- why isn't it their
13 communication in part if it -- if it's part of
14 this larger mosaic of editorialized discretion
15 and the whole feel of the website?

16 GENERAL PRELOGAR: Well, I don't think
17 that there is any basic incompatibility with
18 immunizing them as a matter of -- of Congress's
19 statutory choices and recognizing that they
20 retain First Amendment protection --

21 JUSTICE GORSUCH: Isn't the whole
22 premise -- I'm sorry --

23 GENERAL PRELOGAR: -- for the First
24 Amendment --

25 JUSTICE GORSUCH: -- the whole premise

1 of Section 230 that they are common carriers,
2 that -- that they're not going to be held liable
3 in part because it isn't their expression, it --
4 they are a conduit for somebody else?

5 GENERAL PRELOGAR: No, not at all,
6 Justice Gorsuch. I think, you know, to the
7 extent that the states are trying to argue that
8 Section 230 reflects the judgment that the
9 platforms aren't publishing and speaking here,
10 there would have been no need to enact Section
11 230 if that were the case.

12 Congress specifically recognized the
13 platforms are creating a speech product. They
14 are literally, factually publishers. And
15 Congress wanted to grant them immunity. And it
16 was for the purpose of encouraging this kind of
17 editorial discretion. That's the whole point of
18 the "Good Samaritan" blocking provision,
19 230(c)(2)(A).

20 CHIEF JUSTICE ROBERTS: General,
21 there's been a lot of talk about the procedural
22 posture of the case, how it was litigated below,
23 what's available if it -- it goes back, when it
24 goes back. I -- I'd like your views on that.

25 GENERAL PRELOGAR: Yes. So we

1 presented our arguments in this case taking the
2 way it had been litigated at face value, and
3 what that means is that below Florida treated
4 this law as though the central provision and
5 scope was focused on the -- the true social
6 media platforms, the thing that -- the website
7 you have in mind when I use that term, things
8 like YouTube and X and Facebook.

9 And Florida's presentation to the
10 lower courts was this law isn't a regulation of
11 their speech at all and so it's valid.

12 So I understand the force of the
13 questions that the Court has been asking today
14 about are there other types of websites that
15 might be covered, could this extend to direct
16 messaging. You know, we don't really have a dog
17 in that fight. To the extent that there are
18 those other applications of the law out there,
19 that's not how Florida sought to defend it.

20 And to Justice Barrett's question, you
21 know, what should the Court do with this, it's
22 been litigated one way and now it looks like
23 maybe there are other possible applications you
24 would have in mind, I would urge the Court to
25 take a really narrow approach here.

1 Florida defended this law on the basis
2 that it could control what the true social media
3 platforms are doing with respect to their
4 expressive websites, and if I were the Court, I
5 would really want to reserve judgment on the
6 application to e-commerce sites, to -- to
7 companies like Uber, which don't seem to be
8 creating a comparable type of expressive
9 product.

10 And I think the Court could save those
11 issues for another day or for further factual
12 development in this case while looking at the
13 decision on the record that was created based on
14 those litigation judgments by the parties.

15 JUSTICE SOTOMAYOR: Am I correct --

16 CHIEF JUSTICE ROBERTS: Justice Thomas

17 --

18 JUSTICE SOTOMAYOR: I'm sorry.

19 CHIEF JUSTICE ROBERTS: -- anything

20 further?

21 JUSTICE THOMAS: No.

22 CHIEF JUSTICE ROBERTS: Justice Alito?

23 JUSTICE ALITO: Yeah, I'm baffled by
24 your -- your -- your answer to the -- the Chief
25 Justice. Didn't Florida argue that this -- that

1 a preliminary injunction should not be issued
2 because the plaintiffs had not shown that they
3 were likely to succeed on their facial
4 challenge? Did they not make that argument?

5 GENERAL PRELOGAR: They made that
6 overarching argument, but they didn't go further
7 and say and the reason for that is because
8 here's direct messaging. And it's lawful as
9 applied to that --

10 JUSTICE ALITO: All right. Well, do
11 you think that issue is not before us?

12 GENERAL PRELOGAR: I think it would be
13 hard for the Court to figure that issue out
14 because there's a lot of lack of clarity --

15 JUSTICE ALITO: Oh, well, it may be
16 hard for us to figure out, but my question was,
17 is the issue before us?

18 GENERAL PRELOGAR: I think that the
19 way Florida litigated this case makes it
20 difficult to say that the issue is properly
21 before you. Usually, the Court holds a party to
22 the arguments it pressed below and that were
23 passed upon below, and there is no court in this
24 case that has considered -- questions about
25 other types of platforms or about other types of

1 functionalities.

2 JUSTICE ALITO: If the record is
3 insufficient to allow us to comfortably decide
4 whether the facial stand -- facial challenge
5 standard or an overbreadth standard is met,
6 isn't that the fault of the plaintiffs, and
7 isn't the remedy to vacate and remand for all of
8 that to be fleshed out, and that would not mean
9 -- that wouldn't say anything necessarily about
10 what will happen in the near future.

11 It would mean that it would be
12 litigated and perhaps, if the plaintiffs
13 developed the record in the way that Florida
14 thinks they should and provides a -- a list of
15 all of the -- all of the NetChoice members who
16 are covered by this and goes through all of the
17 functions that they perform and assesses whether
18 the law is unconstitutional in every application
19 or whether it has a legitimate scope that is
20 constitutional, then they would be entitled to a
21 preliminary injunction.

22 GENERAL PRELOGAR: So I -- I certainly
23 don't want to resist the idea that if this Court
24 thinks those issues are properly before it and
25 affect the analysis of the facial challenge,

1 notwithstanding the way the parties litigated
2 the case, I -- I don't want to stand in the way
3 of that.

4 I do think there would be a lot of
5 value, though, in the Court making clear that
6 with respect to Florida's defense of this law in
7 the lower courts, namely, the idea that the
8 state really can control the curation and
9 editorial function of the true social media
10 platforms with respect to their expressive
11 product, that seems to me a type of provision
12 that is invalid in all of its applications with
13 respect to those platforms.

14 JUSTICE ALITO: Could I just ask you
15 to comment on a few things I understood Mr.
16 Clement to say.

17 So I understood him to say that an
18 email -- that the email function could be denied
19 on the basis of -- access to that could be
20 denied on the basis of viewpoint. Direct
21 messaging could be denied on the basis of
22 viewpoint. Do you -- do you agree with that?

23 GENERAL PRELOGAR: No, we disagree
24 with that. We think that both direct messaging
25 and email service seems a little more like the

1 pure transmission of communications, so we would
2 likely put those in the box of the phone
3 company, the telegraph company, Internet service
4 providers, and so forth.

5 We don't think that that's an
6 inherently expressive product in the same way as
7 the main website that has the news feed and
8 that's curating the stories and deciding how to
9 prioritize them.

10 JUSTICE ALITO: Do you -- do you agree
11 that discrimination on the basis of bigness
12 violates the First Amendment?

13 GENERAL PRELOGAR: No, I don't think
14 that on -- that on its own, simply trying to
15 regulate based on the size of a company is -- is
16 always a First Amendment problem.

17 JUSTICE ALITO: Do you agree that a
18 private party cannot engage in censorship? Let
19 me give you an example. Suppose that a private
20 law school says that any student who expresses
21 support for Israel's war with Hamas will be
22 expelled. Is that -- would that be censorship,
23 or would that be content moderation?

24 GENERAL PRELOGAR: So I think the --

25 JUSTICE ALITO: Because it's a private

1 party.

2 GENERAL PRELOGAR: Yeah. So I guess
3 the first-order question would have to be, is
4 there some kind of regulation that prohibits the
5 law school from acting in that way? So, if
6 you're thinking about a public accommodations
7 law, for example --

8 JUSTICE ALITO: No. I'm just saying
9 -- I'm just talking about terminology.

10 GENERAL PRELOGAR: Oh, colloquial
11 terminology? You know, I -- I --

12 JUSTICE ALITO: That's -- that's not
13 censorship; that's content moderation --

14 GENERAL PRELOGAR: I -- I -- I think
15 that --

16 JUSTICE ALITO: -- because it's a
17 private party?

18 GENERAL PRELOGAR: -- the semantics of
19 it don't matter. You could say that the parade
20 in Hurley was censoring the -- the GLIB
21 contingent that wanted to march or that the
22 newspaper in Tornillo was censoring the
23 candidate who wanted to publish his speech.

24 You know, I think that the particular
25 word you use doesn't matter. What you have to

1 look at is whether what's being regulated by the
2 government is something that's expressive by a
3 private party, and, here, we think you have
4 that.

5 JUSTICE ALITO: Well, I mean, the --
6 the particular word that you use matters only to
7 the extent that some may want to resist the
8 Orwellian temptation to recategorize offensive
9 conduct in seemingly bland terms. But, anyway,
10 thank you.

11 (Laughter.)

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor?

14 JUSTICE SOTOMAYOR: General, I think
15 I'm finally understanding the argument, but let
16 me make sure I do, okay?

17 When I came in, I had the reaction
18 Justice Alito did, which is we should vacate and
19 remand. And I have been thinking about what
20 does that do the -- to the preliminary
21 injunction, because I agree with you, as I
22 understand what the State did below, was to say
23 we don't have to offer you any justification for
24 any part of our law because everybody of these
25 social media companies are common carriers.

1 And I think what's clear is -- from
2 our questioning -- that that's not true, that
3 there are many functions that are expressive
4 that we can't say are common carriers. But,
5 even if we did say they were like common
6 carriers, it -- the issue would be one of what's
7 the level of scrutiny.

8 And the State said there's no level of
9 scrutiny we're going to address. They basically
10 said we can do anything we want to common
11 carriers and to any of the expressive
12 platforming or deplatforming things.

13 But I don't even think that's true.
14 They can't come in and -- I -- and I'm not sure
15 they can -- do any of these things or some of
16 these things even to common carriers if it -- it
17 is a sort of content or viewpoint content
18 exclusion.

19 So a common carrier doesn't have to
20 permit unruly behavior. Doesn't have to permit
21 -- it can throw somebody off the train if they
22 are threatening somebody else or if they're
23 doing other things.

24 So I -- I guess what you're saying is
25 let's keep the injunction in place, vacate and

1 remand -- affirm on the preliminary injunction
2 but vacate and remand on the application of this
3 law and how based on what level of scrutiny
4 given the function that's at issue, correct?

5 GENERAL PRELOGAR: So we do think that
6 the Court should hold the parties to the way
7 they litigated this case and teed it up for the
8 Court's review. And it's uncommon for the Court
9 to start considering new arguments that weren't
10 presented by the party defending its law below.

11 But -- but, if I can respond for a
12 moment on the common carrier point, Justice
13 Sotomayor, because I think you've put your
14 finger on a really important response here to
15 many of the arguments that Florida is making.

16 They suggest that the designation of a
17 platform as a common carrier or not has some
18 kind of talismanic significance. But it's
19 completely irrelevant to answering the First
20 Amendment question because it's not like
21 companies that are treated as common carriers
22 have no First Amendment rights with respect to
23 their expressive activities.

24 You know, you can take a railroad like
25 Amtrak and you can regulate it as a common

1 carrier with the transportation of passengers,
2 but if it creates some kind of magazine for
3 those passengers to peruse, that's entitled to
4 -- to full First Amendment protection.

5 And the reason that the
6 non-discrimination mandate in the common carrier
7 scenario usually poses no problem under the
8 First Amendment is there's no speech or
9 expressive activity in carrying passengers or in
10 carrying communications.

11 It's entirely different with respect
12 to the activity that Florida is seeking to
13 regulate because that is inherently expressive.
14 It's putting together literally a website with
15 pictures and video and text and arranging it.
16 And that looks just like the kind of protected
17 editorial and curatorial activity the Court has
18 recognized in other cases.

19 So whether you say they're a common
20 carrier or not we think is entirely beside the
21 point.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: I think I want to try
24 again on this question of, like, where does this
25 leave us? Because suppose that I agree with

1 pretty much what you said. Let's just take that
2 as an assumption, which is, you know, when
3 Florida is trying to regulate Facebook news
4 feed, well, it can't do that because Facebook
5 news feed is itself providing a kind of speech
6 product.

7 But, when Florida is trying to
8 regulate Gmail, well, maybe it can do that
9 because Gmail is not in the business of
10 providing that sort of speech product. And if
11 you take it -- and if we again assume that this
12 statute covers a variety of things that are
13 Gmail-like, direct messaging and -- and Uber
14 and, you know, things that are not creating
15 speech products, and we have this First
16 Amendment doctrine that says, if you can find a
17 legitimate sweep, we can't overrule something
18 facially, but you don't really want to keep --
19 you -- you don't want -- really want to allow
20 this law to go into effect because of the
21 unconstitutional applications that you're
22 talking about with respect to all these
23 companies that are creating speech products,
24 what do we do?

25 GENERAL PRELOGAR: So I guess, if you

1 were confident that the state law had these
2 applications and that the particular provisions
3 would regulate the kinds of -- of companies that
4 you're referring to that aren't creating an
5 expressive speech product, then I think that
6 that would poke holes in the theory of facial
7 invalidity.

8 But I don't think you can have that
9 certainty because that's not how Florida
10 litigated this case below. It's not as though
11 it said this statute is not invalid on its face
12 because it applies to Gmail or other --

13 JUSTICE KAGAN: I -- I take your
14 point. We could just say, gosh, we can't -- we
15 can't even think about those questions because
16 this was litigated in a certain way. So that's
17 one option.

18 But suppose we think it's pretty
19 obvious that this covers a lot of stuff that
20 does not look like Facebook feed and we wanted
21 -- I mean, suppose we were to -- you know, we --
22 we can take notice of that, then what?

23 GENERAL PRELOGAR: Okay. So I think,
24 at that point, what I would do if I were the
25 Court is make clear that with respect to the

1 issues Florida did present and that the Eleventh
2 Circuit and the district court resolved, Florida
3 is wrong to say that it can apply these
4 provisions to the social media companies that
5 are engaged in creating an expressive product
6 and make that much clear.

7 Otherwise, I think, if the Court just
8 vacates and sends it back, it'll be right back
9 up here on -- in an emergency posture, again on
10 an as-applied basis, with respect to one of
11 those companies. So I think the Court can
12 decide that much. That was the issue that was
13 litigated below and decided.

14 And then, if you think that there are
15 some additional questions about the scope of the
16 Florida law and whether it might have valid
17 applications along the lines we've been
18 discussing, you know, I -- I don't have a
19 particular interest on behalf of the United
20 States in what you do with the preliminary
21 injunction in the meantime. I think there's a
22 lot of force to the idea that this is backed up
23 by \$100,000 in penalty per violation, and that
24 could have a huge chilling effect on any
25 protected speech out there that's occurring.

1 But, you know, I think the Court could
2 say there are some unresolved issues about
3 concrete applications of this law and await
4 further factual development on that.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 JUSTICE GORSUCH: This is a facial
9 challenge, right? It's an all-or-nothing deal.
10 How is a court supposed to make as-applied
11 rulings in a facial challenge on remand?

12 GENERAL PRELOGAR: I would do it based
13 on the party presentation principle and the
14 fact --

15 JUSTICE GORSUCH: No, I got the first
16 point.

17 GENERAL PRELOGAR: Yeah. Yeah. I --
18 I --

19 JUSTICE GORSUCH: The first --

20 GENERAL PRELOGAR: So I might run out
21 of options --

22 JUSTICE GORSUCH: Yeah.

23 GENERAL PRELOGAR: -- beyond that,
24 Justice Gorsuch.

25 JUSTICE GORSUCH: After the first one,

1 I --

2 GENERAL PRELOGAR: I -- I agree that
3 these are hard questions asked --

4 JUSTICE GORSUCH: Right. So the first
5 -- it's the first one you --

6 GENERAL PRELOGAR: Now I suppose you
7 could certify to the Florida Supreme Court the
8 unresolved issues of Florida law if you think
9 that that is necessary to actually reach a
10 disposition in this case.

11 JUSTICE GORSUCH: Okay. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh?

14 JUSTICE KAVANAUGH: I just want to
15 follow up on Justice Alito's questions, and --
16 and he'll have the opportunity since this is
17 continuing to follow up on mine if he wants to.

18 (Laughter.)

19 JUSTICE KAVANAUGH: But the -- I think
20 he asked a good, thought-provoking, important
21 question and used the term "Orwellian."

22 When I think of "Orwellian," I think
23 of the state, not the private sector, not
24 private individuals. Maybe people have
25 different conceptions of "Orwellian," but the

1 state taking over media, like in some other
2 countries. And in Tornillo, we made clear, the
3 Court made clear, that we don't want to be that
4 -- that country, that we have a different model
5 here and have since the beginning, and we don't
6 want the state interfering with these private
7 choices.

8 Now Tornillo then dealt with -- and
9 this is my question. Tornillo dealt with the
10 idea, well, newspapers have become so
11 concentrated and so big that maybe we should
12 have a different rule. In Tornillo, in -- in
13 the Court's opinion, Chief Justice Burger's
14 opinion for a unanimous court talked about those
15 -- those changes. I mentioned those before.

16 He says, those changes have placed in
17 a few hands the power to inform the American
18 people and shape public opinion. "The abuses of
19 bias and manipulative reportage are said to be
20 the result of vast accumulations of unreviewable
21 power in the modern media empires. In effect,
22 it is claimed the public has lost any ability to
23 respond. The monopoly of the means of
24 communication allows for little or no critical
25 analysis of the media."

1 And then, though, he -- and he says,
2 "From this premise, it is reasoned that the only
3 effective way to ensure fairness and accuracy to
4 provide for some accountability is for
5 government to take affirmative action." And
6 then he goes on and explains no, we're not going
7 to do that. The First Amendment stands against
8 that. "However much validity may be found in
9 these arguments, at each point, the
10 implementation of a remedy calls for some
11 mechanism, either government or consensual. And
12 if it's governmental, that's just one brings
13 about a confrontation with the express
14 provisions of the First Amendment. Compelling
15 editors or publishers to publish that which
16 reason tells them should not be published is
17 what is at issue in this case."

18 And so he says for the Court in 1973,
19 no, we're not -- we don't have a big exception
20 to the idea that the First Amendment
21 distinguishes the state from the private sector
22 and private individuals.

23 Now my -- here's my question. We're
24 50 years later. How does that principle
25 articulated in Tornillo apply to the current

1 situation, the current bigness?

2 GENERAL PRELOGAR: So I think that
3 Tornillo does establish a bright-line
4 proposition that the -- the state, even if it
5 has these concerns about market power and
6 dominance and control, cannot directly overtake
7 the editorial function and prevent a private
8 party that's creating an expressive product from
9 making those kinds of judgments about how to
10 present that product.

11 But, at the same time, I think that
12 there are legitimate concerns here about the
13 kind of power and influence that social media
14 platforms wield. And I want to emphasize it's
15 not like the government lacks tools to deal with
16 this. It's not as though it can't regulate at
17 all. There is a -- a whole body of government
18 regulation that would be permissible that would
19 target conduct, things like antitrust laws that
20 could be applied or data privacy or consumer
21 protection, things that we think wouldn't come
22 into any conflict with the First Amendment at
23 all.

24 And even in a situation where the
25 government does think that it's necessary to

1 regulate in a manner that's going to affect
2 protected speech rights, that's not the end of
3 the inquiry. You still have a chance as the
4 government to establish that your regulation can
5 pass constitutional muster like it did in the
6 Turner case that you were referring to earlier.

7 So I want to be very clear that we are
8 not suggesting that governments are powerless to
9 respond to some of the concerns that Justice
10 Alito mentioned. You know, I think one natural
11 place to go as a government is to disclosure, to
12 ensuring that if you think that platforms have
13 Orwellian policies, you at least make sure users
14 have information about how they're acting, what
15 their policies are, the kind of generalized
16 disclosure requirements here that were not
17 invalidated by the lower courts and aren't
18 before this Court.

19 JUSTICE KAVANAUGH: On Turner, the key
20 was content-neutral there, right?

21 GENERAL PRELOGAR: Yes. So Turner
22 concluded that the interest -- the governmental
23 interest --

24 JUSTICE KAVANAUGH: Or one key.

25 GENERAL PRELOGAR: -- that was

1 asserted there, as you put it, was unrelated to
2 the suppression of expression.

3 And the problem here, you know, my
4 friend suggested that Florida has precisely the
5 same interest. But, here, the interest that
6 Florida has asserted in affecting these content
7 moderation choices is to change the speech on
8 the platforms. It doesn't like the way that the
9 platforms are moderating content and it wants
10 them to create a new expressive product that
11 reflects the state's judgments about what should
12 go on the website, whether that's candidate
13 speech or speech by journalistic entities or
14 otherwise.

15 And that is just not an interest
16 that's unrelated to the suppression of
17 expression. So we think the Court should apply
18 intermediate scrutiny here and find that the
19 State can't get out of the starting gate with
20 that interest.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: General, I asked Mr.
25 Clement at the end this practical question,

1 which Justice Kagan also asked you, and so I
2 just want to be sure that I'm understanding
3 maybe exactly your answer to Justice Kagan. It
4 was different than Mr. Clement's to me.

5 You were pointing out to Justice Kagan
6 that if we just vacate and send it back, it's
7 going to be right up here in an emergency
8 posture on an as-applied challenge. So you were
9 encouraging us to address at least this question
10 of whether, like, the Facebook news feed or
11 YouTube, et cetera, is expressive.

12 But, if I think there are real
13 problems with some of these other applications,
14 which may be legitimate, do you think it's an
15 option to say, you know, that we think that some
16 of these editorial applications would be
17 unconstitutional, but because we don't know
18 about these other applications, they might be
19 within the statute's legitimate sweep, that
20 we're going to vacate and remand anyway and send
21 it back for the court to sort out all of those
22 other applications?

23 GENERAL PRELOGAR: So I think that
24 would be one possible approach here. You know,
25 I want to express strong agreement with the

1 instinct I think that is -- is -- underlies that
2 question that the Court shouldn't do more than
3 is necessary here with respect to the types of
4 applications that we've been discussing,
5 e-commerce, you know, Gmail, or -- or websites
6 or -- or email servers and that kind of thing.

