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Some lingering questions for the Court in *NetChoice*:

Last Monday, February 26, the Supreme Court heard oral arguments in *Moody v. NetChoice* (out of the 11th Circuit Court of Appeals) and *NetChoice v. Paxton* (out of the 5th Circuit Court of Appeals). While the two cases differed in some relevant nuance, both disputes forced the Court to grapple with Texas and Florida laws designed to combat social media censorship.

With almost four hours of oral argument between both cases, the justices discussed what analogies the Court should use for modern-day social media companies, the level of applicable First Amendment scrutiny, and how common carriage status could apply. However, a few issues important to the disposition of the cases require some lingering questions. Let's talk about these lingering questions.

1. **How will the Court deal with a circuit split on *Spence v. Washington* (1974) and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995)?**

What message do social media companies have that these laws get in the way of? The *Spence*-test, especially as modified in *Texas v. Johnson* (1989), requires a particularized message and the likelihood that viewers would understand the message. However, in *Hurley*, a unanimous Supreme Court seemed to alter the test, stating that a parade was a form of expression protected by the First Amendment, even if it did not have a single, clear message.

With a resulting circuit split taking hold over the last three decades, how will the Court grasp these differing tests?

2. **How does the *Zauderer* standard exist post-*NIFLA*?**

Florida and Texas argue that the disclosure provisions of their law do not compel expression in violation of the First Amendment. Under the Court's precedent in *Zauderer,* the states assert that they may compel a corporation to divulge "purely factual and uncontroversial information" about the "terms under which their [services] will be available."

In *NIFLA v. Becerra* (2018), the Court enjoined a California law that mandated that crisis pregnancy centers post notices about state abortion services, clarifying that the "controversial" prong in *Zauderer* means something different from "factual." What about Florida and Texas' disclosure provisions applicable to social media companies?

The Court might rely on a passage in its *NIFLA* majority explaining why *Zauderer* did not apply since the California law's required "notice[s] in no way relate[d] to the services that licensed

clinics provide. Instead, it requires these clinics to disclose information about state-sponsored services."

3. **How does *Americans for Prosperity Foundation v. Bonta* (2021) bear on questions about "plainly legitimate sweep?"**

The states argue that their laws are phrased broadly enough to non-paradigmatic social media companies like Uber or Venmo, with minimal First Amendment interests. Therefore, the states assert that so long as their laws have any "plainly legitimate sweep," courts cannot strike them down facially.

In *Americans for Prosperity*, Justice Thomas concurred that "the Court has no power to enjoin the lawful application of a statute just because that statute might be unlawful as-applied in other circumstances." Judging that "a substantial number of its applications are unconstitutional…in relation to the statute's plainly legitimate sweep," the majority took a somewhat different approach. Will we see a similar divide in *NetChoice*?

4. **Does the motive of the laws render them unconstitutional?**

Florida and Texas contend that a motive to protect the speech of third-party speakers and content does not regulate expressive interests and, therefore, triggers strict scrutiny. If that were the case, the states argue, congressional regulation across two centuries (from the late 1700s to late 1900s) giving preferential postage rates for newspapers would be unconstitutional. Will the Court address whether this historical example says anything about the modern constitutional question at issue?

5. **What about Section 230?**

Section 230 of the Communications Decency Act of 1996—the law that facilitates the internet as we know it today—generally grants immunity for third-party content generated by users on interactive computer services (like social media). Section 6 of the Florida law declares that the statute is not enforceable to the extent it conflicts with Section 230. Accordingly, Florida argues that their law has no preemption issue since it has exemptions for content moderation practiced in "good faith." Essentially, Florida argues that social media companies are arguing for a constitutional right to engage in "bad faith" content moderation, which they posit that the Court should not indulge in.

But without a definitive interpretation of the state law from Florida courts, how can the Supreme Court parse this language? What does "good faith" vs. "bad faith" mean?