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# Supreme Court Leaves Constitutionality of Content Moderation Regulations for Another Day

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**Associate Max Bloom, who just commenced a judicial clerkship, assisted in preparing this alert*

Today, in a 9-0 decision written by Justice Kagan, the Supreme Court in *Moody v. NetChoice, LLC/NetChoice, LLC v. Paxton* declined to resolve whether state laws regulating content moderation violate the First Amendment, instead vacating and remanding the cases to the lower courts for reconsideration.

The laws at issue—arising out of Florida and Texas—restrict the ability of social media companies, such as Facebook and Twitter, to take down speech on the basis of the viewpoint expressed. The lower courts split as to whether such laws were unconstitutional. In vacating and remanding, Justice Kagan for the majority expressed concern that these laws *might* violate the First Amendment as applied to decisions by social media platforms that serve an editorial function by curating third-party content. But the plaintiffs had pursued only *facial* challenges to the laws, seeking to invalidate the laws in their entirety in all applications. Because the lower courts failed properly to analyze the constitutionality of the laws, the Court vacated and remanded each of the cases for reconsideration. Nonetheless, the Court's decision made clear that the First Amendment would provide meaningful protection to content moderation decisions made by social media platforms, and thus the decision marks a significant practical win for them.

It is unclear at this stage whether the laws will ultimately be upheld, but language in the Court's decision is likely to aid social media companies and other sites seeking to moderate speech on their platforms. The Court emphasized that when social media companies "use their Standards and Guidelines to decide which third-party content [their] feeds will display, or how the display will be ordered and organized, they are making expressive choices. And because that is true, they receive First Amendment protection." Accordingly, on the current record, the Court suggested the "Texas law does regulate speech when applied in the way the parties focused on below" and that Texas's justifications up to this point are "unlikely to withstand First Amendment scrutiny." But whether the entirety of the laws will be struck down remains unknown, and thus companies affected by the laws (which sweep broadly) will continue to face uncertainty.

In a series of concurrences, several Justices offered a variety of views on the merits. Justice Barrett stated "the Eleventh Circuit's understanding of the First Amendment's protection of editorial discretion [striking down the Florida law] was generally correct; the Fifth Circuit's [upholding the Texas law] was not." And Justice Jackson agreed. Justice Thomas wrote to explain his view that the Court should not opine on what "the record suggests," and that the common-carrier doctrine should continue to guide the lower courts. Finally, Justice Alito expressed his doubts that content moderation on platforms like Facebook and YouTube is per se expressive, suggesting there might be a "constitutionally significant difference between what newspaper editors did more than a half-century ago at the time of [*Miami Herald Publishing Co. v.*] *Tornillo* and what Facebook and YouTube do today."

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