7 I do think they present a really
8 distinctive set of issues. And so, if you think
9 that those issues are properly in this case,
10 I -- I don't think the Court has received the
11 briefing, frankly, to try to take a stab at
12 resolving them, but it seems like it would be a
13 reasonable thing to do to send it back for
14 further factual development and consideration by
15 the lower courts.

16 JUSTICE BARRETT: Okay. And one other
17 question and this is about Section 230.

18 When you were talking to Justice
19 Gorsuch, you were pointing out the distinction
20 between the post and the post's content for
21 which, you know, the -- the platform would not
22 be liable, and then the feed, and you were
23 saying, well, the speech -- the speech that is
24 the platform's is not what's on the post, and
25 that's -- you know, the -- the platform can't be

1 liable for that.

2 So could a platform be liable then,
3 say, if its algorithm or its feed boosted things
4 like, say, the Tide POD challenge? That's
5 different. Is that within Section 230?

6 GENERAL PRELOGAR: Yeah. So I -- I
7 think that this is, you know, a difficult issue
8 about how 230 might apply with respect to kind
9 of decisions that the platform is -- is making
10 itself with respect to how to structure its
11 service.

12 And I want to be careful here because
13 I have to confess that I haven't gone back
14 recently to look at the brief we submitted in
15 the Gonzalez case last term that I think touched
16 on some of these issues, but I do think that
17 there are circumstances where, of course, if the
18 thing that's causing harm is the platform's own
19 -- own conduct in how it structures its service,
20 that's something that might not be immunized
21 under Section 230.

22 I think all of this is separate and
23 apart from the First Amendment issue in this
24 case, though, because, here, whether or not you
25 think that, you know, recognizing that they have

1 a speech product affects the proper
2 interpretation of the statute under 230 and
3 means that there are some situations where they
4 won't have immunity, that is a completely
5 distinct question from whether they are creating
6 a speech product that warrants First Amendment
7 protection.

8 JUSTICE BARRETT: I totally agree.
9 But I also think there are a bunch of land
10 mines. And if that's a land mine, if what we
11 say about this is that this is speech that's
12 entitled to First Amendment protection, I do
13 think then that has Section 230 implications for
14 another case, and so it's always tricky to write
15 an opinion when you know there might be land
16 mines that would affect things later.

17 GENERAL PRELOGAR: Yes. And I -- I
18 certainly would think the Court could try to
19 carefully cabin it and make clear that it's not
20 opining on the specific statutory terms in 230
21 or whether this First Amendment characterization
22 of the expressive compilation fits within the
23 provision that Justice Gorsuch cited earlier
24 about creating speech in whole or in part, and
25 the Court could very clearly outline that in its

1 decision to try to caution lower courts away
2 from conflating those two issues.

3 JUSTICE BARRETT: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: General, I hear you
7 struggling valiantly to set aside other kinds of
8 applications in response to a number of the
9 questions, and I guess I can't figure out why
10 those other applications aren't in this case.

11 I mean, I think Florida defended the
12 law as NetChoice challenged it, and NetChoice
13 brought a facial challenge. And I had
14 understood that to mean -- I mean, first, I was
15 a little surprised that the government's brief
16 didn't focus on that, but I had understood that
17 -- stood that to mean that NetChoice, number
18 one, bears the burden in this case and, number
19 two, that NetChoice has to, you -- you know -- I
20 guess Mr. Clement and I had a difference of
21 opinion as to how you say it, but that burden is
22 to show that there's either no valid application
23 of this law or that the law has a legitimate
24 sweep.

25 So, if we can identify other valid

1 applications, if we see worlds in which Uber
2 and, you know, money services or whatnot could
3 be regulated, I don't understand why that does
4 -- just doesn't mean that NetChoice has not met
5 its burden and so that's the answer.

6 GENERAL PRELOGAR: Well, I think you
7 would have to conduct it at a more granular
8 level, Justice Jackson, because it's not just
9 about what are the universe of platforms out
10 there and what functionality do they offer.

11 You'd really have to parse the
12 challenged provisions of the Florida law and
13 ask: Are those platforms, you know, engaged in
14 any kind of the relevant conduct? And I think
15 that --

16 JUSTICE JACKSON: I agree with you
17 100 percent, but the question is, isn't it
18 NetChoice's burden to have presented the case to
19 us in that way? If we don't have that
20 information, again, I say, don't they lose?

21 GENERAL PRELOGAR: So I want to say
22 again that we don't have a particular stake in
23 how you think about their own litigation
24 decisions on both sides, but this case very much
25 was teed up in the lower courts as being all

1 about what they called the Big 3 social media
2 companies. That's clearly the central aim of
3 this law. It was focused not on the Ubers of
4 the world and their comment boxes but on the
5 core function of creating an expressive website
6 that principally contains user-generated
7 components, the text and the photos and so
8 forth, and the -- the provisions that are
9 challenged here are the ones that are focused on
10 the type of editorial discretion that those
11 types of platforms are engaged in.

12 So I don't think it's as easy to say
13 maybe we can look in the dark recesses of this
14 law and peek around a corner and find some
15 possible valid application. That's not how
16 Florida sought to defend the law. And I think
17 it would go down a complicated road to allow the
18 core provisions of this statute to take effect.

19 JUSTICE JACKSON: I understand,
20 General, but the confusion --

21 GENERAL PRELOGAR: Yeah.

22 JUSTICE JACKSON: -- I think, is that
23 the law on its face is really broad. We've said
24 that. And other people, many people, have, you
25 know, noticed that it could apply to all sorts

1 of things. And yet you say it was litigated
2 below as if it was narrow. I appreciate that.
3 But we have a facial challenge on the -- on the
4 table.

5 GENERAL PRELOGAR: Yeah.

6 JUSTICE JACKSON: And to the extent
7 the entire law goes, then I suppose maybe these
8 other lawful applications would go too. And
9 isn't that problematic when you're talking about
10 facial challenges?

11 GENERAL PRELOGAR: Well, you are
12 looking at this in the posture of a preliminary
13 injunction, so I don't think that the Court is
14 definitively resolving and -- and, you know,
15 kind of issuing the final say on exactly what
16 the status of this Florida law is.

17 But -- but, look, I -- I want to
18 agree, I have some sympathy here. In
19 preparation for this argument, I've been working
20 with my team to say, does this even cover direct
21 messaging? Does this even cover Gmail? And
22 we've been trying to study the Florida law and
23 figure it out ourselves. We think there's a lot
24 of ambiguity about exactly what the state law
25 provisions require.

1 I -- I don't think, though, that
2 that's a basis to not resolve the central issue
3 in the case, which is, with respect to what we
4 know the state law does, it would require these
5 social media platforms that are creating the
6 compilation of third-party speech to
7 fundamentally alter their product that they're
8 offering. We think that's an infringement of
9 speech and the Court should say so.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Rebuttal, Mr. Whitaker?

14 REBUTTAL ARGUMENT OF HENRY C. WHITAKER
15 ON BEHALF OF THE PETITIONERS

16 MR. WHITAKER: First, on the
17 procedural posture, the fact that there's no
18 record in this case is entirely NetChoice's
19 fault. It was NetChoice who insisted in
20 district court on litigating the PI very fast.
21 In fact, we actually wanted to slow it down and
22 take discovery. And what NetChoice -- and we
23 actually even offered to voluntarily stay the
24 law while we did that. And NetChoice says, no,
25 we want to go fast. And they -- and the

1 district court obliged them, went fast. There
2 was no meaningful opportunity to take discovery.

3 And, in fact, when we appealed, we
4 tried to say, hey, let's litigate this case
5 while it's on appeal and do discovery. And they
6 said, no, we want to stay discovery even while
7 it's on appeal. And the district court obliged.
8 So the fact that there's no record in this case
9 is not Florida's fault. It is NetChoice's
10 fault.

11 Second, there are clearly
12 constitutional applications of this statute, and
13 contrary to what my friend said, it does apply
14 to Uber. And he read you the definition of
15 "censorship" on 97a, and right before that is
16 the definition of "deplatforming." And Uber --
17 if Uber deplatforms a -- a user, that is covered
18 by our law. If users -- if Uber says to a
19 journalistic enterprise, I don't like the -- the
20 cut of your jib, the broadcast you -- you did
21 last week, that is covered by our law. And so
22 that -- that is something that is there.

23 There -- and there are also -- you
24 know, there -- it's not just Gmail. It's also
25 WhatsApp. There are messaging functions. Those

1 are constitutional applications. And the
2 consequences of my friend's argument is really
3 quite sweeping. My friend seems to think that
4 -- that even a traditional common carrier has a
5 First Amendment right, I guess, to -- to censor
6 anything. I guess that means that Verizon can
7 turn around tomorrow and have a First Amendment
8 right to kick all Democrats or all Republicans
9 off of the -- the platform, and that is -- that
10 would have sweeping consequences that I -- I do
11 not think is supported because Verizon has no
12 message in deplatforming or censoring its users.

13 And that principle is distinct from
14 what my friend from the United States is saying
15 because she's talking about, oh, well, they
16 arrange material on the site in various ways.
17 But that doesn't speak to -- at all to whether
18 they have a constitutional right to censor
19 because just because you have to carry content
20 or carry a particular user, you could still
21 arrange it.

22 And -- and I think that's the
23 fundamental conflation -- conflation that the
24 United States does in its brief. It -- it
25 ignores the distinction between the hosting

1 function and the organizational function, and
2 that's something that I think the Court needs to
3 keep separate in its -- in its mind. And I
4 would -- I would commend to the Court Professor
5 Volokh's article cited on page 24 of our brief
6 that -- that makes this distinction.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 The case is submitted.

11 (Whereupon, at 12:27 p.m., the case
12 was submitted.)

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|---|---|---|--|---|
| \$ | ability ^[6] 13:20 78:18 100:4 111:9 119:22 142:22 | affirm ^[4] 81:3 104:20 109:8 135:1 | 31:1 37:10,19,24 38:1,9,10 43:18,20,21,23 44:1,4 45:17 46:25 50:25 62:24 63:5 64:10 65:4,10,18 68:8 70:5 71:24 72:7,24 73:24,25 74:2,8 76:13 80:16 81:14 84:8,10,17 85:22,23 86:13 98:13 102:5,21 103:13 | application ^[15] 9:10 11:1 56:4 61:21 68:12 69:1,9 71:1 76:5 84:19 127:6 129:18 135:2 151:22 153:15 |
| \$1,000 ^[1] 108:5 | able ^[3] 70:10 80:12 85:4 | affirmative ^[1] 143:5 | 108:7 112:16 114:9,18,21,24 115:4,12 116:2,14 117:1,4 124:3,20,24 131:12,16 135:20,22 136:4,8 137:16 143:7,14,20 144:22 149:23 150:6,12,21 157:5,7 | applications ^[30] 35:14 56:10 68:17 69:10 71:14 73:20 78:25 80:10,20 82:22 83:5,24 126:18,23 130:12 137:21 138:2 139:17 140:3 147:13,16,18,22 148:4 151:8,10 152:1 154:8 156:12 157:1 |
| \$100,000 ^[3] 80:13 105:16 139:23 | above ^[1] 124:8 | affirmatively ^[1] 94:4 | African ^[1] 76:8 | applied ^[7] 7:8 33:2 60:18 82:8 84:7 128:9 144:20 |
| 1 | above-entitled ^[1] 1:15 | afraid ^[2] 13:6 32:24 | ago ^[1] 61:5 | applies ^[10] 16:5 41:23 60:9 63:6 69:4,14 70:21,22 101:3 138:12 |
| 1 ^[2] 18:5,6 | absolutely ^[7] 7:23 20:21 42:1 64:7 65:9 81:2 102:12 | agree ^[34] 22:4,14,17,18 24:23,24 26:19 32:5 43:22,24,25 44:15,16 51:3 57:4 70:7 76:2 79:13,23 80:3 108:13 110:15 116:22 118:25 122:19 130:22 131:10,17 133:21 136:25 141:2 150:8 152:16 154:18 | agreed ^[1] 57:7 | apt ^[3] 42:16,18 43:7 |
| 10:04 ^[2] 1:17 4:2 | absorb ^[1] 52:12 | agreement ^[1] 147:25 | ahead ^[1] 71:6 | area ^[2] 9:25 65:8 |
| 100 ^[1] 152:17 | abstract ^[2] 60:2 98:13 | aim ^[1] 153:2 | aim ^[1] 153:2 | areas ^[2] 13:3 16:9 |
| 113 ^[1] 3:11 | abuses ^[2] 21:20 142:18 | AL ^[2] 1:4,8 | AL ^[2] 1:4,8 | aren't ^[11] 16:16 61:23 86:17 91:24,25 114:23 122:14 125:9 138:4 145:17 151:10 |
| 12:27 ^[1] 158:11 | accepted ^[1] 21:21 | Alexandria ^[1] 2:4 | algorithm ^[13] 50:3,10 53:3,12,12,13,24 89:24 90:7,12,14 91:8 149:3 | argue ^[4] 20:8 36:11 125:7 127:25 |
| 154 ^[1] 3:14 | access ^[3] 10:7 75:8 130:19 | algorithm ^[13] 50:3,10 53:3,12,12,13,24 89:24 90:7,12,14 91:8 149:3 | algorithms ^[1] 50:14 52:24 53:1,6 54:16,19,22 90:2,24 | argued ^[2] 46:7 122:7 |
| 19 ^[1] 111:12 | accommodations ^[1] 132:6 | Alito ^[43] 32:11,12,19 33:16 34:6,22 35:5 36:1 57:19 69:5,21,25 70:4,14 71:5 77:17,19,23 78:9 79:17 81:17 82:5,11,14 93:4,5,16 94:3 127:22,23 128:10,15 129:2 130:14 131:10,17,25 132:8,12,16 133:5,18 145:10 | alogize ^[3] 9:24 13:7 47:21 | arguing ^[1] 55:10 |
| 1917 ^[1] 93:18 | accordance ^[1] 14:17 | Alito's ^[1] 141:15 | alogized ^[1] 42:14 | argument ^[29] 1:16 3:2,5,8,12 4:4,7 21:17 33:17 47:12 53:21 56:16 62:18 66:9 68:24 69:18 76:23 77:5 96:23 99:8,16 111:17 114:4 128:4,6 133:15 154:19 155:14 157:2 |
| 1973 ^[1] 143:18 | account ^[1] 29:5 | all-encompassing ^[1] 33:23 | alogy ^[4] 42:16,19 43:6 49:4 | arguments ^[9] 56:19 66:16 69:19 107:17 126:1 128:22 135:9,15 143:9 |
| 1976 ^[1] 21:6 | accountability ^[1] 143:4 | all-or-nothing ^[1] 140:9 | alogy ^[4] 42:16,19 43:6 49:4 | Arkansas ^[1] 73:2 |
| 1997 ^[1] 111:17 | accounts ^[1] 70:7 | allege ^[1] 30:9 | alysis ^[8] 15:16 20:22 22:12 25:7 37:22 81:25 129:25 142:25 | around ^[4] 63:18 93:6 153:14 157:7 |
| 2 | accumulations ^[1] 142:20 | allegedly ^[1] 32:2 | alysis ^[8] 15:16 20:22 22:12 25:7 37:22 81:25 129:25 142:25 | arrange ^[3] 114:10 157:16,21 |
| 2 ^[1] 113:21 | accuracy ^[1] 143:3 | allow ^[9] 20:4,4 21:22 37:11 106:20 115:25 129:3 137:19 153:17 | alogy ^[4] 42:16,19 43:6 49:4 | arranging ^[2] 119:23 136:15 |
| 20 ^[1] 111:13 | accurate ^[2] 104:3,5 | allowed ^[1] 58:8 | alogy ^[4] 42:16,19 43:6 49:4 | article ^[3] 41:18 51:7 158:5 |
| 2000s ^[1] 66:12 | achieve ^[1] 4:14 | allowing ^[3] 37:11 44:1 78:1 | alogy ^[4] 42:16,19 43:6 49:4 | articulate ^[2] 85:18 95:2 |
| 2024 ^[1] 1:13 | acknowledge ^[1] 121:3 | allows ^[1] 142:24 | alogy ^[4] 42:16,19 43:6 49:4 | articulated ^[1] 143:25 |
| 22-277 ^[1] 4:4 | across ^[2] 90:20 119:16 | alluded ^[1] 106:4 | alogy ^[4] 42:16,19 43:6 49:4 | artifact ^[1] 85:8 |
| 230 ^[35] 29:4,15,23 40:19,21 66:10,15,23 67:5 86:3,5,6,20,22 87:7,9 88:3 92:8,10 119:4 121:6 123:12,14,20,25 125:1,8,11 148:17 149:5,8,21 150:2,13,20 | act ^[2] 14:17 92:7 | almost ^[3] 8:10 46:24 68:16 | alogy ^[4] 42:16,19 43:6 49:4 | |
| 230(c) ^[1] 29:20 | acting ^[2] 132:5 145:14 | alone ^[2] 70:25 86:20 | alogy ^[4] 42:16,19 43:6 49:4 | |
| 230(c)(2) ^[6] 41:12,15,23 42:2,5,10 | action ^[7] 9:3 63:6 65:8 89:23 99:23 108:3 143:5 | alphabetical ^[1] 52:17 | alogy ^[4] 42:16,19 43:6 49:4 | |
| 230(c)(2)(A) ^[1] 125:19 | actions ^[1] 100:4 | already ^[1] 42:8 | alogy ^[4] 42:16,19 43:6 49:4 | |
| 24 ^[1] 158:5 | activities ^[6] 26:1 27:12 99:10,12 121:14 135:23 | alter ^[2] 99:25 155:7 | alogy ^[4] 42:16,19 43:6 49:4 | |
| 26 ^[1] 1:13 | activity ^[34] 12:19 27:14,16 37:19,25 38:1 39:1 47:6 60:8 63:9,19 65:12 69:20 71:11 74:22 76:14,24 77:7,13 79:7 81:10 85:15 100:8 103:7,12 104:1,19 112:15 114:18 117:18 118:23 136:9,12,17 | alternative ^[1] 35:25 | alogy ^[4] 42:16,19 43:6 49:4 | |
| 3 | actual ^[1] 99:20 | although ^[1] 122:13 | alogy ^[4] 42:16,19 43:6 49:4 | |
| 3 ^[1] 153:1 | actually ^[23] 6:22 10:8 11:19 20:14 25:21 29:23 35:10 49:17 51:11 54:3 60:8 62:4 68:25 71:22 72:2 73:3 74:10 92:2 97:10 109:16 141:9 155:21,23 | Amazon ^[2] 55:6 57:6 | alogy ^[4] 42:16,19 43:6 49:4 | |
| 30 ^[1] 60:24 | add ^[1] 97:8 | ambiguity ^[3] 25:22 59:7 154:24 | alogy ^[4] 42:16,19 43:6 49:4 | |
| 30-day ^[5] 60:12 61:12 62:12 94:24 101:2 | addendum ^[1] 100:2 | amend ^[1] 105:3 | alogy ^[4] 42:16,19 43:6 49:4 | |
| 303 ^[6] 64:1 102:24,25 103:2,2,6 | additional ^[2] 52:1 139:15 | Amendment ^[9] 1:4,20,24 5:2,7 6:1 7:18 14:1,22 15:2,6,10 20:16 21:7,11 22:8 | alogy ^[4] 42:16,19 43:6 49:4 | |
| 4 | address ^[7] 6:14 40:24 57:12,25 74:16 134:9 147:9 | | alogy ^[4] 42:16,19 43:6 49:4 | |
| 4 ^[1] 3:4 | adjunct ^[1] 61:14 | | alogy ^[4] 42:16,19 43:6 49:4 | |
| 5 | adopt ^[1] 122:22 | | alogy ^[4] 42:16,19 43:6 49:4 | |
| 50 ^[1] 143:24 | advances ^[1] 22:8 | | alogy ^[4] 42:16,19 43:6 49:4 | |
| 6 | advancing ^[1] 44:23 | | alogy ^[4] 42:16,19 43:6 49:4 | |
| 6 ^[1] 40:19 | advertisers ^[19] 5:6,6,8 64:8 93:15 118:2 | | alogy ^[4] 42:16,19 43:6 49:4 | |
| 62 ^[1] 3:7 | affect ^[3] 129:25 145:1 150:16 | | alogy ^[4] 42:16,19 43:6 49:4 | |
| 7 | affected ^[1] 6:11 | | alogy ^[4] 42:16,19 43:6 49:4 | |
| 7 ^[2] 92:18 112:20 | affecting ^[2] 39:21 146:6 | | alogy ^[4] 42:16,19 43:6 49:4 | |
| 9 | affects ^[2] 11:2 150:1 | | alogy ^[4] 42:16,19 43:6 49:4 | |
| 9/0 ^[1] 103:16 | | | alogy ^[4] 42:16,19 43:6 49:4 | |
| 90s ^[1] 66:12 | | | alogy ^[4] 42:16,19 43:6 49:4 | |
| 97A ^[2] 99:21 156:15 | | | alogy ^[4] 42:16,19 43:6 49:4 | |
| 99 ^[4] 17:19,22,23 73:6 | | | alogy ^[4] 42:16,19 43:6 49:4 | |
| A | | | alogy ^[4] 42:16,19 43:6 49:4 | |
| a.m ^[2] 1:17 4:2 | | | alogy ^[4] 42:16,19 43:6 49:4 | |

Official

| | | | | |
|--|--|--|---|--|
| <p>artificial ^[1] 72:11</p> <p>as-applied ^[9] 6:11 31:12 81:20 82:15,17 105:5 139: 10 140:10 147:8</p> <p>ASHLEY ^[1] 1:3</p> <p>aside ^[3] 49:10 88:6 151:7</p> <p>aspect ^[6] 6:17 15:5 20:14 54:25 73:22 79:2</p> <p>asserted ^[3] 5:7 146:1,6</p> <p>asserting ^[1] 42:6</p> <p>assesses ^[1] 129:17</p> <p>Associated ^[1] 44:6</p> <p>assume ^[4] 50:20 60:6 108: 13 137:11</p> <p>assuming ^[1] 37:18</p> <p>assumption ^[1] 137:2</p> <p>attacked ^[1] 58:17</p> <p>attacks ^[1] 92:17</p> <p>attempt ^[1] 41:5</p> <p>attempts ^[1] 112:7</p> <p>attention ^[3] 10:11 52:8 94: 23</p> <p>ATTORNEY ^[1] 1:3</p> <p>attribute ^[1] 39:6</p> <p>audience ^[3] 63:12 88:18, 24</p> <p>Austin ^[1] 61:5</p> <p>authors ^[2] 76:8 98:14</p> <p>available ^[1] 125:23</p> <p>avoid ^[1] 86:4</p> <p>await ^[1] 140:3</p> <p>aware ^[4] 28:1,8 33:22 45: 14</p> <p>away ^[3] 55:18 118:2 151:1</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back ^[18] 30:1 44:5 52:22 66:12 105:19,22,25 106:2 110:13 122:7 125:23,24 139:8,8 147:6,21 148:13 149:13</p> <p>backed ^[1] 139:22</p> <p>bad ^[5] 18:24 67:2,8,18 78: 20</p> <p>bad-faith ^[2] 42:1,7</p> <p>baffled ^[1] 127:23</p> <p>balance ^[1] 44:13</p> <p>balanced ^[1] 44:12</p> <p>ban ^[5] 23:3 30:24 40:6 100: 19,21</p> <p>ban's ^[1] 100:20</p> <p>banning ^[4] 31:7 54:10 59: 10,14</p> <p>bans ^[1] 12:12</p> <p>bare ^[1] 121:18</p> <p>Barrett ^[27] 48:8,9 49:9,25 50:18 52:4 53:20 54:23 56: 8,15,25 57:4,14 77:18 79: 11 80:5,25 94:14 108:11, 12,23 110:9 146:23,24 148: 16 150:8 151:3</p> <p>Barrett's ^[1] 126:20</p> <p>based ^[9] 23:4 54:1 76:3 85:11 122:5 127:13 131:</p> | <p>15 135:3 140:12</p> <p>baseline ^[2] 60:2 118:17</p> <p>basic ^[1] 124:17</p> <p>basically ^[8] 15:18 17:24 30:18 37:13 66:24 77:11 111:19 134:9</p> <p>basis ^[21] 63:2 71:9 74:25 75:9 77:25 78:5 95:15 97: 4,6,17 98:7,9,15 106:20 127:1 130:19,20,21 131:11 139:10 155:2</p> <p>basket ^[3] 77:2 81:10 104: 17</p> <p>beam ^[1] 96:14</p> <p>bear ^[1] 8:15</p> <p>bears ^[1] 151:18</p> <p>become ^[3] 8:13 64:10 142: 10</p> <p>becoming ^[1] 67:1</p> <p>beg ^[1] 84:25</p> <p>began ^[1] 13:19</p> <p>beginning ^[1] 142:5</p> <p>behalf ^[9] 2:3,5 3:4,7,14 4: 8 62:19 139:19 155:15</p> <p>behavior ^[1] 134:20</p> <p>beliefs ^[1] 75:1</p> <p>below ^[18] 32:14 68:25 81: 7,12 85:13 95:6,7,12,14 125:22 126:3 128:22,23 133:22 135:10 138:10 139: 13 154:2</p> <p>benefit ^[3] 103:23 109:22, 25</p> <p>beside ^[1] 136:20</p> <p>best ^[2] 30:7 103:9</p> <p>better ^[2] 78:22 105:4</p> <p>between ^[11] 45:18 46:13 48:16 75:3 89:23 94:2 119: 13,19 123:22 148:20 157: 25</p> <p>beyond ^[2] 121:18 140:23</p> <p>bias ^[5] 21:20 62:23 72:13, 19 142:19</p> <p>bicycles ^[1] 100:16</p> <p>big ^[11] 38:6 62:23 63:11 71:22 72:6 96:9 119:13,18 142:11 143:19 153:1</p> <p>biggest ^[3] 72:21,22 96:13</p> <p>bigness ^[3] 71:9 131:11 144:1</p> <p>bigots ^[1] 19:18</p> <p>billion ^[1] 101:16</p> <p>billions ^[1] 4:16</p> <p>bit ^[6] 28:21 47:9 61:12 72: 5 79:21 95:25</p> <p>black ^[3] 76:7 98:14,14</p> <p>blah ^[3] 121:8,8,8</p> <p>bland ^[1] 133:9</p> <p>blinks ^[1] 63:10</p> <p>blocking ^[1] 125:18</p> <p>blow ^[2] 92:14 101:17</p> <p>board ^[1] 74:17</p> <p>body ^[1] 144:17</p> <p>bomb ^[1] 92:13</p> | <p>book ^[2] 24:24 43:5</p> <p>books ^[2] 43:4,4</p> <p>bookstore ^[3] 10:2 24:25 76:5</p> <p>Bookstores ^[2] 24:7 52:16</p> <p>boosted ^[2] 50:7 149:3</p> <p>booted ^[1] 46:8</p> <p>booting ^[1] 32:8</p> <p>Boston ^[2] 102:16,17</p> <p>both ^[6] 25:8 56:19 59:2 104:11 130:24 152:24</p> <p>bottleneck ^[1] 111:8</p> <p>bouncing ^[1] 93:6</p> <p>bound ^[4] 116:5,14,25 117: 14</p> <p>bounds ^[1] 115:11</p> <p>box ^[1] 131:2</p> <p>boxes ^[1] 153:4</p> <p>breadth ^[3] 9:7,11,15</p> <p>breakneck ^[1] 33:12</p> <p>brick-and-mortar ^[1] 55: 13</p> <p>brief ^[11] 8:7 15:11 47:21 55:20 74:21 77:9 118:21 149:14 151:15 157:24 158: 5</p> <p>briefed ^[2] 29:18 41:21</p> <p>briefing ^[3] 79:20 80:22 148:11</p> <p>Briefly ^[1] 29:10</p> <p>briefs ^[1] 31:6</p> <p>bright-line ^[1] 144:3</p> <p>bring ^[3] 6:11 82:14,16</p> <p>bringing ^[1] 7:3</p> <p>brings ^[2] 63:20 143:12</p> <p>broad ^[12] 4:20 8:9,14,24 11:1 25:8 31:5 55:2,17 69: 11 94:20 153:23</p> <p>broadcast ^[3] 23:5 45:3 156:20</p> <p>broadcaster ^[1] 23:11</p> <p>broadcasters ^[1] 23:10</p> <p>broadcasting ^[1] 23:14</p> <p>broader ^[2] 17:13 88:18</p> <p>Broadly ^[3] 5:5 19:10 59:3</p> <p>brought ^[4] 55:9 81:20,23 151:13</p> <p>Buckley ^[2] 21:1,5</p> <p>build ^[1] 92:13</p> <p>bulimia ^[1] 92:22</p> <p>bullying ^[1] 36:25</p> <p>bunch ^[6] 48:20 87:5 89:19, 20 101:8 150:9</p> <p>burden ^[12] 8:15,23 9:2 68: 15,15,21,22 83:25 151:18, 21 152:5,18</p> <p>Burger's ^[1] 142:13</p> <p>business ^[11] 5:13 14:18 15:17 36:16 37:6 45:21 97: 12 106:14 114:20 121:15 137:9</p> <p>businesses ^[3] 14:10,23 17:16</p> <p>buy ^[2] 38:15 52:20</p> | <p>bypass ^[1] 116:20</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>c)(2) ^[1] 29:20</p> <p>cabin ^[1] 150:19</p> <p>cable ^[3] 23:9 65:7 111:7</p> <p>cagey ^[1] 33:1</p> <p>California ^[1] 12:18</p> <p>call ^[3] 10:4 43:2 122:21</p> <p>called ^[2] 14:3 153:1</p> <p>calls ^[1] 143:10</p> <p>came ^[10] 1:15 76:22 94:10, 11 102:18 103:24 104:5 106:2 111:24 133:17</p> <p>campus ^[5] 19:18 20:5 32: 9 40:5 46:9</p> <p>cancel ^[1] 5:8</p> <p>candid ^[1] 53:3</p> <p>candidate ^[8] 73:14 84:18 112:24 113:6,7,18 132:23 146:12</p> <p>candidates ^[3] 64:14 73: 13 100:11</p> <p>cannot ^[4] 23:3 63:23 131: 18 144:6</p> <p>canvass ^[1] 108:24</p> <p>careful ^[1] 149:12</p> <p>carefully ^[3] 14:20 40:10 150:19</p> <p>Carlson's ^[1] 70:6</p> <p>carried ^[1] 89:10</p> <p>carrier ^[21] 7:16,18 14:13 26:12 34:15 43:9 46:15 49: 4,10,11 74:10,12 80:23 115:3 134:19 135:12,17 136:1,6,20 157:4</p> <p>carriers ^[13] 17:15 42:15 43:11 80:2 121:12,23 125: 1 133:25 134:4,6,11,16 135:21</p> <p>carry ^[6] 54:7 113:14,15 114:23 157:19,20</p> <p>carrying ^[3] 119:15 136:9, 10</p> <p>Case ^[79] 4:4 6:6,18 8:1 15: 22 16:25 20:15,22 26:4,4 27:21,25 28:6 29:22 30:9, 9,22 31:15,19 33:7 35:18, 23 42:4 44:5,6,8 58:15 61: 5 65:7,17 66:1,11 72:2,5 74:11,19 76:18,22 79:13 81:18 84:8,10 85:9 88:1 102:14,15,18 103:4,9,15 104:20 107:18 110:7 125: 11,22 126:1 127:12 128:19, 24 130:2 135:7 138:10 141:10 143:17 145:6 148: 9 149:15,24 150:14 151:10, 18 152:18,24 155:3,18 156: 4,8 158:10,11</p> <p>cases ^[20] 8:18 22:15 45: 14,19,24 47:22,23 63:22 64:25 65:23 66:23 86:25 87:1,3 90:16 93:6 95:21</p> | <p>107:17 114:12 136:18</p> <p>categorical ^[1] 26:6</p> <p>category ^[1] 111:4</p> <p>cause ^[1] 113:22</p> <p>causes ^[1] 19:13</p> <p>causing ^[1] 149:18</p> <p>caution ^[1] 151:1</p> <p>celebrate ^[1] 76:7</p> <p>celebrating ^[1] 112:20</p> <p>cellphone ^[1] 43:11</p> <p>ensor ^[17] 4:21 6:2 10:19 23:3 39:8 43:1,4 48:3 49:7 63:17 65:2,18 99:22,23 100:7 157:5,18</p> <p>censored ^[2] 45:1,2</p> <p>ensoring ^[11] 31:19,21 32:6 39:2 51:16 54:4 63: 14 116:18 132:20,22 157: 12</p> <p>ensors ^[1] 102:2</p> <p>ensorship ^[18] 5:10 6:1 40:2 53:19 54:12 59:10,13 93:17,24 101:25 102:11 110:23 111:1,3 131:18,22 132:13 156:15</p> <p>center ^[1] 45:22</p> <p>central ^[3] 126:4 153:2 155: 2</p> <p>centuries ^[1] 14:14</p> <p>cert ^[1] 29:18</p> <p>certain ^[17] 6:3 9:13 26:10 30:25 36:24 51:10 71:18 78:21 79:9 91:15 115:14 121:5,5,13,13 122:22 138: 16</p> <p>Certainly ^[23] 6:16 7:10,14 14:6,19 15:8 17:12 19:16 24:24 26:18 30:21,23 31: 24 33:25 34:19 53:2 59:5 61:3 88:1 120:15 122:21 129:22 150:18</p> <p>certainty ^[1] 138:9</p> <p>certify ^[1] 141:7</p> <p>cetera ^[1] 147:11</p> <p>chaff ^[1] 120:10</p> <p>challenge ^[49] 6:6,12,15, 19,24 7:3 8:13 25:25 28: 16,21 29:2,6 31:12 34:23 41:8 54:17,25 55:16 57:9, 13 58:13,18 76:21 81:21, 24 82:3,15,17 83:1,3 87:2 95:3,19,23 98:12,20 105:5 107:20 119:1 120:8 128:4 129:4,25 140:9,11 147:8 149:4 151:13 154:3</p> <p>challenged ^[3] 151:12 152: 12 153:9</p> <p>challenges ^[2] 31:10 154: 10</p> <p>challenging ^[1] 9:3</p> <p>chance ^[5] 33:13 40:18 45: 7 57:25 145:3</p> <p>change ^[8] 60:23 61:1,18 101:4,10 106:13 113:23</p> |
|--|--|--|---|--|

Official

| | | | | |
|---|---|--|--|--|
| <p>146:7 changed [2] 39:14,14 changes [3] 21:17 142:15, 16 characteristics [1] 97:18 characterization [2] 7:22 150:21 characterize [1] 34:12 charged [1] 19:12 CHIEF [46] 4:3,9 13:18 15: 4 19:24 20:7 21:1,13 29:8 30:3 32:11 36:2 40:15 43: 14 48:7 57:15 62:15,20 73: 17,21 74:4 84:20 85:16,24 93:4 94:6 96:17 101:21 108:10 110:10 114:1,7 125:20 127:16,19,22,24 133:12 136:22 140:6 141: 12 142:13 146:22 151:4 155:11 158:8 children [2] 107:5,8 chilling [1] 139:24 choice [2] 53:9 117:7 choices [3] 124:19 142:7 146:7 choke [1] 5:3 choose [1] 122:25 choosing [1] 124:7 chosen [1] 14:18 church [1] 92:14 Circuit [6] 59:18 77:8 81: 12 104:12,13 139:2 circumstance [2] 57:19 118:13 circumstances [2] 28:23 149:17 cite [1] 51:8 cited [2] 150:23 158:5 City [3] 61:5 102:16,17 civil [2] 80:13 105:16 claim [6] 5:9 35:18,20,24 81:24 114:20 claimed [2] 5:9 142:22 claims [2] 42:4 122:10 clarity [2] 57:25 128:14 classic [4] 37:9 55:3 79:10 121:11 classroom [1] 103:15 clause [1] 76:15 clean [1] 78:22 clear [22] 56:20 57:22 59: 23 60:1 64:2 76:21 77:10 78:13 81:5,11 103:6 104: 13 109:11 112:15 130:5 134:1 138:25 139:6 142:2, 3 145:7 150:19 clearly [5] 36:19 95:21 150: 25 153:2 156:11 CLEMENT [109] 2:4 3:6 33: 17 62:17,18,20 64:18,21 65:14,19 66:17 67:21 68:5, 8,20 69:6,13,21 70:2,9,18 71:8,10,25 72:8 73:1,19 74:1,6,20 75:2,13,16,22 76:</p> | <p>4,12 77:17,18,21 78:7,10 79:11 80:3,6 81:2,18 82:4, 11,16,19,21 83:2,7,16 84:5 85:2,20 86:4,23 87:14,17, 22 88:13,21,25 89:4,8 90:1, 10,15 91:3,5,7,11,18,23 92: 1,11 93:9,22 94:8 95:13 97:10,20 98:3,10,17 99:2, 18 102:12,25 104:4 105:1, 23,25 106:11 107:16 108: 22 109:1 110:12,24 112:3, 12 113:2,9 116:16 130:16 146:25 151:20 Clement's [1] 147:4 client's [1] 113:11 clients [11] 63:14 64:19 66: 20 67:13 74:16 75:6 77:24 98:11,19 109:22,25 closely [1] 73:12 closer [3] 52:18 64:9 74:18 clothes [1] 10:14 cognizable [1] 30:16 coincide [1] 72:12 coincidentally [1] 72:12 collections [1] 114:16 colloquial [1] 132:10 Colorado [1] 103:3 come [14] 10:17 12:23 16:1, 1 19:15 30:22 37:10 67:15 78:23 84:2 106:16 111:22 134:14 144:21 comers [4] 7:15 14:11 46: 24 121:19 comes [9] 6:18 48:2,11 75: 17 81:14 101:7 105:19,21, 25 comfortably [1] 129:3 coming [1] 8:15 commend [1] 158:4 comment [5] 6:13 21:2 101:4 130:15 153:4 comments [6] 78:14,15,19, 21 101:9,11 commercial [1] 13:13 commit [1] 87:4 committee [2] 47:15,16 common [39] 7:16,17 13:3, 7 14:13 17:15 26:12 34:15 42:14 43:9,11 46:15 49:4, 10,11 66:23 67:3 74:9,12 80:1,23 115:3 118:6 121: 11,23 125:1 133:25 134:4, 5,10,16,19 135:12,17,21, 25 136:6,19 157:4 communicate [2] 4:12 119:22 communicated [1] 88:12 communication [8] 5:5 42:21 115:9 123:17,19 124:11,13 142:24 communications [7] 4:16 34:17 45:21 115:3 122:1 131:1 136:10 community [3] 11:4 30:14</p> | <p>65:7 companies [32] 5:12 16:5 21:4 36:20 48:17,23 51:24 72:6,19,21,22 92:18 96:9, 13,15 106:23 107:3 110:20, 21 111:7 112:8 114:22 122:1,7 127:7 133:25 135: 21 137:23 138:3 139:4,11 153:2 companies' [2] 27:12 36:8 company [11] 5:1 15:16 59: 15 71:19 87:24 106:14 115:3 119:14 131:3,3,15 comparable [1] 127:8 compare [1] 35:14 compared [1] 15:16 comparison [2] 35:16 60: 2 compelling [3] 23:15,16 143:14 compels [1] 63:1 competing [1] 70:24 competitive [1] 43:12 compilation [4] 49:19 123: 3 150:22 155:6 compilations [1] 114:11 compiling [1] 124:6 complaining [1] 91:25 completely [5] 26:19 80: 15 102:15 135:19 150:4 compliance [1] 106:16 complicate [1] 41:5 complicated [1] 153:17 complicating [1] 29:1 complication [1] 29:6 components [1] 153:7 computer [1] 90:3 concentrated [1] 142:11 concept [1] 21:8 conceptions [1] 141:25 concern [2] 14:2 22:23 concerned [4] 13:19 14:6 106:7,8 concerns [4] 110:23 144:5, 12 145:9 conclude [2] 27:10 67:25 concluded [2] 29:24 145: 22 conclusion [1] 20:15 concrete [1] 140:3 condition [1] 20:20 conditions [2] 10:23 50:23 conduct [34] 5:6,17 11:21, 23 19:23 20:17 22:5 25:1, 11 26:14,20 32:3 34:8,11, 13,16,25 35:1 55:18 66:14 67:2 68:2 88:8,11 101:15 104:2 113:12 114:21 119: 19 133:9 144:19 149:19 152:7,14 conducted [1] 17:15 conduit [8] 47:12 66:11,25 67:11 119:11,13,20 125:4 conduit-type [1] 74:22</p> | <p>conduits [1] 66:22 conference [1] 43:2 confess [1] 149:13 confident [1] 138:1 conflating [1] 151:2 conflation [2] 157:23,23 conflict [1] 144:22 conflicts [1] 40:21 confrontation [1] 143:13 confronted [1] 111:17 confused [1] 60:11 confusing [1] 28:16 confusion [1] 153:20 Congress [7] 23:8 66:22 67:10,13 86:8 125:12,15 Congress's [1] 124:18 connection [1] 11:22 consensual [1] 143:11 consequences [2] 157:2, 10 consider [1] 79:16 consideration [4] 22:12 61:6 62:8 148:14 considerations [1] 63:25 considered [2] 58:14 128: 24 considering [1] 135:9 consistency [10] 23:21,24 58:3,22 59:8 61:14,21 107: 14,22 112:12 consistent [9] 7:8,18 24: 10 59:11 91:12 92:9 94:23 108:1 119:4 consistently [9] 24:2,3 58: 24 61:17,23 66:21 106:21 108:4 112:8 constantly [1] 61:18 Constitution [3] 7:9 116:6 117:15 constitutional [11] 29:25 42:4,7 69:1 84:18 115:15 129:20 145:5 156:12 157: 1,18 constraints [6] 51:21,21, 25 52:7,8 64:1 construe [2] 58:10,16 consumer [7] 23:22 24:16 52:9,12 73:4,5 144:20 consumers [1] 4:23 contact [1] 94:16 contain [1] 120:20 contains [2] 33:3 153:6 contend [1] 4:19 content [7] 5:15,24 7:16 9: 19 10:15 11:16 14:12 16:6, 16,19 17:20,22 19:2 23:5 24:1,10,18 27:13 30:12 31: 5 32:13 38:22 39:4,6,13,20 40:11,13 41:16,24 42:1,8, 10 52:2 54:8,19 56:23 60: 17,17,18 61:7,24 62:8 63:2, 12,15 67:3 75:15 84:17 93: 7,10,12,21,23,25 100:3,21 101:1,16 106:21 114:16</p> | <p>116:19 117:16,22,24 118:1, 7,15 122:5 131:23 132:13 134:17,17 146:6,9 148:20 157:19 content-based [10] 36:19 37:7 60:14 61:2,8 62:4,9 64:15 73:15 95:17 content-moderating [1] 27:13 content-neutral [3] 60:14 62:5 145:20 contention [1] 30:11 context [7] 35:11 67:14 68: 9 84:3 104:5,8 119:1 contingent [1] 132:21 continuing [2] 88:15 141: 17 contradicts [1] 4:22 contrary [1] 156:13 control [20] 4:11 13:21,23 45:9,10,16 46:2,4,8,14 47: 1 48:1,10,14 49:13 50:25 111:8 127:2 130:8 144:6 controvery [2] 19:13,20 convey [2] 65:24 67:20 conveying [1] 118:4 core [5] 79:3,15 103:12 153:5,18 corner [1] 153:14 correct [4] 72:14 105:24 127:15 135:4 correctly [1] 115:23 couldn't [4] 32:17 97:5 101:10 110:15 Counsel [9] 6:5 13:18 30:4 62:16 73:17 84:21 114:2 155:12 158:9 counsels [1] 58:12 countering [1] 56:16 countries [1] 142:2 country [1] 142:4 couple [4] 58:2 61:4 80:20 84:14 course [6] 45:14 90:22,24 110:4 116:12 149:17 COURT [94] 1:1,16 4:10 5: 20 6:18,20 12:18 14:19,20 19:19 20:13 21:14,16,21 23:7,12 29:12,22 30:25 38: 12 40:25 41:1 44:3,8 46: 10,12 47:11,22 48:3 51:13, 22 53:7,15 57:12 58:5,14 61:4 62:21 65:20 71:12 76: 25 80:13 84:7 95:7,11,13 103:5 105:4 106:3 108:6 109:15 110:3,8 111:16,18 114:8 118:13 126:13,21,24 127:4,10 128:13,21,23 129: 23 130:5 135:6,8 136:17 138:25 139:2,7,11 140:1, 10 141:7 142:3,14 143:18 145:18 146:17 147:21 148: 2,10 150:18,25 154:13 155: 9,20 156:1,7 158:2,4</p> |
|---|---|--|--|--|

Official

| | | | | |
|---|---|---|--|---|
| <p>Court's ^[10] 35:15 64:17 65:6 84:10 95:21 102:13 114:12 115:16 135:8 142: 13 courts ^[11] 58:9,16 70:12 74:8 85:12 126:10 130:7 145:17 148:15 151:1 152: 25 cover ^[17] 8:8,19 9:12,13 11:10 34:6,9 55:4,5,17 70: 1,3 76:24 94:19 114:13 154:20,21 covered ^[10] 32:21 33:18 44:14 60:8 69:4 82:10 126: 15 129:16 156:17,21 covering ^[2] 8:3,9 covers ^[5] 55:23 57:21 114: 14 137:12 138:19 crack ^[1] 20:12 crazy ^[1] 10:1 create ^[5] 5:14 30:24 116:4 117:4 146:10 created ^[2] 90:11 127:13 creates ^[1] 136:2 creating ^[16] 30:13 116:4 117:8 122:2,14 125:13 127:8 137:14,23 138:4 139:5 144:8 150:5,24 153: 5 155:5 Creative ^[2] 64:1 103:6 crime ^[1] 92:5 critical ^[4] 65:9 116:11,24 142:24 crushing ^[1] 101:17 curate ^[2] 114:10 123:11 curated ^[2] 96:22 122:17 curating ^[1] 131:8 curation ^[2] 122:21 130:8 curatorial ^[1] 136:17 curiae ^[3] 2:8 3:11 114:5 curiosity ^[1] 93:7 current ^[2] 143:25 144:1 curse ^[1] 11:5 customers ^[2] 46:18 52:20 cut ^[2] 79:12 156:20</p> <hr/> <p style="text-align: center;">D</p> <p>D.C ^[2] 1:12 2:7 damaging ^[1] 36:22 danger ^[1] 99:19 dark ^[2] 33:10 153:13 data ^[1] 144:20 day ^[5] 39:12 45:4 47:6 122: 8 127:11 days ^[1] 60:24 DBA ^[1] 1:7 deal ^[6] 21:25 46:22 101:6 118:24 140:9 144:15 dealt ^[2] 142:8,9 debate ^[2] 87:18,25 decide ^[5] 76:16 80:4 85:5 129:3 139:12 decided ^[2] 102:17 139:13 decides ^[1] 105:9</p> | <p>deciding ^[2] 117:15 131:8 decimal ^[1] 50:17 decision ^[10] 19:12 39:7 65:6 79:10 102:10,13 109: 19 111:18 127:13 151:1 decisions ^[8] 19:21 76:18 81:20 101:15 102:7 109:6 149:9 152:24 declarations ^[3] 33:4 34:1, 2 decorum ^[2] 17:17,18 deem ^[1] 117:25 deep-learning ^[1] 90:7 defamation ^[1] 67:16 defend ^[6] 28:17,18 55:21 56:3 126:19 153:16 defendants ^[1] 28:24 defended ^[3] 56:5 127:1 151:11 defending ^[3] 56:13 115: 18 135:10 defends ^[1] 63:7 defense ^[1] 130:6 define ^[2] 9:8 93:8 defined ^[1] 38:21 defines ^[1] 63:11 definitely ^[1] 16:18 definition ^[7] 9:11,16 77: 21 99:21 123:18 156:14,16 definitions ^[1] 83:8 definitively ^[2] 109:3 154: 14 delay ^[1] 77:16 delete ^[4] 70:5 76:1,2 99: 24 delivery ^[3] 5:2 114:22 119: 18 Democrats ^[1] 157:8 Democrats.com ^[1] 15:14 denied ^[3] 130:18,20,21 denominator ^[3] 35:6,10 118:6 Department ^[1] 2:7 depend ^[1] 25:5 depends ^[3] 53:22 86:24 117:20 deplatform ^[4] 6:3 23:4 39: 8 88:14 deplatformed ^[4] 88:20 112:25 113:8,10 deplatforming ^[8] 32:7 39: 2 54:12 59:10,13 134:12 156:16 157:12 deplatforms ^[2] 88:10 156: 17 deprioritizing ^[1] 31:7 describe ^[2] 5:22 43:20 described ^[1] 53:7 design ^[2] 4:24 43:17 designation ^[1] 135:16 designed ^[2] 53:24 90:4 designers ^[1] 114:14 details ^[1] 109:15 determination ^[1] 58:5</p> | <p>determine ^[4] 60:9 61:1,22 62:3 determining ^[1] 60:13 detrimental ^[1] 121:14 developed ^[2] 33:9 129:13 development ^[4] 66:7 127: 12 140:4 148:14 devices ^[1] 90:19 devoted ^[1] 16:15 Dewey ^[1] 50:16 dictate ^[2] 111:13 117:2 difference ^[9] 94:2 116:12, 17,24 119:13,19 121:22 123:4 151:20 different ^[3] 4:17 15:15, 21 18:19 20:25 22:21,22 28:22,22,24,25 35:21 39: 15,20 49:2 51:18 53:11,15 55:7 69:10 94:12 96:20 102:1,15 123:23 136:11 141:25 142:4,12 147:4 149:5 differently ^[1] 94:11 difficult ^[6] 20:8 33:15 52: 25 120:11 128:20 149:7 direct ^[19] 20:19 74:4,5,6, 14,23 76:2 78:1 80:22 94: 17,22 97:2 98:4 126:15 128:8 130:20,24 137:13 154:20 directly ^[3] 20:22 22:24 144:6 disagree ^[3] 19:7 60:6 130: 23 disagrees ^[1] 119:7 disavow ^[1] 5:17 discernable ^[1] 118:16 disclose ^[1] 59:16 disclosure ^[4] 12:12 59:17 145:11,16 discovery ^[10] 33:14 77:15 104:6,11 105:8,12 155:22 156:2,5,6 discretion ^[2] 62:25 64:7 65:2 66:14 67:8 86:10 87: 8 90:20 91:3 93:11,14 94: 1,4 96:16,24 99:8 102:9 107:22 124:14 125:17 153: 10 discriminate ^[8] 74:25 75: 7 77:24 97:4,6,16 106:20 122:5 discriminates ^[1] 63:1 discriminating ^[2] 78:4 107:11 discrimination ^[6] 12:11 75:5 95:11 96:2 107:12 131:11 discriminatory ^[2] 96:2 122:22 discuss ^[1] 121:7 discussing ^[3] 56:21 139: 18 148:4 disfavor ^[1] 5:4</p> | <p>disfavored ^[1] 5:8 display ^[4] 63:13 76:6,8 101:1 dispose ^[1] 29:21 disposition ^[1] 141:10 dispute ^[1] 46:1 disseminate ^[2] 65:25 66: 3 dissemination ^[4] 15:3 23: 14 63:23 118:22 distinct ^[3] 53:17 150:5 157:13 distinction ^[7] 48:15 89:23 110:14 116:22 148:19 157: 25 158:6 distinctions ^[3] 72:11 73: 10 95:24 distinctive ^[1] 148:8 distinguish ^[3] 71:9 75:3 123:22 distinguishes ^[1] 143:21 district ^[6] 29:22 110:7 139:2 155:20 156:1,7 DMS ^[3] 79:17,24 108:16 doctrine ^[3] 6:8 88:5 137: 16 dog ^[1] 126:16 dogs ^[1] 106:25 doing ^[2] 4:22 25:5 26:24 27:6 47:16 49:21 53:1 61: 23 64:19 65:1 67:14 78:11 90:21 93:23,25 107:4 115: 20 117:9 119:20 127:3 134:23 dominance ^[1] 144:6 done ^[3] 24:11 26:15 83:10 down ^[8] 25:18 67:18,23 84:11 102:18 103:23 153: 17 155:21 draw ^[2] 46:12 72:10 drawn ^[1] 73:10 drill ^[1] 25:18 drive ^[1] 118:2 driven ^[1] 101:15 drivers ^[2] 78:6,14 Dropbox ^[1] 97:2 due ^[2] 68:5 84:6 duty-to-explain ^[2] 101:13, 14</p> <hr/> <p style="text-align: center;">E</p> <p>e-commerce ^[2] 127:6 148:5 each ^[8] 4:12 26:21 42:22 94:16 106:14 118:3 124:4 143:9 earlier ^[3] 21:2 145:6 150: 23 early ^[2] 40:24 66:12 easy ^[4] 6:10 62:2 111:22 153:12 edit ^[2] 64:14 99:25 editing ^[3] 49:24 86:22 89: 23</p> | <p>editor ^[2] 49:17,22 editorial ^[47] 37:14 38:14 45:8,10,15 46:1,4,8,14 47: 1 48:10,14 49:13 50:25 62: 25 64:6 65:2 66:14 67:8 75:21 76:18 79:10 86:10 87:7 90:5,19 91:3 93:10, 13 94:1,3 96:16,23 99:8 101:10 102:9 107:22 108: 2 110:16 113:23 120:21 125:17 130:9 136:17 144: 7 147:16 153:10 editorialize ^[2] 75:20 108: 4 editorialized ^[1] 124:14 editors ^[3] 4:18 114:13 143:15 effect ^[11] 58:9 67:19 80:17 92:3 105:21,21 106:12 137:20 139:24 142:21 153: 18 effective ^[2] 110:6 143:3 effects ^[2] 6:25 7:2 effort ^[1] 62:22 eggs ^[47] 7:2 81:10 104:17, 17 either ^[5] 39:7 70:16 77:11 143:11 151:22 ejusdem ^[1] 88:5 element ^[1] 43:8 elements ^[3] 21:9 117:12, 13 Eleventh ^[6] 59:17 77:8 81: 12 104:12,13 139:1 eliminate ^[1] 46:21 ELIZABETH ^[3] 2:6 3:9 114:4 elude ^[1] 116:21 email ^[6] 70:24 77:25 130: 18,18,25 148:6 emails ^[1] 76:1 embodied ^[1] 117:22 embody ^[1] 118:8 emergency ^[2] 139:9 147: 7 emphasize ^[3] 45:15 105: 15 144:14 emphasized ^[2] 44:9 45: 12 empires ^[1] 142:21 employees ^[1] 16:14 enable ^[2] 5:1 42:21 enabling ^[1] 42:21 enact ^[2] 52:15 125:10 encourage ^[2] 67:6,18 encouraging ^[3] 87:3 125: 16 147:9 end ^[5] 15:14 18:2 19:13 145:2 146:25 endorse ^[1] 119:8 enforce ^[3] 16:12 37:2,12 enforceable ^[1] 40:20 enforced ^[2] 80:10,12 enforcement ^[1] 112:10</p> |
|---|---|---|--|---|

Official

| | | | | |
|--|---|---|--|---|
| <p>enforcing [2] 16:15 113:5 engage [7] 34:8,10 42:7,9 104:15 111:9 131:18 engaged [12] 19:22 26:7 34:16 46:3 56:17 66:13 99: 9,12 119:15 139:5 152:13 153:11 engagements [1] 60:23 engages [1] 88:9 engaging [3] 24:25 34:13 41:25 engines [1] 55:6 enhance [2] 21:10 115:13 enough [11] 6:10 21:22 52: 11 55:17 56:25 57:8 68:13 71:1 95:17 105:15 107:4 ensure [1] 143:3 ensuring [4] 14:23 15:3 44: 11 145:12 entails [1] 107:15 entered [1] 39:22 enterprise [3] 13:13 23:17 156:19 enterprises [6] 23:1,4 45: 1 64:15 100:12,22 entire [2] 95:19 154:7 entirely [4] 53:21 136:11, 20 155:18 entities [5] 26:10 43:10 68: 1 114:9 146:13 entitled [3] 129:20 136:3 150:12 entity [4] 26:24,24 60:22 102:7 entity's [1] 102:10 environment [3] 30:25 39: 22 110:22 envision [1] 84:3 equal [2] 76:15 103:14 equalizing [1] 45:6 errs [2] 74:21 118:22 escape [2] 80:25 81:3 ESQ [4] 3:3,6,9,13 ESQUIRE [1] 2:4 essence [1] 42:6 essentially [7] 47:1 65:5 67:7 90:3 100:11 103:17 105:13 establish [3] 84:1 144:3 145:4 ET [3] 1:4,8 147:11 ether [1] 90:3 Etsy [21] 9:23,23 10:13,13 11:13,15,17,19,24 13:10 33:4 55:9,10,24 56:4,21 57:5 78:16,18,20 79:18 Etsy's [1] 13:14 euphemism [4] 93:17,24, 25 122:25 euphemisms [1] 116:20 evaluate [1] 60:12 even [36] 4:22 10:5 13:14 15:25 16:12 19:10 34:7 37: 12 38:4 49:20,23 52:6 58:</p> | <p>22 61:21 75:1,8 98:12 100: 14 101:3 102:9 104:12 105:2 113:19 119:7 121: 17 134:5,13,16 138:15 144: 4,24 154:20,21 155:23 156: 6 157:4 event [1] 50:24 events [1] 70:21 everybody [3] 99:14 120:6 133:24 everyone [1] 10:16 everything [4] 8:10 26:13 52:16 85:9 evidence [1] 103:1 exact [2] 47:23 66:11 exactly [18] 8:16 20:18 25: 5 28:13 53:1 54:18 57:22 73:6 77:10 82:23 88:7 91: 5 103:21 106:7 115:19 147:3 154:15,24 example [13] 23:20 39:11 44:25 50:6 56:2 58:3 60: 12 65:17 88:8 114:22 117: 2 131:19 132:7 examples [1] 79:5 exception [2] 115:4 143: 19 exceptions [2] 36:18,19 excessively [1] 87:12 exchange [2] 44:3 115:9 excised [1] 89:12 exclude [12] 24:10 38:7 93: 3 98:7,9 101:15 102:8,10, 17 121:5,13 124:7 excluded [1] 96:22 excludes [2] 97:25 102:3 excluding [3] 37:14 79:8 119:24 exclusion [1] 134:18 exclusively [1] 34:7 excuse [3] 26:5 46:6 49:7 exercise [4] 49:14 67:7 86: 10 93:13 exercised [1] 96:16 exercising [9] 13:23 46:8, 14 48:1 64:6 65:1 87:7 102:20 124:6 exhausted [1] 89:7 existence [2] 40:12,12 expansive [1] 42:5 expelled [1] 131:22 explain [1] 86:2 explains [1] 143:6 explanation [1] 30:7 explicit [1] 16:17 explicitly [1] 46:10 express [5] 56:1 119:5 120: 2 143:13 147:25 expresses [2] 39:3 131:20 expression [13] 13:12 38: 21 53:9 55:19 56:11,17 85: 1 115:1 123:10 124:5 125: 3 146:2,17 expressive [63] 19:23 24:</p> | <p>25 32:2 34:16,25 38:18,20 47:7,9 50:22 53:4,21 56: 22 60:7 63:9,19 66:14 69: 19 71:11 74:23 76:24 77:7, 13 79:2,7 81:10 85:15 88: 8,11 97:12 100:7 103:7,11 104:1,17,19 112:15 114:11, 17 117:6,8,9,17 118:23 122:3 123:3 127:4,8 130: 10 131:6 133:2 134:3,11 135:23 136:9,13 138:5 139:5 144:8 146:10 147: 11 150:22 153:5 expressly [1] 81:6 extend [1] 126:15 extent [12] 6:7 11:17,19 40: 21 41:24 61:24 74:16 81: 18 125:7 126:17 133:7 154:6 extreme [1] 64:16 extremely [3] 18:6 36:22 37:1 eyeballs [1] 15:18 eyes [1] 50:2</p> <hr/> <p style="text-align: center;">F</p> <p>face [7] 58:17 60:15 61:8 62:12 126:2 138:11 153: 23 Facebook [28] 15:16 16:3 25:14,16 26:12 33:4 36:8 38:19 78:2 79:14 81:22 89: 14 90:17 91:19 94:14 98:1, 2 99:7 108:14,15 111:11, 12,13 126:8 137:3,4 138: 20 147:10 Facebook's [1] 25:12 Facebooks [1] 79:8 facial [38] 6:6,14,18 25:24 28:15,20 29:1,6 31:9 34: 23 41:8 54:17,25 55:16 57: 8,13 58:13,18 67:22 76:21 81:23 82:3 83:1,2 95:3,23 118:25 120:8 128:3 129:4, 4,25 138:6 140:8,11 151: 13 154:3,10 facially [4] 41:11 67:24 68: 19 137:18 facilitate [1] 5:19 facilitating [3] 5:5 115:9 119:21 facilities [1] 14:11 facility [1] 78:3 fact [30] 4:18 6:14 9:17 13: 11 17:17,18,21,22 19:1,11, 25 39:20 40:4 46:23 47:5, 13 58:8,15 62:7 68:23 103: 9 109:10 110:18 118:25 122:17 140:14 155:17,21 156:3,8 factor [1] 51:23 facts [4] 28:2,9 36:12 57: 19 factual [4] 28:23 127:11</p> | <p>140:4 148:14 factually [1] 125:14 fail [2] 5:9 57:1 failed [2] 5:10 122:10 FAIR [16] 5:11 19:14 20:9 26:4,9 27:19,21 32:8 46:7 48:16,18 51:22 74:18 103: 4,5,10 fairly [3] 33:1 43:12 85:5 fairness [4] 21:23 44:13 60:3 143:3 fairs [1] 48:18 faith [1] 42:11 falls [1] 12:11 familiar [1] 14:9 far [3] 31:19 53:5 55:1 farther [1] 55:18 fast [3] 155:20,25 156:1 fault [5] 85:11 129:6 155: 19 156:9,10 favor [1] 58:13 favors [1] 25:23 feature [2] 25:13 29:1 featuring [1] 117:12 February [1] 1:13 federal [2] 20:1,2 FedEx [2] 43:3 119:18 feed [17] 25:13 36:8 53:23 55:10 89:2 94:13 98:2 99: 7 100:9,9 131:7 137:4,5 138:20 147:10 148:22 149: 3 feeds [5] 39:14 96:23 100: 16 108:14,14 feel [2] 57:17 124:15 felt [1] 19:16 few [4] 16:1 21:18 130:15 142:17 field [1] 62:23 fight [3] 45:9 62:23 126:17 figure [5] 25:19 128:13,16 151:9 154:23 filtering [1] 124:7 filters [1] 18:1 filthy [1] 87:12 final [4] 80:7 104:24 105:19 154:15 finally [2] 91:4 133:15 find [8] 32:17,20 33:19 35: 21 118:10 137:16 146:18 153:14 fine [7] 55:22 57:5,6 82:7 84:14 87:18,25 finger [1] 135:14 finish [1] 40:18 finished [1] 83:13 first [109] 4:4,20,24 5:2,7, 25 7:18 11:14 14:1,1,22 15:2,6,10 20:16 21:7,11 22:3,8 31:1 37:9,18,24 38: 1,9,10 43:17,20,21,23 44:1, 4 45:17 46:25 50:25 51:19 52:21,22 62:24 63:5,5 64: 10 65:4,10,18 68:3,8 70:5</p> | <p>71:23 72:6,24 73:24,25 74: 2,7 76:13 80:16 81:13 82: 12 84:5,8,9,16 85:21,23 86: 12 98:10,13 102:5,20 108: 7 112:15 114:9,18,20,24 115:4,12 116:2,14 117:1,4 124:3,20,23 131:12,16 135: 19,22 136:4,8 137:15 140: 15,19,25 141:4,5 143:7,14, 20 144:22 149:23 150:6,12, 21 151:14 155:16 157:5,7 first-order [1] 132:3 fit [2] 6:8 102:24 fits [4] 24:22 47:17 86:22 150:22 flags [1] 73:9 flea [1] 55:13 fleshed [1] 129:8 floats [1] 86:15 FLORIDA [44] 1:4 2:3 14:9 32:21 52:15 55:23 58:9 63: 7 69:25 70:2 77:20 79:5 81:6 92:6 100:17 103:17 104:14 105:9 106:25 109: 7 113:18 126:3,19 127:1, 25 128:19 129:13 135:15 136:12 137:3,7 138:9 139: 1,2,16 141:7,8 146:4,6 151: 11 152:12 153:16 154:16, 22 Florida's [9] 19:9 55:1,17 59:22 62:22 64:9 126:9 130:6 156:9 Floridian [2] 80:11,12 focus [2] 70:12 151:16 focused [5] 79:2 96:22 126:5 153:3,9 follow [3] 42:13 141:15,17 footnote [2] 35:23 77:9 force [2] 126:12 139:22 forced [2] 63:23 67:20 foreign [1] 21:11 forget [2] 82:9 116:19 forth [3] 122:2 131:4 153:8 fortunate [1] 66:5 forum [5] 38:6 48:2 93:3 115:25 116:5 forums [2] 4:15 120:19 forward [1] 110:2 found [2] 39:12 143:8 frankly [1] 148:11 free [10] 4:15 10:16 12:25 15:3 23:13 41:19 44:2 63: 4 66:25 115:9 freely [2] 119:6 120:3 friend [6] 68:9 104:10 146: 4 156:13 157:3,14 friend's [4] 76:23 85:8 103: 9 157:2 friends [5] 19:4 32:4 35:19 79:5 103:5 front [5] 15:14 18:2 31:13 52:18 69:3 front-end [2] 47:13,17</p> |
|--|---|---|--|---|

Official

| | | | | |
|--|---|--|--|--|
| <p>front-line [1] 22:4 full [1] 136:4 fully [2] 33:9 64:2 function [12] 42:20 51:5,5 90:5 124:7 130:9,18 135:4 144:7 153:5 158:1,1 functionalities [2] 94:12 129:1 functionality [1] 152:10 functions [8] 33:20,24 51: 4 53:23 94:25 129:17 134: 3 156:25 fundamental [2] 94:1 157: 23 fundamentally [4] 45:16 106:13 113:23 155:7 funding [2] 20:14,20 further [8] 30:5 94:5 103:1 127:11,20 128:6 140:4 148:14 future [2] 110:4 129:10</p> <hr/> <p style="text-align: center;">G</p> <p>gain [2] 43:1,3 game [1] 19:13 gate [1] 146:19 gathering [1] 48:20 gave [1] 86:10 GEN [3] 2:6 3:9 114:4 GENERAL [70] 1:3 2:2,6 17:4,16,18 27:8 34:2 40: 14 46:1 64:5 114:3,7 115: 22 116:11,23 117:11,20 118:20 119:12 120:13 121: 1,22 122:9,12,20 123:1,6,8, 21 124:16,23 125:5,20,25 128:5,12,18 129:22 130:23 131:13,24 132:2,10,14,18 133:14 135:5 137:25 138: 23 140:12,17,20,23 141:2, 6 144:2 145:21,25 146:24 147:23 149:6 150:17 151: 6 152:6,21 153:20,21 154: 5,11 generality [5] 25:8 27:8,9 30:15,21 generalized [2] 8:14 145: 15 generally [6] 14:11 34:3 54:9,11 102:8 120:16 gets [3] 75:22 89:12 110:7 getting [5] 18:15 20:1 39: 15 96:9 107:3 give [14] 7:23 30:7 40:8,18 57:11,24 64:13 65:16 94: 22 100:10 103:14 113:16 121:13 131:19 given [6] 36:11 38:18 58:2 64:4 108:21 135:4 gives [2] 99:4 113:18 giving [1] 45:7 GLIB [2] 102:21 132:20 global [2] 73:7,8 glorifies [3] 89:19,21 92:</p> | <p>21 glorifying [1] 92:17 Gmail [18] 70:1,3,5,7,22 74: 9,12,23 79:24 94:15 97:1 108:16 137:8,9 138:12 148:5 154:21 156:24 Gmail-like [1] 137:13 Gonzalez [3] 5:22 50:13 149:15 good-faith [1] 41:24 goodness [1] 73:12 goods [7] 11:15,22,24 12:4 55:12,24 56:1 Google [3] 5:22 55:5 70:23 GORSUCH [51] 28:19 29: 10,14 30:1 40:16,17,23 41: 4,7 42:12 43:13 74:20 75: 2,10,14,18,25 76:10 82:18, 20,23 83:4,9,20 101:22 118:20 119:25 120:25 121: 3 122:6,11,16,24 123:5,7,9 124:9,21,25 125:6 140:7,8, 15,19,22,24,25 141:4,11 148:19 150:23 Gorsuch's [1] 104:21 gosh [1] 138:14 got [2] 73:3 140:15 gotten [2] 18:5 103:22 govern [1] 68:1 government [40] 20:1,2 21: 2,8 24:5 43:21,22 47:22,25 64:19,20,22,23,24,25 65: 10 66:1 74:21 102:2,3 110: 15 111:1,2 112:7,13 115:6, 19,21,25 116:3,17 122:4 133:2 143:5,11 144:15,17, 25 145:4,11 government's [5] 65:1 93: 22 116:8,25 151:15 government-mandated [1] 21:23 governmental [2] 143:12 145:22 governments [3] 115:7,11 145:8 governor [1] 96:10 governor's [1] 96:5 Grange [1] 58:15 grant [1] 125:15 granular [1] 152:7 great [2] 21:15 39:18 greater [2] 43:1,3 ground [1] 103:25 group [1] 102:17 guarantee [1] 119:5 guess [22] 11:20,20 25:6, 12 26:3 27:7 29:13 30:14 31:9 45:25 47:4 57:1 98: 24 112:9 118:5 132:2 134: 24 137:25 151:9,20 157:5, 6</p> <hr/> <p style="text-align: center;">H</p> <p>Halleck [2] 65:7 102:14</p> | <p>Hamas [1] 131:21 hammered [1] 107:3 hand [3] 45:19 86:13,13 handful [1] 69:14 handmade [2] 55:12 56:1 handmarked [1] 56:1 hands [2] 21:18 142:17 happen [7] 72:12 104:22, 24 105:18 106:4,5 129:10 happening [1] 28:12 happens [1] 101:16 happy [1] 17:7 harassing [1] 87:12 hard [8] 10:12 22:21 25:6 75:23 79:12 128:13,16 141:3 harder [2] 72:2 74:18 harm [1] 149:18 harmful [3] 107:5,7 118:1 hate [2] 16:7 36:25 haul [1] 108:6 he'll [1] 141:16 health [1] 36:24 hear [3] 4:3 26:11 151:6 heard [3] 63:8 76:23 106:6 hearing [1] 104:7 heart [2] 23:24 76:19 heckler's [1] 19:9 held [9] 12:18 14:15 38:12 48:3 61:4 74:10 114:12 124:1 125:2 help [1] 120:12 HENRY [5] 2:2 3:3,13 4:7 155:14 highly [1] 23:16 Historically [1] 86:16 history [3] 76:7 84:10 98: 14 hit [1] 56:11 hold [4] 77:6 80:18 81:15 135:6 holding [3] 74:12 109:3 120:18 holds [3] 121:16,17 128:21 holes [1] 138:6 home [1] 49:6 honestly [2] 106:12 109:1 Honor [46] 6:16,23 7:11 9:2 11:12 12:17 13:10 14:7 15: 7 16:24 17:11 23:21 24:13, 22 25:23 26:19 29:19 32: 15,24 33:23 34:5 35:11 37: 17 38:25 39:24 41:10,21 42:19 43:25 44:17 47:4 49: 2,17 50:12 51:17 54:3 56: 20 58:7 59:6 62:13 68:21 70:10 86:5 90:2 92:11 110: 25 horrible [2] 39:19 113:12 host [15] 4:16,21 9:19 14: 24 17:21 36:17 39:4 46:13, 14,20 49:6 51:10 52:1 94: 13,14 hosting [12] 7:19 12:20 13:</p> | <p>11 19:12 22:25 34:14 48: 18,23 51:5 53:19 55:15 157:25 hosts [1] 48:17 houses [1] 24:6 however [3] 54:8,11 143:8 huge [1] 139:24 human [3] 10:11 50:2 90:8 humanized [2] 50:1,1 humans [2] 90:4,23 hundred [2] 73:8 108:1 Hurley [16] 16:25 17:1,8 45: 14 46:22 47:4,12,17 63:21 65:22 86:14 91:14 93:1 102:14 118:13 132:20 hypo [1] 37:18 hypothesis [1] 53:22 hypothetical [2] 16:18 115: 23</p> <hr/> <p style="text-align: center;">I</p> <p>idea [8] 30:12 45:9 107:16 129:23 130:7 139:22 142: 10 143:20 ideas [6] 15:3 23:14 44:3 48:21 115:10 119:5 identical [1] 70:25 identify [2] 118:15 151:25 ideological [1] 19:20 ideologically [1] 19:12 ignore [1] 113:24 ignores [1] 157:25 illegality [1] 92:16 illegitimate [3] 112:5,6,11 illicit [1] 42:10 illuminate [1] 57:20 images [1] 114:11 imagine [6] 15:8 53:2,11 58:21 59:1 73:15 immune [1] 115:6 immunity [2] 125:15 150:4 immunized [1] 149:20 immunizing [1] 124:18 impact [1] 72:23 implementation [1] 143: 10 implicate [1] 116:2 implicated [2] 22:24 121:2 implicates [2] 34:24 85:22 implications [1] 150:13 important [13] 14:21,22 16: 2 21:6 26:20 51:2,3 92:24 103:20 115:8 123:22 135: 14 141:20 imposed [1] 23:8 imposing [2] 12:14 14:9 impossible [2] 72:5 107:6 incident [2] 12:21 13:12 include [4] 79:6 102:7 120: 24 121:4 included [2] 10:6 85:5 includes [2] 99:23 100:4 including [2] 95:22 122:18 incompatibility [1] 124:17</p> | <p>inconsistent [3] 6:2 92:8 107:10 incorrect [1] 120:18 incredibly [1] 92:22 indeed [11] 5:16 7:12 14: 17 15:10,13 23:15 43:6,10 46:16 55:17 64:4 indeterminacy [1] 57:18 indeterminate [1] 8:25 indicate [1] 118:21 indicated [1] 120:16 indicating [1] 68:9 individual [5] 18:25 89:25 102:6 123:24 124:4 individualized [1] 89:13 individuals [2] 141:24 143: 22 industries [1] 121:24 infinite [2] 8:12 10:5 influence [1] 144:13 influences [1] 96:3 inform [2] 21:18 142:17 information [8] 10:10 52:9, 11,24 54:18 111:21 145:14 152:20 infringement [1] 155:8 infused [1] 96:1 inherently [8] 19:23 24:25 32:2,2 114:17 117:17 131: 6 136:13 inhibit [2] 99:25 100:4 initial [1] 116:14 injunction [23] 33:12 77:1, 4,6,16 80:8 81:4 82:1,7 83: 12 104:7 107:19 109:9,13, 21 110:1 128:1 129:21 133:21 134:25 135:1 139: 21 154:13 innkeeper [1] 14:15 innocuous [1] 84:13 inquiry [1] 145:3 inside [2] 12:22,24 insisted [1] 155:19 insisting [1] 63:8 insofar [2] 13:10 34:14 Instagram [1] 48:13 instance [1] 37:20 Instead [6] 19:21 81:23 96: 20 104:1 119:23 124:4 instinct [1] 148:1 insufficient [1] 129:3 insurrectionists [1] 18:13 interact [1] 100:5 interest [31] 14:22 15:1,2 22:10,10 23:6,7,13,15,16 31:25 32:1 44:1,4,17 45:5, 7 56:22 73:5,5 100:14 115: 8,10 118:9 139:19 145:22, 23 146:5,5,15,20 interested [2] 31:4 78:11 interesting [2] 85:10 118: 10 interests [12] 13:14 22:6,8, 13,13,19,22 23:19 31:21</p> |
|--|---|--|--|--|

Official

| | | | | |
|---|---|--|--|---|
| <p>44:23,25 46:25 interfere ^[1] 120:1 interference ^[1] 54:13 interferes ^[1] 62:25 interfering ^[1] 142:6 interim ^[3] 105:14,18 106:23 intermediate ^[7] 37:21 77:3 81:8 85:10,14 104:15 146:18 Internet ^[12] 4:11 8:4,11 10:8 15:12 45:3 64:3,5 66:7 110:19 111:19 131:3 interpret ^[1] 59:2 interpretation ^[3] 31:14,15 150:2 interpretations ^[1] 58:21 interpreting ^[1] 58:6 interpretive ^[1] 59:5 interrupt ^[2] 52:5 124:10 intersection ^[1] 27:4 intervention ^[4] 21:3 44:8,10 90:9 interview ^[1] 40:5 intolerable ^[1] 16:22 invalid ^[2] 130:12 138:11 invalidated ^[1] 145:17 invalidity ^[1] 138:7 invoked ^[1] 46:9 involved ^[4] 22:15 27:20 45:20 103:25 involves ^[1] 76:18 involving ^[1] 74:11 irony ^[1] 106:17 irrelevant ^[2] 46:25 135:19 irrespective ^[1] 99:14 ISIS ^[1] 49:21 isn't ^[15] 18:15 35:9 37:8 38:9 48:24 89:11 113:5 124:12,21 125:3 126:10 129:6,7 152:17 154:9 isolate ^[1] 26:20 Israel's ^[1] 131:21 issue ^[19] 23:18 29:23,25 71:16,20 84:23 85:15 120:21 128:11,13,17,20 134:6 135:4 139:12 143:17 149:7,23 155:2 issued ^[1] 128:1 issues ^[12] 20:6 36:24 101:7 127:11 129:24 139:1 140:2 141:8 148:8,9 149:16 151:2 issuing ^[1] 154:15 it'll ^[1] 139:8 Italian ^[1] 100:16 itself ^[7] 45:11 54:1 90:8 115:25 116:5 137:5 149:10</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>JACKSON ^[43] 25:4 26:2,23 27:1,4,17 28:3,5,8,11 51:3 57:16,17 58:19 59:19,</p> | <p>21 60:4,21 61:20 62:1,14 65:14 67:21 68:7,14 69:7,23 83:21 110:11,12 112:1,4,22 113:4,25 151:5,6 152:8,16 153:19,22 154:6 155:10 jail ^[1] 93:19 jib ^[1] 156:20 job ^[5] 27:19 48:18 74:17 78:20,20 Journal ^[1] 41:19 journalistic ^[9] 22:25 23:4,17 45:1 64:15 100:12,22 146:13 156:19 judge ^[1] 70:15 judgment ^[12] 37:14 38:10 52:14 53:25 80:7 81:6 104:24 105:19 106:15 118:8 125:8 127:5 judgments ^[11] 16:17,19 39:20 88:2 110:16 112:17,18 117:21 127:14 144:9 146:11 jurisprudence ^[2] 8:2 21:7 Justice ^[347] 2:7 4:3,9 6:5 7:5,25 8:22 9:22 12:3,6,10,22 13:16,18 15:4,20 17:3,7 18:4,9,12,18 19:24 20:8,24 21:13 22:2,14 24:4,9,14 25:4 26:2,23 27:1,4,17 28:3,5,8,11,19 29:8,10,14 30:1,3,5,6 31:3 32:10,11,11,12,19 33:16 34:6,22 35:5 36:1,2,2,4,5,14 37:23 38:4,16 39:10 40:14,15,15,17,23 41:4,7 42:12,13 43:13,14,14,16 44:7,19 45:8 46:19,21 48:5,7,7,9 49:9,25 50:4,18 51:3 52:4,5 53:20 54:23 55:8 56:8,15,21,25 57:4,14,15,15,17,19 58:19 59:19,21 60:4,21 61:20 62:1,14,15,20 64:18 65:13,14,16,20 66:5,9,17 67:21 68:7,14 69:5,7,21,23,25 70:4,14 71:3,5,7,15 72:4,16 73:17,21 74:4,20 75:2,10,14,18,25 76:10 77:17,18,19,23 78:9 79:11,17 80:5,24,25 81:17 82:5,11,14,18,20,23 83:4,9,20,21 84:20 85:16,24,25 86:1,21 87:9,16,21 88:4,19,23 89:3,5,22 90:6,13 91:2,4,8,12,21,24 92:4 93:4,4,5,16 94:3,6,6,8,14 95:8 96:17,17,18 97:14,23 98:4,15,24 99:3,18 101:20,21,21,23,24 102:23 103:19 104:18,21 105:17,24 106:2 107:13 108:9,10,10,12,23 110:9,10,10,12 112:1,4,22 113:4,25 114:1,7 115:17,24 116:10,16,24 117:10,19,</p> | <p>118:20 119:25 120:25 121:3 122:6,11,16,24 123:5,7,9,13 124:9,21,25 125:6,20 126:20 127:15,16,16,18,19,21,22,22,23,25 128:10,15 129:2 130:14 131:10,17,25 132:8,12,16 133:5,12,12,14,18 135:12 136:22,22,23 138:13 140:5,6,6,8,15,19,22,24,25 141:4,11,12,12,14,15,19 142:13 145:9,19,24 146:21,22,22,24 147:1,3,5 148:16,18 150:8,23 151:3,4,4,6 152:8,16 153:19,22 154:6 155:10,11 158:8 Justice's ^[1] 21:2 justification ^[1] 133:23</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>KAGAN ^[39] 15:20 17:3,7 18:4,9,12,18 36:4,5,14 37:23 38:4,16 39:10 40:14 46:21 50:4 71:3,7,15 72:4,16 96:17,18 97:14,23 98:4,15,24 99:3,19 101:20 136:22,23 138:13 140:5 147:1,3,5 Kagan's ^[2] 42:13 95:9 KAVANAUGH ^[31] 20:24 22:3,14 24:4,9,14 43:15,16 44:7,19 45:8 46:19 48:5 80:24 101:23,24 102:23 103:19 104:18 105:17,24 106:2 107:13 108:9 116:25 141:13,14,19 145:19,24 146:21 keep ^[12] 14:21 67:8 78:22 87:24 91:5 92:19,23 107:4,7 134:25 137:18 158:3 keeping ^[1] 67:2 keeps ^[1] 109:19 key ^[4] 43:20 121:22 145:19,24 kick ^[1] 157:8 kids ^[4] 87:1,1,3,4 kind ^[52] 10:18 11:3 14:8 15:15 16:18,19 18:23 21:23 28:17,17 33:10 49:13,16,22 50:5 52:14 53:11,25 55:21 62:10 67:15 69:20 71:18 90:11 92:16 96:19,22 104:9,9 115:2 117:2,24 118:1 119:14,19 120:21,23 122:3 124:2,6 125:16 132:4 135:18 136:2,16 137:5 144:13 145:15 148:6 149:8 152:14 154:15 kinds ^[14] 16:21 24:10 36:22 37:15 38:7,8,21 56:10 98:5 119:3 121:23 138:3 144:9 151:7</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>label ^[1] 111:3</p> | <p>lack ^[2] 57:25 128:14 lacks ^[2] 9:4 144:15 lament ^[1] 109:10 land ^[3] 150:9,10,15 language ^[1] 59:25 large ^[3] 9:13,14 14:23 larger ^[1] 124:14 largest ^[2] 34:19,20 lascivious ^[2] 87:11 121:8 laser ^[1] 96:14 last ^[6] 5:20 54:24 87:14,19 149:15 156:21 later ^[2] 143:24 150:16 Latin ^[1] 87:23 latitude ^[1] 121:10 Laughter ^[6] 20:10 36:13 66:8 87:15 133:11 141:18 law ^[120] 8:2,7,13,19,24 9:4,7,15,18 10:22 11:2,10,13,15 13:7 14:10 15:9 16:5 19:9,16,22 22:7,10,21 23:2,20,25 26:5,9,22,23 27:5,10 29:5 31:15,16 32:8 34:6,18,24 40:4,19,20 41:2,11,19,25 44:18,23 46:6 48:18 52:15 55:1,17 56:4,11,13 57:11 58:8,17 59:16,23 63:7,19 64:9 66:23 67:4 68:1 69:10 70:1,2,15 77:20 80:9,16 81:13 94:19 95:5,10,15,16,18,19 96:21,21,25 103:14 126:4,10,18 127:1 129:18 130:6 131:20 132:5,7 133:24 135:3,10 137:20 138:1 139:16 140:3 141:8 151:12,23,23 152:12 153:3,14,16,23 154:7,16,22,24 155:4,24 156:18,21 law's ^[1] 9:10 lawful ^[2] 128:8 154:8 laws ^[8] 18:15 22:19 67:19 92:3 107:6 115:12 120:22 144:19 lays ^[1] 41:20 leafleting ^[4] 30:24 38:14,17 40:6 leaned ^[1] 49:3 leaps ^[1] 96:24 least ^[13] 6:13 26:1 31:12,14 41:11 69:2 76:13 106:23,25 118:7 121:21 145:13 147:9 leave ^[2] 123:12 136:25 lectern ^[1] 56:6 led ^[1] 21:20 left ^[3] 43:19 104:21,22 legal ^[1] 28:22 legislation ^[1] 79:4 legislature ^[2] 9:4,8 legitimate ^[28] 6:21 7:13,24 8:17 9:5 22:20 23:8,13 27:11 35:13 44:4 57:11 68:11,23 70:19 85:23 94:21 95:4 99:5 108:17,25 109:4</p> | <p>129:19 137:17 144:12 147:14,19 151:23 length ^[1] 21:15 lenient ^[2] 47:10 118:14 lens ^[1] 95:25 less ^[5] 5:9 52:2 79:1 93:14 99:16 letting ^[1] 94:16 level ^[14] 10:25 25:8 27:8,9 30:15,21 59:1 60:10 62:22 115:7 134:7,8 135:3 152:8 lewd ^[2] 87:11 121:7 liability ^[7] 67:1,4,16 86:7,7,11,12 liable ^[5] 124:1 125:2 148:22 149:1,2 license ^[1] 113:19 likelihood ^[1] 83:17 likely ^[2] 128:3 131:2 limit ^[7] 10:15 11:24,24 76:7 104:11 111:8,12 limited ^[4] 10:10 52:11 81:21 95:20 limiting ^[1] 96:13 line ^[5] 42:13 45:13,18,23 46:12 lines ^[1] 139:17 LinkedIn ^[2] 27:18 28:2 list ^[5] 32:20 33:19,24 97:8 129:14 listeners ^[1] 42:22 listings ^[1] 12:12 literally ^[4] 119:15,21 125:14 136:14 litigate ^[2] 80:19 156:4 litigated ^[14] 33:11 85:8 110:7 125:22 126:2,22 128:19 129:12 130:1 135:7 138:10,16 139:13 154:1 litigating ^[2] 33:10 155:20 litigation ^[11] 70:12 81:6,19 104:25 105:2,7 109:6 110:2,5 127:14 152:23 little ^[14] 5:23 9:25 10:12 47:9 60:11 61:12 68:12 72:5 79:21 90:8 95:25 130:25 142:24 151:15 LLC ^[1] 1:7 local ^[1] 113:21 locution ^[1] 65:20 logic ^[1] 74:13 long ^[3] 42:10 106:21 123:16 longer ^[2] 67:3 89:2 look ^[37] 10:13 19:19 24:23 25:25 32:20 33:19 38:25 49:12,17 53:8,14 55:7,21 60:24 62:9 64:9 67:14 73:11 76:5 77:3 78:23 79:18 80:3 84:15 90:12 93:9 95:23 100:15 104:8 117:16 118:5 121:11 133:1 138:20 149:14 153:13 154:17 looked ^[6] 19:21,25 26:8</p> |
|---|---|--|--|---|

Official

| | | | | |
|--|---|---|--|---|
| <p>66:23 70:13 74:9 looking ^[10] 11:1 29:15 32:4 61:23 65:8 118:11,19 120:14 127:12 154:12 looks ^[5] 55:4,4,12 126:22 136:16 lose ^[4] 22:16 84:4 123:20 152:20 loses ^[1] 63:4 losing ^[1] 99:19 lost ^[2] 122:11 142:22 lot ^[30] 12:11 15:23,25 16:24,24 39:17,18 42:9 51:20 55:12,18 57:18 71:21 74:18 79:20 88:5 93:5 111:14 118:12,15 119:10 121:9,20 122:18 125:21 128:14 130:4 138:19 139:22 154:23 lots ^[6] 25:13 38:6 90:23,23 102:1 109:18 lower ^[10] 41:1 70:12 76:25 109:15 126:10 130:7 145:17 148:15 151:1 152:25 lowest ^[1] 118:6</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>Maddow's ^[1] 70:6 made ^[12] 35:24 39:21 46:20 47:23 51:7 53:13 81:6 103:5 109:7 128:5 142:2,3 magazine ^[1] 136:2 magazines ^[1] 10:2 mail ^[1] 80:23 main ^[1] 131:7 mall ^[5] 12:20 30:23 38:17 40:7 46:15 mandate ^[2] 112:14 136:6 Manhattan ^[1] 65:6 manipulation ^[1] 21:21 manipulative ^[1] 142:19 manner ^[4] 6:2 53:6 59:11 145:1 many ^[10] 15:18 28:23 69:10 71:23 113:10 119:1 120:15 134:3 135:15 153:24 map ^[2] 27:20,24 march ^[1] 132:21 market ^[7] 13:20 43:7,8,12 55:14 63:25 144:5 marketing ^[1] 4:14 marketplace ^[8] 9:23 10:16,17 11:9,25 12:8 55:13 108:16 massive ^[2] 14:24 90:20 Matal ^[1] 47:24 material ^[19] 49:18,23 64:5 67:19 86:25 87:10 88:16, 18 89:13,17,19,21 90:25 100:3 107:4,7,9 118:9 157:16 materials ^[2] 78:23 86:17 matter ^[10] 1:15 16:9 26:6 113:10,11,12 116:15 124:</p> | <p>18 132:19,25 matters ^[1] 133:6 mean ^[80] 7:11 15:11 16:3, 11,25 17:7 18:14 19:11 20:12 22:15 25:5,10 26:5 31:25 34:11 37:25 38:3,11 44:20 48:17,22 49:19 50:1 51:9 52:5,14 54:9 56:8,9 58:21,23 59:21 60:21 61:3,13, 24 64:24 66:18 68:14 70:10 71:3 73:12 74:2 79:19 83:12,22 84:6 86:19,24 87:17,25 88:23 89:9 91:13 92:5 96:4,7,18 98:10,12 103:1 106:4,11 107:23,24 109:24 110:14,25 112:17 114:19 116:23 129:8,11 133:5 138:21 151:11,14,14,17 152:4 meaningful ^[2] 54:13 156:2 meaningfully ^[3] 8:18 51:12 54:5 means ^[14] 6:19 18:19 20:9 31:16 51:25 58:1,4 66:25 104:22 113:9 126:3 142:23 150:3 157:6 meantime ^[1] 139:21 measure ^[1] 23:22 mechanism ^[1] 143:11 mechanisms ^[1] 5:23 media ^[38] 8:3,5 9:8 13:21, 24 15:5 16:4 21:4 24:17 25:2 36:7 42:20 46:3 48:12,22 51:24 55:3,19 59:9, 15 71:18 72:9 79:15 99:24 100:6 114:15 115:6 126:6 127:2 130:9 133:25 139:4 142:1,21,25 144:13 153:1 155:5 meet ^[1] 69:15 members ^[5] 7:2 33:2 34:3 47:14 129:15 mentioned ^[5] 22:9 26:4 33:25 142:15 145:10 mere ^[4] 19:11 40:12 46:23 66:22 merely ^[1] 66:10 merits ^[4] 83:17,18,19 105:2 mess ^[1] 74:4 message ^[23] 13:2 15:13 30:16,17 32:6,8 39:3 40:1, 8,12 61:10 62:11 66:3 88:17 89:5,10 91:13 92:25 93:1,2 118:3,16 157:12 messages ^[11] 38:6,7,8 74:5,7,23 76:2 78:1,2 116:1 122:13 messaging ^[12] 74:14 94:17,22 97:2 98:5 126:16 128:8 130:21,24 137:13 154:21 156:25 met ^[4] 7:9 107:25 129:5</p> | <p>152:4 metaphorical ^[1] 39:16 methods ^[3] 50:15,15 52:13 middle ^[1] 13:1 might ^[32] 11:13 25:15,15 50:7,12 62:2 64:21 70:9 74:18 82:10 85:10 93:23 94:20,21,25 102:14 106:22, 24 109:12,16 116:4 118:1, 9 121:14,15 126:15 139:16 140:20 147:18 149:8,20 150:15 military ^[5] 19:17 20:4 32:9 46:9 103:14 million ^[2] 73:7,8 millions ^[3] 4:12 10:7 71:23 mind ^[6] 14:21 94:5 95:11 126:7,24 158:3 mine ^[3] 17:11 141:17 150:10 mines ^[2] 150:10,16 minimum ^[2] 34:20 121:18 Minneapolis ^[4] 64:12 71:12,13 73:1 minute ^[1] 110:13 misattribution ^[1] 63:25 misinformation ^[5] 16:8 18:20 36:21,23,23 misrepresenting ^[1] 113:13 mistake ^[1] 111:4 model ^[2] 14:18 142:4 models ^[1] 106:14 moderating ^[1] 146:9 moderation ^[24] 11:16 17:17 20 19:2 24:1,18 30:13 31:6 41:16,24 42:1,8,9 56:23 93:8,10,21,23,25 116:20 117:22 118:8 131:23 132:13 146:7 modern ^[2] 14:3 142:21 modify ^[1] 109:12 moment ^[1] 135:12 Monday ^[1] 1:13 money ^[3] 20:1,3 152:2 monopolized ^[1] 13:16 monopoly ^[1] 142:23 month ^[2] 76:6 98:14 MOODY ^[2] 1:3 4:5 morning ^[3] 4:4 39:17 63:8 mosaic ^[1] 124:14 most ^[10] 22:24 31:25 36:15 37:5 66:6 68:17 72:23 103:3 108:7 119:3 motivated ^[1] 18:14 motivation ^[1] 79:4 move ^[1] 29:9 movie ^[1] 24:6 MSNBC ^[1] 45:2 much ^[26] 7:16 10:10 17:22 20:5,9 29:5 39:4,21 46:21 50:16 61:16 74:13 79:7 87:</p> | <p>20 99:16 103:4 104:5 106:6 107:9 111:20 113:17 137:1 139:6,12 143:8 152:24 multiple ^[1] 58:21 must ^[2] 59:9,15 must-carry ^[1] 23:9 muster ^[1] 145:5 myself ^[1] 10:6</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>nail ^[1] 103:23 name ^[1] 63:3 namely ^[2] 39:1 130:7 narrow ^[4] 36:7 105:11 126:25 154:2 narrowed ^[1] 9:17 narrowly ^[2] 59:3 120:22 natural ^[1] 145:10 nature ^[1] 67:22 near ^[2] 38:22 129:10 necessarily ^[5] 58:1 62:2 87:10 116:8 129:9 necessary ^[4] 64:7 141:9 144:25 148:3 need ^[7] 25:25 35:5,6,13 46:12 56:7 125:10 needs ^[2] 57:12 158:2 nervous ^[1] 79:22 NETCHOICE ^[13] 1:7,7 4:5 118:21 129:15 151:12,12, 17,19 152:4 155:19,22,24 NetChoice's ^[3] 152:18 155:18 156:9 networking ^[4] 5:12 27:12 34:12,20 neutral ^[4] 4:15 50:15 53:8, 23 never ^[2] 84:7 94:5 new ^[6] 93:5 107:24,25 111:22 135:9 146:10 news ^[13] 25:13,13 36:8 94:13,13 96:22 98:2 100:9 108:14 131:7 137:3,5 147:10 newspaper ^[10] 4:19 10:3 24:24 39:16 40:11 48:25 51:18 53:14 114:13 132:22 newspapers ^[3] 21:16 49:13 142:10 newsstands ^[2] 24:7 86:16 next ^[1] 104:23 nice ^[2] 41:18 78:20 NIFLA ^[1] 95:22 nine ^[1] 105:13 nobody ^[1] 107:9 non-discrimination ^[3] 7:20 100:13 136:6 non-expressive ^[5] 34:8, 10,13 35:1 54:22 none ^[5] 46:10 69:2,3 115:5 124:7</p> | <p>Normally ^[1] 115:17 note ^[1] 47:11 nothing ^[6] 61:8 62:11 83:9,20 92:8 101:18 notice ^[4] 88:20,22 94:23 138:22 noticed ^[1] 153:25 notion ^[1] 60:3 notwithstanding ^[1] 130:1 nowhere ^[1] 111:25 number ^[7] 7:14,22 68:17 72:23 151:8,17,18 numerator ^[2] 35:6,10 numerator/denominator ^[1] 35:16</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objected ^[1] 40:3 objectionable ^[3] 41:17 87:13 117:25 objective ^[2] 39:1,5 objectively ^[1] 19:21 obligation ^[1] 23:9 obliged ^[2] 156:1,7 obscene ^[2] 87:11 121:8 observed ^[1] 116:25 observer ^[1] 39:5 obvious ^[5] 79:1,25 106:9 108:7 138:19 obviously ^[16] 41:20 64:25 66:18 69:18 70:11 73:15 74:3,15 76:17 79:3 85:3 98:20 102:4 103:2 110:2 115:8 occurring ^[2] 110:22 139:25 October ^[2] 92:18 112:20 odd ^[2] 6:8 8:1 offensive ^[4] 87:6,10 93:14 133:8 offer ^[2] 133:23 152:10 offered ^[1] 155:23 offering ^[3] 11:15 24:20 155:8 office ^[1] 113:7 official ^[2] 96:5 102:16 Okay ^[20] 42:12 53:20 54:23 55:15 68:7 77:24 78:9, 11 80:21 91:2 94:22,25 95:9 112:18 123:7,7 133:16 138:23 141:11 148:16 oligarchs ^[1] 96:12 once ^[1] 60:23 one ^[59] 8:10,13 14:9,20 22:22 23:2 28:14 29:3 34:4 39:12 41:14 42:3 43:5 45:19 48:15 49:10 51:23 52:22 54:24 57:24 65:17 68:12 69:18 72:2 73:20 75:4 76:20 78:2 79:12 85:2 86:19 87:14 92:7,18 93:7 96:8 101:6,6 106:18 107:2,16 110:25 112:23,24 118:3</p> |
|--|---|---|--|---|

Official

| | | | |
|---|--|--|---|
| 119:6 122:25 126:22 134:6 138:17 139:10 140:25 141:5 143:12 145:10,24 147:24 148:16 151:18 ones [3] 5:14 90:18 153:9 online [7] 10:2,2,3,3,4 39:15 48:19 only [25] 6:19 10:14,18 11:17 33:3 37:3 41:23 54:20 60:22 63:6 69:13,18,24 71:20,21 74:16 77:5 84:23 96:9 106:25 111:1,12 113:20 133:6 143:2 open [8] 7:15 10:16 14:16 36:16 37:5 95:24 115:25 121:19 opened [2] 14:11 39:23 opening [1] 43:16 openly [1] 120:3 opens [1] 12:3 operate [3] 43:12 86:8 109:16 operated [1] 74:17 operators [1] 23:9 opining [1] 150:20 opinion [9] 20:13 21:19 108:21 110:3 142:13,14,18 150:15 151:21 opinions [2] 99:15 119:6 opportunity [5] 58:10,16 83:14 141:16 156:2 opposed [6] 20:20 43:5 45:21 56:15 89:24 103:24 opposing [1] 93:19 opposite [2] 111:19 122:7 option [2] 138:17 147:15 options [1] 140:21 oral [7] 1:16 3:2,5,8 4:7 62:18 114:4 order [7] 21:9 25:19 52:17 68:18 93:14 117:3,17 organization [4] 51:15 52:13 53:16 102:20 organizational [1] 158:1 organize [4] 51:2 52:18 54:8,11 organized [1] 52:10 organizer [2] 46:24 86:14 organizing [8] 5:24 50:15,16,21 51:5,13 54:6,14 orientation [1] 97:7 orthogonal [1] 23:23 Orwellian [5] 133:8 141:21,22,25 145:13 other [53] 4:13 13:12 18:18 19:15 23:19 24:9 25:14,16 30:22 31:21 42:23 45:4,13,20,22 55:22 67:6 75:5 82:9 86:19,25 87:1,3 88:1,24 94:16 96:2 101:18 103:16 106:8 107:17 111:9,12 114:10 119:22 126:14,18,23 128:25,25 134:23 136:18 138:12 142:1 147:13,18,22 148:16 151:7,10,25 153:24 154:8 others [7] 8:6,19 13:4 21:10 65:3 86:17 94:15 otherwise [7] 38:13 41:17 87:13 105:11 121:15 139:7 146:14 ourselves [1] 154:23 out [54] 13:2 14:16 15:11 19:15 25:19 30:22 41:20 43:19 44:12 50:4 51:14 52:6,16 55:21 56:9 61:12 64:11 67:2,3,9 72:17 80:17,20 81:16 82:25 83:10,14 85:7 86:22 87:8 93:7 95:6,8,15,18 96:24 107:1 111:21,24 120:19 123:2 126:18 128:13,16 129:8 139:25 140:20 146:19 147:5,21 148:19 151:9 152:9 154:23 outline [1] 150:25 over [11] 45:12,12 47:1 48:1 52:3 62:25 63:19 70:23 73:9 89:11 142:1 overarching [1] 128:6 overbreadth [14] 6:7,23 7:3 32:13,17 35:18,20,22,24 70:17,20 81:25 82:3 129:5 override [1] 79:9 overrule [1] 137:17 overtake [1] 144:6 own [11] 4:22 79:6 81:19 106:15 115:2 116:8 117:8 131:14 149:18,19 152:23 owner [2] 38:17 45:22 | 15 119:1 parties [7] 6:25 67:7 116:13 117:14 127:14 130:1 135:6 parts [1] 22:21 party [14] 65:24,25 66:3,4 93:24 116:18 128:21 131:18 132:1,17 133:3 135:10 140:13 144:8 pass [2] 105:10 145:5 passed [3] 17:24 95:10 128:23 passengers [3] 136:1,3,9 passing [1] 66:22 passive [1] 5:23 past [3] 26:16 96:5 105:3 Patrick's [1] 47:6 PAUL [3] 2:4 3:6 62:18 pay [1] 94:23 peek [1] 153:14 penalties [1] 80:14 penalty [2] 105:16 139:23 people [32] 10:17,20 11:21 13:21 15:25 16:1 18:5,16,19,24 19:2,8 21:19 30:18 37:4 40:3,6 48:21 78:5,23 88:24 89:13 91:15 94:16 98:9 101:8 107:3 109:23 141:24 142:18 153:24,24 people's [2] 44:2 114:10 per [1] 139:23 perceive [1] 30:8 perceived [1] 62:23 percent [7] 17:19,23 18:5,6 108:1 113:21 152:17 percentage [2] 34:25 37:4 perfectly [2] 55:22 59:23 perform [3] 33:21,24 129:17 perhaps [5] 31:22 47:8 66:12 109:10 129:12 permissible [2] 76:17 144:18 permit [2] 134:20,20 permitted [2] 14:17 40:5 permitting [2] 10:25 13:4 pernicious [1] 84:16 person [3] 55:24 88:17 90:14 peruse [1] 136:3 petition [2] 79:6 99:21 Petitioners [7] 1:5 2:3 3:4,14 4:8 115:20 155:15 PG&E [3] 45:14 63:21 65:22 phone [1] 131:2 photos [2] 117:13 153:7 physical [2] 9:24 52:7 PI [2] 103:24 155:20 pick [4] 10:9 52:25 78:6 101:24 picks [1] 21:1 pictures [1] 136:15 piece [4] 39:6 52:1,25 54:7 | place [12] 21:18 34:4 55:14 78:22 81:4 89:24 100:23 104:23 109:20 113:16 134:25 145:11 placed [1] 142:16 places [1] 36:15 plain [1] 64:12 plainly [19] 6:21 7:13,23 9:5 27:10 35:13 57:11 65:4 68:11,23 70:19 73:24 85:23 94:21 95:4 99:4 108:17,25 109:4 plaintiffs [6] 9:3 28:24 32:12 128:2 129:6,12 plat [1] 5:16 platform [25] 6:11 8:3 9:9 13:1 15:12 45:3 49:21 54:1 59:9,12 62:11 89:12 99:9,24 100:6 117:21 118:3 119:7 124:5 135:17 148:21,25 149:2,9 157:9 platform's [2] 148:24 149:18 platform-driven [1] 15:13 platform-specific [2] 33:4 34:1 platforming [1] 134:12 platforms [73] 4:11,13 5:16,18,21,25 6:10 7:15,21 8:5 13:21,24 15:8 17:17,24 23:3,25 24:17 25:2 30:12 32:21 33:1,18,20,24 34:12,21 46:3 48:11,12 49:15,20 50:14 55:3,20 56:17 57:23 61:10,17 73:23 79:15 81:21 82:8,9 114:15,15 115:6,13 116:13 117:5,13,25 119:2,20 120:16,23 123:24,25 125:9,13 126:6 127:3 128:25 130:10,13 144:14 145:12 146:8,9 152:9,13 153:11 155:5 playing [1] 62:22 pleadings [2] 32:18 35:22 please [4] 4:10 12:6 62:21 114:8 POD [2] 87:2 149:4 point [39] 5:3 8:12 15:11 18:22 22:11 25:1 38:3 40:19 41:22 45:9 46:20,20 47:23 51:6 59:6 60:6,16 61:15,19 67:6 76:21 77:14 81:5 105:3,7,9 109:14 112:2,5 114:23,23 123:14 125:17 135:12 136:21 138:14,24 140:16 143:9 pointed [1] 52:6 pointing [6] 50:4 55:21 56:9 85:7 147:5 148:19 points [1] 51:19 poke [1] 138:6 policies [15] 6:2 19:3 24:1,2,18 30:13 56:24 61:17 101:5 113:23 118:8 120: | 21 122:23 145:13,15 policy [7] 18:23 24:5 38:14 53:25 56:23 101:10 108:2 political [10] 13:2 56:2 64:13 73:12,14 74:25 84:18 99:15 100:11 122:19 politicians [1] 100:17 politics [5] 11:6 12:7 75:19 76:3 100:15 poll [1] 113:20 pop [1] 100:13 popping [1] 100:17 portion [2] 34:24,25 poses [1] 136:7 posit [1] 79:13 position [9] 22:4 25:23 36:6 59:22 66:21 68:24 84:23 88:2 104:14 possess [1] 4:20 possibility [1] 109:12 possible [8] 15:19 53:13 54:21 67:25 120:19 126:23 147:24 153:15 Post [10] 36:16 37:5 88:15 100:2,2 113:21 116:1 124:4 148:20,24 post's [1] 148:20 Post-prioritization [2] 100:8,25 posted [2] 93:13 100:3 postings [1] 36:8 posts [5] 42:24 48:22 73:14 119:3 123:24 posture [9] 25:24 81:1,3 103:20 125:22 139:9 147:8 154:12 155:17 potentially [2] 93:12 105:20 power [15] 13:20,20,23 14:25 21:3,15,18 43:8,8 63:25 75:21 142:17,21 144:5,13 powerful [1] 14:23 powerfully [1] 110:6 powerless [1] 145:8 practical [3] 83:13 108:12 146:25 pre [2] 54:5,5 precedent [1] 20:25 precedents [2] 26:16 35:16 precinct [1] 113:21 precise [1] 25:22 precisely [6] 14:22 67:17 69:11 84:22 85:12 146:4 preclude [1] 54:5 preempted [2] 41:12 42:2 preemption [2] 29:20,21 preempts [1] 29:4 preference [2] 53:24 59:1 preferences [2] 50:22 64:13 preliminary [22] 33:12 77:1,4,6,16 80:8 81:4 82:1,7 83:12 104:7 107:19 109:9, |
|---|--|--|---|

P

p.m [1] 158:11
PAGE [2] 3:2 158:5
pages [1] 77:10
parade [20] 15:22 17:2 46:24 47:2,6,14,15 86:14,15,16 91:14,15 102:16,22 114:13 118:12,16,17,19 132:19
paradigm [1] 24:21
paradigmatic [2] 16:4 36:7
parse [1] 152:11
part [23] 9:9 24:19 25:6 33:6,14 36:15 37:5 63:11 69:1,3 70:22 98:11,25 106:17 107:18 109:6 123:17,20 124:13,13 125:3 133:24 150:24
participated [1] 47:2
participation [1] 93:20
particular [27] 11:3 13:5 16:9 26:8,21,21 27:6 36:21 37:15 38:21 39:6 42:15 47:7 54:18 60:17 61:9 63:13 64:6,11 65:20 95:5 132:24 133:6 138:2 139:19 152:22 157:20
particularly [3] 60:16 105:

Official

| | | | | |
|--|---|--|---|--|
| 13,21 110:1 128:1 129:21 133:20 135:1 139:20 154: 12 PRELOGAR [56] 2:6 3:9 114:3,4,7 115:22 116:11, 23 117:11,20 119:12 120: 13 121:1,22 122:9,12,20 123:1,6,8,21 124:16,23 125:5,25 128:5,12,18 129: 22 130:23 131:13,24 132:2, 10,14,18 135:5 137:25 138: 23 140:12,17,20,23 141:2, 6 144:2 145:21,25 147:23 149:6 150:17 152:6,21 153:21 154:5,11 premise [3] 124:22,25 143: 2 preparation [1] 154:19 present [9] 48:21,22 52:9 86:3 114:10,16 139:1 144: 10 148:7 presentation [4] 5:19 13: 19 126:9 140:13 presented [6] 29:13 85:4,6 126:1 135:10 152:18 Press [1] 44:6 pressed [1] 128:22 presses [1] 24:6 presumably [1] 89:4 pretend [1] 49:11 pretty [4] 112:25 120:11 137:1 138:18 prevail [1] 83:11 prevent [7] 4:25 43:18 46: 17 51:12,12 63:14 144:7 prevented [1] 46:17 preventing [3] 45:5 51:15 54:4 pride [2] 100:23 113:16 primarily [3] 34:7,10,13 principal [3] 42:20 51:19 76:23 principally [4] 7:1 41:13 63:8 153:6 principle [5] 46:1 63:5 140: 13 143:24 157:13 principles [7] 22:1 28:22 64:2 112:11 113:6 114:13 116:3 printing [1] 24:6 prioritize [1] 131:9 privacy [1] 144:20 private [27] 65:11,24 66:2 78:3 93:24 102:6,6,10,11, 20 110:14,21 116:13,18 117:5,14 131:18,19,25 132: 17 133:3 141:23,24 142:6 143:21,22 144:7 pro-Israel [1] 50:8 pro-Palestinian [1] 50:7 pro-terrorist [1] 91:19 probability [1] 82:2 Probably [3] 76:4,9 97:20 problem [10] 28:6,21 31:10 | 33:6 65:11 86:3 101:7 131: 16 136:7 146:3 problematic [4] 37:1 64: 10 83:8 154:9 problems [5] 52:23 64:10 81:14 86:5 147:13 procedural [3] 103:20 125: 21 155:17 procedures [1] 112:9 proceed [1] 14:19 proceedings [1] 40:25 producing [1] 115:1 product [20] 10:18 11:3,8 17:20 117:9 122:3 125:13 127:9 130:11 131:6 137:6, 10 138:5 139:5 144:8,10 146:10 150:1,6 155:7 products [2] 137:15,23 Professor [3] 41:18 51:6 158:4 programs [1] 90:4 prohibit [1] 119:3 prohibited [1] 92:15 prohibition [1] 54:12 prohibitions [1] 54:9 prohibits [2] 41:25 132:4 Project [1] 73:2 promise [1] 121:9 promising [3] 120:1,2,3 promote [2] 44:2 106:19 promoting [4] 15:2 23:13 63:4 115:10 proper [1] 150:1 properly [3] 128:20 129:24 148:9 proposition [1] 144:4 prosecuted [1] 93:19 protect [1] 67:17 protected [18] 15:6 20:16 25:20 31:20 37:19 45:16 65:12 73:23 74:2,7 88:2 97:18 102:8 114:18 124:3 136:16 139:25 145:2 protecting [1] 44:25 protection [17] 23:22 67:4 73:4,5 76:15 86:6,7,11,12, 20 114:21 123:12 124:20 136:4 144:21 150:7,12 protections [1] 123:20 protects [2] 65:18 114:9 provide [4] 18:20 70:25 114:25 143:4 provided [1] 73:22 providers [3] 43:11 74:24 131:4 provides [1] 129:14 providing [3] 122:3 137:5, 10 provision [28] 23:2,17,21, 24 26:21 58:3,6,22 59:8,16 61:9,13,13,14 62:12 73:13 77:25 84:12 88:22 92:7,16 95:19 101:2 105:16 125: 18 126:4 130:11 150:23 | provisions [18] 9:18,20 61: 22 62:4 64:13 80:11 94:25 95:17 96:1 101:14,14 138: 2 139:4 143:14 152:12 153:8,18 154:25 Pruneyard [10] 5:10 12:17 26:4 30:21,23 38:13 40:7 45:12,19 46:16 public [16] 11:8,10 14:3,16 21:19 36:24 42:25 102:3 110:14,17,19 116:5 121:21 132:6 142:18,22 publication [2] 23:5 100:1 publicly [1] 59:16 publish [2] 132:23 143:15 published [1] 143:16 publisher [2] 67:2,12 publishers [4] 86:9 123:15 125:14 143:15 publishing [3] 24:5 67:15 125:9 puppy [1] 106:25 pure [3] 66:24 119:13 131: 1 purpose [3] 47:7 48:19 125:16 purposes [1] 83:13 push [1] 110:13 put [18] 49:9,11 52:16,18 77:1 78:19 80:18 81:9,15 84:12 85:3 88:6 107:22 108:3 117:16 131:2 135: 13 146:1 putting [3] 104:16 123:2 136:14 | R race [6] 75:1,9,20 76:3 97:6 98:7 Rachel [1] 70:6 radical [1] 103:10 railroad [1] 135:24 railroads [1] 122:1 raise [1] 32:13 raising [1] 79:17 rather [2] 4:19 120:5 reach [5] 20:15 29:24 95: 20 109:2 141:9 reached [1] 29:23 reaction [1] 133:17 read [4] 20:13 59:7 60:1 156:14 readily [1] 39:5 readings [1] 8:7 real [1] 147:12 real-world [1] 39:11 reality [2] 63:10 111:23 really [40] 8:14 10:6 17:20 21:6 23:22,24 24:19,21,21 25:6,19 26:15 29:21 30:15 45:9 47:4 48:11 56:11 61: 13 66:2 71:17 77:5 78:13 79:1 99:18 101:9 104:15 110:25 111:3 126:16,25 127:5 130:8 135:14 137: 18,19 148:7 152:11 153:23 157:2 reason [14] 22:18 40:9 41: 10,14 51:17 58:18 66:2 86: 6 90:21,23 102:18 128:7 136:5 143:16 reasonable [1] 148:13 reasoned [1] 143:2 reasons [3] 28:15 33:14 110:24 REBUTTAL [3] 3:12 155: 13,14 recategorize [1] 133:8 received [1] 148:10 recently [1] 149:14 recesses [1] 153:13 recognition [1] 117:7 recognize [1] 65:12 recognized [6] 21:17 23:7 44:3 67:13 125:12 136:18 recognizing [2] 124:19 149:25 recollection [1] 95:22 recommended [1] 55:10 record [16] 32:19,25 33:3,8, 19,23 52:24 81:9 85:9 109: 5,10 127:13 129:2,13 155: 18 156:8 recruiters [4] 20:4 32:9 46: 6,9 recruiting [1] 48:19 red [1] 73:9 reduced [2] 50:8,8 reference [1] 60:18 | referring [2] 138:4 145:6 reflect [4] 50:22 52:14 53:8, 25 reflects [3] 49:5 125:8 146: 11 refrain [1] 39:8 register [1] 113:17 registration [1] 94:24 regrettably [1] 37:22 regulate [14] 11:14,23 12: 19 69:19 71:20 99:25 131: 15 135:25 136:13 137:3,8 138:3 144:16 145:1 regulated [16] 22:5 25:11 39:1 43:10 46:16 53:18 60: 22 63:10 67:7 84:24 112: 13,14 121:16,25 133:1 152: 3 regulates [3] 11:15 41:13 63:12 regulating [5] 9:18 14:2 26:22 63:18 71:11 regulation [13] 14:8,13 20: 19 43:9 51:14 61:6 112:7 115:7 122:4 126:10 132:4 144:18 145:4 regulations [1] 115:18 reject [3] 57:13 58:18 63: 24 rejecting [2] 47:12 58:13 related [2] 44:11,24 relative [3] 21:10 44:12 115:14 relatively [2] 52:2 111:21 relevant [5] 27:14 47:20 51:23 103:3 152:14 relied [2] 47:13 51:22 relies [1] 6:7 religion [2] 75:19 76:3 religious [1] 75:1 rely [4] 6:25 20:14 103:4,5 relying [1] 7:1 remains [2] 17:19,22 remand [11] 82:25,25 83: 10,15 109:13 129:7 133:19 135:1,2 140:11 147:20 remarks [1] 43:17 remedy [2] 129:7 143:10 remind [1] 72:14 remove [1] 100:2 Reno [2] 64:1 111:16 reply [1] 21:24 reportage [1] 142:19 represent [1] 120:5 representations [2] 4:23 85:12 representatives [1] 44:2 represented [1] 58:4 representing [2] 120:4 121:20 represents [1] 6:9 Republicans [1] 157:8 republication [1] 100:1 require [5] 61:16 94:22 |
| Q | | | | |
| | qualifies [3] 26:13 70:23 84:25 qualify [3] 25:17 80:1 116: 8 quarter [1] 101:17 question [44] 6:19 17:4,13 20:18 29:9,13,21 33:9,17 35:12 48:10 53:16,17 54: 20,24 57:2 68:10 72:1,17 75:23 77:12 80:8,22 84:25 90:16 96:19 104:10,21 108:13,18 126:20 128:16 132:3 135:20 136:24 141: 21 142:9 143:23 146:25 147:9 148:2,17 150:5 152: 17 questioning [2] 42:14 134: 2 questions [20] 6:4 33:15 57:21 59:5 64:17 79:17 80: 18 81:16 85:4,6 94:5 103: 22 115:16 126:13 128:24 138:15 139:15 141:3,15 151:9 quite [6] 16:2,17 40:3 57: 21 119:14 157:3 quoting [2] 119:6,9 | | | |

Official

| | | | | |
|--|---|--|---|---|
| <p>112:7 154:25 155:4 required [3] 22:12 51:10 54:7 requirement [5] 22:25 52: 1 59:17 107:23 108:4 requirements [5] 7:19,20 12:13 70:16 145:16 requires [2] 61:6 62:7 reserve [1] 127:5 reserving [1] 119:2 resist [3] 77:5 129:23 133: 7 resolve [2] 41:7 155:2 resolved [1] 139:2 resolving [2] 148:12 154: 14 respect [22] 15:24 16:8 60: 13 66:17 68:5 78:5 84:6 97:1,3 127:3 130:6,10,13 135:22 136:11 137:22 138: 25 139:10 148:3 149:8,10 155:3 respectfully [1] 39:25 respects [1] 104:20 respond [4] 45:24 135:11 142:23 145:9 responded [1] 21:12 Respondent [1] 6:9 Respondents [8] 1:9 2:5, 9 3:7,11 62:19 114:6 115: 20 response [3] 13:22 135:14 151:8 responsibility [1] 5:17 responsible [4] 47:16 86: 15,17 119:9 rest [2] 77:14 104:9 restrict [3] 21:8 99:25 115: 13 restriction [4] 52:2 60:13, 22 61:2 restrictions [3] 37:7,12 96: 7 result [6] 58:25 67:9 81:19 89:24 109:3 142:20 results [1] 100:10 retain [1] 124:20 revenues [1] 9:14 review [3] 17:25 49:16 135: 8 rides [1] 48:14 rightly [1] 94:19 rights [3] 15:10 135:22 145: 2 RNC [1] 74:11 road [3] 17:13 84:11 153: 17 ROBERTS [38] 4:3 13:18 15:4 19:24 29:8 30:3 32: 11 36:2 40:15 43:14 48:7 57:15 62:15 73:17,21 74:4 84:20 85:16,24 93:4 94:6 96:17 101:21 108:10 110: 10 114:1 125:20 127:16,19,</p> | <p>22 133:12 136:22 140:6 141:12 146:22 151:4 155: 11 158:8 Robins [2] 5:10 12:17 rubric [1] 41:17 rude [1] 101:9 rule [1] 142:12 rules [14] 13:7 15:23,23,24 16:6,10,15 17:13,16,18 27: 19 37:2 39:13 60:23 rulings [1] 140:11 Rumsfeld [5] 5:11 19:14, 16 20:9 46:7 run [4] 37:21 90:19 99:6 140:20 running [1] 99:11</p> <p style="text-align: center;">S</p> <p>sale [2] 11:22 12:4 Salerno [4] 68:12 70:17 84: 7 85:17 sales [1] 69:16 Samaritan [1] 125:18 same [16] 20:19 45:11 49: 12 58:24 59:1 73:6 77:7 78:17 96:19 107:2 109:17 110:23 120:20 131:6 144: 11 146:5 sanction [1] 41:15 satisfies [1] 70:16 satisfy [1] 7:21 save [3] 68:13 97:21 127: 10 saw [1] 111:14 saying [26] 26:3,9,18 27:22 38:5 48:21 50:19,20 66:13 71:16 83:23 91:6,9,10,11, 17,18 94:4 95:1 98:25 99: 5 117:19 132:8 134:24 148:23 157:14 says [30] 10:17 23:2,25 27: 5 40:20 50:3 59:8,9 73:2,3, 13 74:21 92:7 95:23 99:13, 17,23 104:8 110:3 122:5 123:15,18,25 131:20 137: 16 142:16 143:1,18 155:24 156:18 scenario [1] 136:7 scenarios [1] 84:2 school [3] 26:9 131:20 132: 5 schools [9] 19:16,22,25 26: 6 32:8 40:4 46:6 48:18 103:14 scope [3] 126:5 129:19 139:15 score [1] 28:20 scream [1] 13:2 scrutiny [14] 10:25 22:7 37: 21 60:10 77:3 81:8 85:11, 14 104:16 115:15 134:7,9 135:3 146:18 search [2] 55:5 100:10 second [6] 41:22 49:10 51:</p> | <p>20 82:13 111:5 156:11 Section [30] 29:4,20,23 40: 18,19,21 41:23 42:5 66:10, 15,23 78:15 84:15,15 86:3, 5,22 92:8,10 119:4 121:6 123:12,14 125:1,8,10 148: 17 149:5,21 150:13 sections [1] 84:16 sector [3] 121:25 141:23 143:21 see [9] 49:13 89:1,13,16,17, 18,20 95:25 152:1 seeking [1] 136:12 seem [10] 6:6 16:10,13 25: 9 62:3 66:15 77:22 79:1 121:9 127:7 seemingly [1] 133:9 seems [21] 6:8 8:2 16:2 18: 5 21:5,12 27:20 30:14,16 48:15 55:9 92:9 94:19 99: 16 112:25 118:7 121:19 130:11,25 148:12 157:3 sees [1] 109:15 select [1] 5:15 selecting [1] 40:10 selection [3] 47:14,17 51: 20 selective [3] 15:14 46:13, 19 selectivity [1] 47:19 sell [4] 10:14 11:3,8 55:24 seller [1] 78:19 selling [1] 11:9 semantics [1] 132:18 send [3] 147:6,20 148:13 sending [2] 88:17 93:2 sends [1] 139:8 sense [3] 33:8 39:16 50:25 sentence [1] 21:6 separate [7] 51:2,4,14 53: 17 59:15 149:22 158:3 separating [1] 120:10 serious [1] 37:6 seriously [2] 16:13 36:20 serve [3] 22:20,22 99:14 servers [1] 148:6 serves [3] 23:6,17,20 service [21] 5:2,18 24:18, 20 50:5 55:6 73:22 75:8,9 99:6 114:25 119:10 120:8, 14,20 121:4 122:4 130:25 131:3 149:11,19 services [7] 5:3 28:25 57:6 70:24,25 78:1 152:2 servicing [1] 22:11 set [4] 57:18 101:7 148:8 151:7 several [1] 62:24 sex [2] 97:6 98:8 sexual [1] 97:7 shadow [8] 23:3 31:7 54: 10 59:10,14 100:19,20,21 shape [3] 21:19 114:15 142:18</p> | <p>shapes [1] 124:5 she's [1] 157:15 shielded [1] 114:24 shift [2] 8:23 82:5 shopping [2] 12:20 45:22 shops [1] 55:11 shot [1] 95:16 shouldn't [3] 67:12 111:3 148:2 show [6] 7:4 9:4 19:3 24:7 82:2 151:22 showed [1] 45:4 shown [3] 7:6 83:17 128:2 shows [2] 91:1 103:10 Shurtleff [2] 47:24 48:4 side [3] 45:22 49:11 122:15 sides [3] 25:9 104:11 152: 24 sight [2] 63:4 99:20 signaling [1] 118:18 signed [1] 111:11 significance [1] 135:18 significant [2] 6:17 56:22 significantly [1] 9:16 signing [1] 96:6 silence [2] 5:4 14:25 silenced [1] 45:6 silencing [1] 46:17 Silicon [1] 96:11 similar [4] 13:10 23:6,18 121:12 similarly [1] 16:3 simply [5] 43:1 51:9,15 61: 5 131:14 since [6] 6:8 13:25 70:21 94:18 141:16 142:5 sing [1] 4:17 single [3] 9:12 118:3,15 singles [1] 64:11 sit [1] 56:9 site [16] 15:19 16:7,20 18: 10,13 38:23 39:7 40:13 42: 20 50:5 91:20 92:23 93:13 97:3,5 157:16 sites [13] 4:21 5:15 18:22 30:18 32:7 71:21,22 90:25 92:19 107:5,8,9 127:6 situation [3] 69:11 144:1, 24 situations [1] 150:3 size [1] 131:15 skepticism [1] 109:17 slant [1] 72:20 slow [1] 155:21 small [2] 37:4 71:21 smartphones [1] 8:6 so-called [1] 73:4 social [1] 9:8 Social [39] 5:12 8:3,5 13: 15,21,24 15:5 16:4 21:3 24:17 25:2 27:12 34:12,20 36:7 42:20 46:3 48:12,22 51:24 55:3,19 59:9,15 72: 9 73:23 79:15 99:24 100:6</p> | <p>114:15 115:5 126:5 127:2 130:9 133:25 139:4 144: 13 153:1 155:5 society [2] 21:9 36:22 solely [2] 53:23 103:24 Solicitor [2] 2:2,6 Solomon [1] 103:13 somebody [11] 16:11 80: 21 88:14 90:11 93:18 108: 5 113:6,20 125:4 134:21, 22 somehow [2] 30:13 111: 11 someone [3] 11:2 12:25 88:10 someone's [1] 88:20 sometimes [3] 74:21 116: 21 118:21 somewhat [2] 11:20 109: 11 somewhere [1] 68:13 sorry [9] 28:24 32:13 65:15 69:8 88:9 91:5 124:10,22 127:18 sort [38] 5:18 23:23 30:7 34: 4 36:6,8 52:10 53:23 61: 18 75:4 78:16 80:7,17 81: 16 83:10,14 86:19 87:19, 22 89:14 92:15,21,21,21 94:9 95:5 96:24 100:12 101:2 104:9 106:13 109: 15 111:7 112:10,20 134:17 137:10 147:21 sorted [1] 82:24 sorting [1] 53:22 sorts [3] 31:8 37:12 153:25 SOTOMAYOR [19] 7:25 8: 22 9:22 12:3,6,10,22 13:16 36:3 52:5 55:8 56:21 94:7, 8 127:15,18 133:13,14 135: 13 sought [3] 76:25 126:19 153:16 sounds [3] 22:23 27:25 119:10 sovereign [1] 9:3 space [7] 9:25 10:5 51:20, 21,25 52:7 64:1 spam [1] 18:1 spans [1] 10:11 speaker [5] 13:5 47:20 63: 2 65:11 75:6 speaker-based [3] 95:20, 24 96:1 speakers [7] 15:1 18:25 42:22 63:14,17 65:3 79:9 speaking [6] 48:2 90:13,17, 18 99:7 125:9 speaks [1] 20:22 specific [3] 31:12 74:11 150:20 specifically [4] 77:2 100:9 118:14 125:12 specificity [1] 31:18</p> |
|--|---|--|---|---|

Official

| | | | | |
|--|--|---|---|---|
| <p>specifics ^[1] 106:10</p> <p>speculating ^[1] 31:16</p> <p>speech ^[127] 4:15,19,25 5:6,14,19 12:20,25 13:11,14 14:25 16:7,20,21 19:3,6,7,8 20:19 21:9 22:6,15 25:11,15,17 26:7,14 30:8 31:18,21,21,24 32:3 34:14 36:25 37:15 39:22 41:19 43:18 44:10,13,13,21,24 45:11,21 46:13,14,20,22 47:22 48:1,17,23 49:5,6 50:7,8,10,16 51:11,13 55:15 63:1,4,24 64:20,22,23,25 65:25 75:12,15,21,24 84:24 85:1 99:9,12 102:3 104:1 106:19 110:21 111:10 113:13 114:20,23 115:13,21 116:9 117:2,12 118:23 119:15 120:19,23 121:5,14 122:3,14,18,19 123:2,23 124:2 125:13 126:11 132:23 136:8 137:5,10,15,23 138:5 139:25 145:2 146:7,13,13 148:23,23 150:1,6,11,24 155:6,9</p> <p>speech-hosting ^[1] 12:19</p> <p>speed ^[1] 33:12</p> <p>sponsors ^[2] 114:14 118:18</p> <p>spot ^[1] 20:17</p> <p>sprawling ^[1] 79:21</p> <p>spring ^[1] 90:2</p> <p>square ^[5] 14:4 70:11 102:4 110:17,19</p> <p>squarely ^[1] 63:20</p> <p>St ^[1] 47:6</p> <p>stab ^[1] 148:11</p> <p>stage ^[3] 29:19 77:4 95:3</p> <p>stake ^[1] 152:22</p> <p>stand ^[4] 12:25 13:1 129:4 130:2</p> <p>standard ^[15] 34:23 35:9 55:19 60:9 68:3 83:23 84:6,7,17 85:17,19,21 108:21 129:5,5</p> <p>standards ^[5] 11:4 58:25 59:11,14 117:23</p> <p>stands ^[2] 86:20 143:7</p> <p>Star ^[4] 64:12 71:12,13 73:1</p> <p>start ^[5] 16:25 17:4,10 67:1 135:9</p> <p>started ^[1] 84:11</p> <p>starting ^[2] 109:18 146:19</p> <p>starts ^[1] 96:13</p> <p>state ^[36] 8:23 9:4 12:18 13:23 14:2,8 15:1 33:13 37:10 54:21 58:5,14,15,17 63:6 65:8 99:13 104:8,14 108:3,5 109:7 115:12 120:22 130:8 133:22 134:8 138:1 141:23 142:1,6 143:21 144:4 146:19 154:24 155:</p> | <p>4</p> <p>state's ^[2] 31:14 146:11</p> <p>statement ^[1] 96:6</p> <p>STATES ^[10] 1:1,17 2:8 3:10 32:5 114:5 125:7 139:20 157:14,24</p> <p>station ^[1] 45:4</p> <p>status ^[3] 75:5 86:13 154:16</p> <p>status-based ^[1] 75:4</p> <p>statute ^[60] 6:20 7:8,12,23 9:20 32:22 33:2 35:12 58:1,10,20 63:10 67:24 68:10,13,16,22,25 69:2,13 70:21 71:1,13,14 72:15 73:10,11 74:15 78:12,25 79:4,19,21 82:21 84:12 85:22 96:7 97:22,24,25 98:11,20,21,25 99:17,20,22 100:18 103:11 104:19 105:11 106:12 109:5,24 113:15 137:12 138:11 150:2 153:18 156:12</p> <p>statute's ^[2] 108:17 147:19</p> <p>statutory ^[2] 124:19 150:20</p> <p>stay ^[3] 115:11 155:23 156:6</p> <p>step ^[1] 52:22</p> <p>still ^[17] 9:2 21:22 29:24 38:25 47:9 67:11 82:25 83:2 90:10 95:6 97:12 100:16 108:19 113:14 118:17 145:3 157:20</p> <p>stool ^[1] 151:17</p> <p>store ^[3] 12:24 13:1 52:19</p> <p>stores ^[1] 12:23</p> <p>stories ^[1] 131:8</p> <p>straight ^[1] 113:3</p> <p>straightened ^[1] 107:1</p> <p>straightforward ^[2] 112:23 113:1</p> <p>strange ^[2] 49:16,22</p> <p>strenuously ^[1] 40:4</p> <p>stress ^[1] 54:16</p> <p>stricken ^[1] 68:19</p> <p>strike ^[1] 67:23</p> <p>strong ^[1] 147:25</p> <p>strongly ^[3] 19:17 25:23 58:12</p> <p>structure ^[1] 149:10</p> <p>structures ^[1] 149:19</p> <p>struggling ^[1] 151:7</p> <p>student ^[1] 131:20</p> <p>study ^[1] 154:22</p> <p>stuff ^[10] 55:22,25 67:9 80:19 81:8 87:5 91:19 109:4 112:20 138:19</p> <p>stunted ^[1] 109:11</p> <p>subject ^[4] 7:19 15:9 16:9 17:16</p> <p>submitted ^[4] 8:6 149:14 158:10,12</p> <p>subscribers ^[3] 5:8 9:14 34:18</p> | <p>substantial ^[1] 68:17</p> <p>substantive ^[2] 9:17,20</p> <p>substantively ^[1] 58:25</p> <p>subterfuge ^[1] 71:17</p> <p>succeed ^[2] 57:9 128:3</p> <p>succeeded ^[1] 68:25</p> <p>success ^[3] 4:14 82:2 83:18</p> <p>succinctly ^[1] 95:2</p> <p>sudden ^[3] 39:15 96:12 101:5</p> <p>sue ^[1] 108:5</p> <p>sued ^[1] 109:23</p> <p>sufficient ^[2] 27:9 95:14</p> <p>suggest ^[1] 135:16</p> <p>suggested ^[2] 82:24 146:4</p> <p>suggesting ^[6] 26:11 35:24 74:22 115:24 118:22 145:8</p> <p>suggests ^[2] 72:1 110:4</p> <p>suicide ^[2] 87:4 89:21</p> <p>supermarket ^[2] 10:4,13</p> <p>supplementing ^[1] 90:22</p> <p>support ^[1] 131:21</p> <p>supported ^[1] 157:11</p> <p>supporting ^[3] 2:8 3:11 114:6</p> <p>suppose ^[13] 36:10,14 60:18 96:20 97:15 102:14 105:5 131:19 136:25 138:18,21 141:6 154:7</p> <p>supposed ^[2] 118:24 140:10</p> <p>suppress ^[1] 75:21</p> <p>suppressed ^[1] 55:25</p> <p>suppression ^[7] 4:25 43:18 44:9,20,24 146:2,16</p> <p>SUPREME ^[3] 1:1,16 141:7</p> <p>surprised ^[1] 151:15</p> <p>surrounding ^[1] 19:20</p> <p>survive ^[1] 95:6</p> <p>susceptible ^[2] 58:20 81:25</p> <p>suspend ^[1] 100:1</p> <p>swath ^[1] 8:18</p> <p>sweep ^[23] 6:21 7:13,24 8:16,17 9:5 27:11 35:13 57:11 68:11,23 70:19 85:23 94:21 95:5 99:5 108:17,25 109:4 112:5 137:17 147:19 151:24</p> <p>sweeping ^[2] 157:3,10</p> <p>sympathy ^[1] 154:18</p> <p>synonymous ^[1] 70:20</p> <p>system ^[1] 50:17</p> | <p>14</p> <p>talks ^[1] 100:9</p> <p>Tallahassee ^[1] 2:2</p> <p>Tam ^[1] 47:24</p> <p>tap ^[1] 89:14</p> <p>target ^[2] 104:19 144:19</p> <p>targeted ^[4] 63:11 69:20 96:14 120:23</p> <p>targeting ^[3] 43:23 62:10 107:21</p> <p>targets ^[2] 61:9 103:11</p> <p>tautology ^[1] 30:17</p> <p>teach ^[1] 63:22</p> <p>teaches ^[1] 90:7</p> <p>teaching ^[1] 63:20</p> <p>team ^[1] 154:20</p> <p>tech ^[1] 62:24</p> <p>tee ^[1] 85:14</p> <p>teed ^[2] 135:7 152:25</p> <p>teenage ^[1] 92:22</p> <p>telegraph ^[3] 119:17 122:6 131:3</p> <p>telegraphs ^[2] 42:15 121:17</p> <p>telephone ^[3] 5:1 114:22 119:17</p> <p>telephones ^[1] 121:17</p> <p>tells ^[4] 12:4 105:4 111:23 143:16</p> <p>temptation ^[1] 133:8</p> <p>term ^[6] 5:20 9:8 100:3 126:7 141:21 149:15</p> <p>terminology ^[3] 93:6 132:9,11</p> <p>terms ^[24] 5:18 24:17,19 31:5 50:4,23 60:23 61:4 70:3 83:8 87:6 88:15,16 89:18 110:6 113:11,24 119:10 120:7,14,20 121:4 133:9 150:20</p> <p>terrorism ^[2] 89:20 92:2</p> <p>terrorist ^[1] 86:25</p> <p>terrorists ^[2] 91:22,25</p> <p>tertiary ^[1] 81:16</p> <p>test ^[1] 70:20</p> <p>Texas ^[2] 35:23 107:11</p> <p>text ^[3] 117:12 136:15 153:7</p> <p>theaters ^[1] 24:6</p> <p>theirs ^[2] 120:5 123:11</p> <p>themselves ^[7] 4:14 5:21 39:13 117:6 120:18 121:20 122:14</p> <p>then-fresh ^[1] 111:18</p> <p>theories ^[1] 10:12</p> <p>theory ^[4] 27:25 47:18 109:24 138:6</p> <p>there'll ^[1] 105:1</p> <p>there's ^[50] 7:7 10:10 16:23 29:17 35:4,4 41:17 43:7 44:12 52:10 53:9 54:20 55:21 57:18 61:1,8 62:11 63:9 67:25 68:12 74:10 75:10 76:13 77:8 80:20 83:9,</p> | <p>16 84:13,18 87:5 88:22 92:17 93:5 94:1 98:12 101:8 109:18 111:20 115:2 117:24 118:3 125:21 128:14 134:8 136:8 139:21 151:22 154:23 155:17 156:8</p> <p>therefore ^[1] 26:13</p> <p>they'll ^[1] 35:20</p> <p>thin ^[1] 92:22</p> <p>thinking ^[4] 94:12,18 132:6 133:19</p> <p>thinks ^[3] 107:25 129:14,24</p> <p>third ^[3] 6:25 65:25 66:3</p> <p>third-party ^[4] 5:24 7:4 63:24 155:6</p> <p>THOMAS ^[43] 6:5 7:5 30:5,6 31:3 32:10 64:18 65:13,16,21 66:5,9,18 85:25 86:1,21 87:9,16,21 88:4,19,23 89:3,5,22 90:6,13 91:2,4,8,12,21,24 92:4 115:17,24 116:10,16 117:10,19 123:13 127:16,21</p> <p>though ^[17] 10:5 15:25 37:12 38:4 52:6 53:6 100:14 102:9 114:19 121:23 126:4 130:5 138:10 143:1 144:16 149:24 155:1</p> <p>thought-provoking ^[1] 141:20</p> <p>thousands ^[2] 16:14,14</p> <p>threatening ^[1] 134:22</p> <p>three ^[4] 33:3,25 43:19 63:22</p> <p>threshold ^[5] 69:15,16 70:23 77:12 104:10</p> <p>throughout ^[1] 31:6</p> <p>throw ^[2] 98:17 134:21</p> <p>thrown ^[1] 93:19</p> <p>thrust ^[5] 65:6,21,22,23 102:13</p> <p>Tide ^[2] 87:2 149:4</p> <p>TikTok ^[3] 48:13 50:7 111:24</p> <p>tired ^[1] 89:7</p> <p>today ^[7] 4:11 20:6 69:3 76:23 80:4 110:19 126:13</p> <p>together ^[2] 48:20 136:14</p> <p>tomorrow ^[1] 157:7</p> <p>ton ^[1] 48:1</p> <p>took ^[2] 46:24 72:16</p> <p>tools ^[2] 5:22 144:15</p> <p>Tornillo ^[14] 21:14 45:15 46:10 48:25 51:22 63:21 65:23 132:22 142:2,8,9,12 143:25 144:3</p> <p>total ^[1] 69:16</p> <p>totally ^[3] 28:1 47:20 150:8</p> <p>touch ^[2] 87:10 96:25</p> <p>touched ^[1] 149:15</p> <p>touches ^[1] 87:11</p> <p>traditional ^[9] 7:16,17 8:5 14:12 34:15 43:9 48:12 67:</p> |
| T | | | | |
| <p>Taamneh ^[3] 5:21 49:19 53:7</p> <p>table ^[2] 98:14 154:4</p> <p>takedowns ^[1] 41:13</p> <p>talismanic ^[1] 135:18</p> <p>talked ^[3] 15:21 58:2 142:</p> | | | | |

Official

| | | | | |
|---|---|---|---|---|
| <p>16 157:4 traditionally ^[1] 121:24 train ^[1] 134:21 transmission ^[1] 131:1 transmits ^[1] 114:20 transmitting ^[4] 5:13 34:17 119:16 122:13 transportation ^[2] 121:25 136:1 treat ^[1] 123:15 treated ^[3] 67:12 126:3 135:21 tricky ^[2] 112:18 150:14 tried ^[7] 57:20 74:16 103:4 107:23 122:18,22 156:4 tries ^[2] 63:13 105:10 triggers ^[1] 9:9 truck ^[1] 119:18 truckload ^[1] 43:4 true ^[12] 42:24 49:7 95:2 120:15 121:16,17 122:21 126:5 127:2 130:9 134:2,13 try ^[10] 9:24 83:21 90:4 95:8 101:6 103:21 136:23 148:11 150:18 151:1 trying ^[14] 13:7 15:18 25:6 31:17 60:9 71:18 72:14 94:9 103:18 125:7 131:14 137:3,7 154:22 Tucker ^[1] 70:6 tune ^[1] 4:17 turn ^[3] 30:2 63:18 157:7 turned ^[1] 47:5 Turner ^[14] 23:8 37:22 44:5,8,14,19 45:15 111:7,15,18,20 145:6,19,21 turns ^[2] 48:14 80:20 Twitter ^[10] 5:20 39:12,17,18 49:19 50:13 53:7 88:10 89:15 111:24 Twitter/X ^[2] 36:9 48:13 two ^[13] 21:25 51:18 68:20 75:3 81:21 85:3 94:2 104:23 105:20 110:24 123:22 151:2,19 type ^[4] 60:17 127:8 130:11 153:10 types ^[6] 123:23 126:14 128:25,25 148:3 153:11 Typically ^[1] 88:21</p> <hr/> <p style="text-align: center;">U</p> <p>U.S ^[2] 93:20 115:19 Uber ^[19] 55:4 57:6 77:20,22 78:4,11,13,15 79:18 97:2 101:3,4 127:7 137:13 152:1 156:14,16,17,18 Ubers ^[1] 153:3 unanimous ^[1] 142:14 unanimously ^[1] 102:19 uncommon ^[1] 135:8 unconstitutional ^[15] 64:23 67:24 68:18 71:2,8,13</p> | <p>73:19 80:10 82:22 83:6,25 84:4 129:18 137:21 147:17 under ^[24] 10:25 12:11 24:19 37:21 41:12,12,16 42:10 54:21 59:15 66:10 72:6 73:23,25 74:7 81:25 86:22 88:3 92:5 113:15 124:3 136:7 149:21 150:2 underlies ^[1] 148:1 undermine ^[1] 66:15 understand ^[31] 6:22,24 7:1 25:7 28:4 30:11 35:15,19 36:6 41:15 42:3 43:19 45:10 55:2 56:12 59:19 61:15,20 67:5 69:8 76:22 84:22 96:6 101:11 103:21 112:10 124:11 126:12 133:22 152:3 153:19 understanding ^[5] 66:20 67:23 115:23 133:15 147:2 understands ^[1] 120:6 understood ^[9] 45:18 91:16 92:6 112:24 123:13 130:15,17 151:14,16 undertaken ^[1] 14:24 unfortunate ^[1] 66:6 uniquely ^[1] 18:2 UNITED ^[9] 1:1,17 2:8 3:10 32:5 114:5 139:19 157:14,24 universe ^[2] 90:11 152:9 unless ^[4] 69:4 105:8,9 107:8 unlike ^[1] 99:7 unprotected ^[1] 26:7 unrelated ^[4] 44:9,20 146:1,16 unresolved ^[2] 140:2 141:8 unreviewable ^[1] 142:20 unruly ^[1] 134:20 unspecific ^[1] 8:14 until ^[3] 104:23 105:21 106:25 up ^[25] 12:4 18:24 21:1 39:12 40:18 42:13 55:9 78:6,22 84:2 85:15 92:14 100:13 101:7,24 104:5 111:11 121:13 135:7 139:9,22 141:15,17 147:7 152:25 upheld ^[1] 59:18 uploading ^[1] 11:21 UPS ^[2] 43:3 119:18 upset ^[1] 18:16 upwards ^[2] 17:19,23 urge ^[1] 126:24 useful ^[1] 64:8 user ^[12] 5:19 53:8,24 78:2 100:3,5,6 123:10,24 124:4 156:17 157:20 user-generated ^[4] 9:19 11:16,21 153:6</p> | <p>user-uploaded ^[1] 27:13 users ^[28] 4:16 5:14 6:3 10:7 12:4 24:20 32:7 39:12,13,17,19 59:11 64:8 71:23 72:23 73:7,8 93:15 115:14 116:1 118:2,10,10 119:5,22 145:13 156:18 157:12 users' ^[4] 4:18 5:13 10:15 119:22 using ^[3] 31:5 90:19 101:8 usual ^[2] 8:1 97:17</p> <hr/> <p style="text-align: center;">V</p> <p>vacate ^[6] 129:7 133:18 134:25 135:2 147:6,20 vacates ^[1] 139:8 vaccination ^[1] 18:23 vagueness ^[1] 107:20 valiantly ^[1] 151:7 valid ^[6] 73:24 126:11 139:16 151:22,25 153:15 validity ^[1] 143:8 Valley ^[1] 96:12 value ^[3] 117:21 126:2 130:5 variety ^[6] 8:11,12 47:23 117:24 120:17 137:12 various ^[5] 7:4 51:4 117:21 119:3 157:16 vast ^[4] 5:24 21:17 64:4 142:20 Venmo ^[3] 97:2 98:5 99:11 Verizon ^[5] 5:7 42:25 49:7 157:6,11 versus ^[13] 4:5 5:10,11,20,22 12:17 19:14 20:9 46:7 47:24 49:19 53:7 110:14 veto ^[1] 19:9 via ^[1] 119:17 video ^[2] 92:13 136:15 videos ^[1] 117:13 view ^[9] 35:11 42:5 44:23 56:2,21 63:2 74:24 100:10 102:9 viewable ^[1] 100:5 viewers ^[2] 10:6 65:2 viewership ^[1] 69:15 viewpoint ^[17] 12:10 50:9 63:3 77:25 78:5 95:10 96:2 97:5,8,16 98:9,16,18 107:11 130:20,22 134:17 viewpoint-based ^[1] 41:16 viewpoints ^[2] 70:8 96:11 views ^[9] 18:19 38:18,20 71:19 74:25 120:3,5,17 125:24 vintage ^[1] 10:14 violate ^[1] 113:11 violates ^[5] 62:24 65:4 88:16 89:17 131:12 violating ^[1] 88:14 violation ^[9] 37:10 64:12 71:24 72:25 102:4 108:7</p> | <p>112:16 117:4 139:23 violent ^[1] 87:12 Virginia ^[1] 2:4 virtual ^[1] 27:19 virtually ^[2] 6:9 8:17 voice ^[2] 21:10 115:14 voices ^[1] 44:12 Volokh ^[2] 41:18 51:6 Volokh's ^[1] 158:5 volume ^[2] 90:25 91:1 volumes ^[1] 90:20 voluntarily ^[2] 14:18 155:23 voting ^[2] 18:20 36:23</p> <hr/> <p style="text-align: center;">W</p> <p>wait ^[1] 69:7 wall ^[1] 105:10 wanted ^[16] 30:23,24 36:5 40:6,17 57:24 67:17 85:14 86:8,9 118:5 125:15 132:21,23 138:20 155:21 wants ^[10] 10:14 13:6 55:24 76:6 78:16 80:21 92:18 101:4 141:17 146:9 War ^[2] 93:20 131:21 warrants ^[1] 150:6 Washington ^[3] 1:12 2:7 58:14 way ^[46] 4:12 5:6 7:7 14:12 17:9 19:15 26:15 30:22 32:3 42:3 44:5 52:10 56:13 68:1 69:20 71:25 78:7,12,17 83:22 85:3,8 93:11 96:20 101:9 102:19 103:4,7,16 107:2 111:10 121:7 124:5 126:2,22 128:19 129:13 130:1,2 131:6 132:5 135:6 138:16 143:3 146:8 152:19 ways ^[6] 10:1 50:21 53:8 102:1 109:18 157:16 weaker ^[1] 13:15 Web ^[3] 55:6 57:6 114:14 website ^[15] 9:12 53:14 69:4,6 72:9 73:6,8 111:9,22 124:15 126:6 131:7 136:14 146:12 153:5 websites ^[28] 9:13,18 34:7,10 63:11,13,16 64:6,8,11 67:6,20 69:14,15,23 72:9,10,13 94:13 111:6,10,13,14 114:17 117:11 126:14 127:4 148:5 week ^[1] 156:21 welcome ^[4] 6:4 64:17 115:16 120:17 welcoming ^[1] 30:14 whatever ^[8] 10:3 11:7 24:2 36:16 38:20 85:5 122:24,25 whatnot ^[1] 152:2 WhatsApp ^[1] 156:25 wheat ^[1] 120:10</p> | <p>Whereupon ^[1] 158:11 wherever ^[1] 17:10 whether ^[44] 6:20 14:1 19:5,6,22 25:19,25 35:12 39:2 40:1,25 45:20 53:18 54:20 60:7,13 61:22 62:3,10 68:10 70:15 74:9 76:16 78:19 80:22 84:24 85:21 98:12,19 99:14 108:24 119:16 129:4,17,19 133:1 136:19 139:16 146:12 147:10 149:24 150:5,21 157:17 whim ^[1] 5:8 WHITAKER ^[92] 2:2 3:3,13 4:6,7,9 6:16 7:10 8:20 9:1 11:11 12:5,9,16 13:9 14:5 15:7 16:23 17:5,10 18:8,11,17 19:1 20:7,11 22:2,17 24:8,12,15 25:21 26:17,25 27:3,7,23 28:4,7,10,13,19 29:7,11,16 30:6,10 31:23 32:15,23 33:22 34:9 35:3,8 37:16 38:2,11,24 39:24 40:22 41:2,6,9 42:18 43:24 44:16,22 45:25 47:3 48:9 49:1,15 50:11 51:1 52:21 54:2 56:3,14,18 57:3,10 58:7 59:4,20,24 60:20 61:3,25 62:6 155:13,14,16 who's ^[3] 6:11 90:13 113:20 whole ^[27] 12:11 25:1 38:3 45:13 48:20 57:1 67:5 79:19 83:16 87:5 95:15,18 97:21 101:8 102:13,18 105:13 118:16 121:9 123:17 124:12,15,21,25 125:17 144:17 150:24 wholly ^[1] 21:11 whom ^[1] 88:11 wide ^[2] 117:24 120:17 wield ^[1] 144:14 will ^[13] 4:3 52:20 78:6 95:6 104:24 105:7,8 106:4,5 118:2,10 129:10 131:21 willing ^[3] 20:17 42:21,22 win ^[4] 77:12 86:2,4 108:19 wires ^[1] 119:17 wishes ^[1] 122:25 within ^[9] 63:20 87:6 108:16,25 109:4 115:11 147:19 149:5 150:22 without ^[7] 10:22 17:24 29:15 33:13 35:13 108:23 109:3 withstand ^[1] 115:15 woke ^[1] 39:12 wolf ^[2] 81:14,14 won ^[2] 82:12 83:18 wonder ^[2] 13:25 118:24 word ^[10] 9:6 11:13 12:1 32:17 35:21 101:25 107:14,14 132:25 133:6 words ^[4] 24:9 43:20 106:8</p> |
|---|---|---|---|---|

Official

114:11
work ^[4] 53:6 57:23 88:6
103:6
worked ^[3] 14:13,14 111:
 10
working ^[1] 154:19
world ^[7] 4:13 37:8 54:21
79:8 93:20 108:8 153:4
worlds ^[1] 152:1
worry ^[1] 111:6
worst ^[1] 84:9
worth ^[1] 71:20
worthy ^[2] 118:11,19
write ^[4] 8:23 108:20 109:
 19 150:14
Writers' ^[1] 73:2
writes ^[1] 8:24
writing's ^[1] 105:10

Y

yards ^[1] 105:13
year ^[3] 104:23 105:20 106:
 5
years ^[1] 143:24
York ^[2] 107:24,25
yourself ^[1] 14:16
YouTube ^[16] 15:17 16:4
33:5 36:9 38:19 48:12 79:
14 81:22 88:8 89:15 90:17
98:1 101:17 108:14 126:8
147:11
YouTubes ^[1] 79:7

Z

zoom ^[1] 61:12