



Can Texas and Florida Ban Viewpoint Discrimination on Social Media Platforms?

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[00:00:00.2] Jeffrey Rosen: This week, the Supreme Court heard oral arguments in NetChoice versus Paxton and Moody versus NetChoice. These cases involve challenges to state laws in Texas and Florida that seek to prevent social media sites from removing controversial posts, NetChoice argues the laws violate the First Amendment.

[00:00:19.9] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We The People, a weekly show of constitutional debate. The National Constitution Center's a nonpartisan non-profit chartered by Congress to increase awareness and understanding of the Constitution among the American people. It is an honor to convene two leading experts on intellectual property, free speech, and the future of the internet to discuss these important cases. Larry Lessig is Roy L. Furman Professor of Law and Leadership at Harvard Law School. He's the founder of Equal Citizens and Creative Commons, and is the author of many books, including How to Steal a Presidential Election, which was released this month, and which we will discuss on our upcoming town hall on March 21st. In the NetChoice cases, Larry joined a brief in support of Florida and Texas. Larry, it is wonderful to welcome you to We The People.

[00:01:15.0] Larry Lessig: Thanks so much for having me, Jeff.

[00:01:18.7] Jeffrey Rosen: And Alex Abdo is the inaugural litigation director of the Knight First Amendment Institute at Columbia University, where he's been involved in important First Amendment litigation. Previously, he worked at the ACLU where he was at the forefront of litigation relating to NSA surveillance, anonymous speech online and government transparency. He wrote a brief in support of neither party. Alex, it's great to welcome you back to We The People.

[00:01:42.6] Alex Abdo: Great to be here.

[00:01:44.3] Jeffrey Rosen: Larry, what is going on in these cases and why are they important?

[00:01:49.5] Larry Lessig: Well, both Texas and Florida have attempted to regulate certain internet platforms such as Facebook or Twitter to make sure that they don't discriminate against certain viewpoints in the content that they make available, and the objective, the motivation for this is not one that concerns me much. Their motivation was their belief that conservative views were being suppressed, but the general principle is incredibly important. Do states retain what we call traditionally the police power to regulate, to assure non-discrimination in access to platforms that are opened to the public generally. And I joined a brief with Tim Wu and Zephyr Teachout to say that that traditional state power must be preserved in the context of the internet if we're going to have the capacity to assure that these platforms just don't take over our lives.

[00:02:52.6] Jeffrey Rosen: Alex, how would you describe what's going on in the case and what the stakes are?

[00:02:57.7] Alex Abdo: I think Professor Lessig's description of the case is right, the case raises the question of whether states can require platforms to carry speech and accounts that they would prefer not to, and also whether states have any power and whether Congress has any power to require the platforms to be more transparent to the public, to the regulators to their users about how they operate and with what effect on public discourse. And I am very sympathetic to the concerns that a small number of very powerful companies now exercise enormous control over what can be said and what will be heard online. And I would love to see any number of laws that might rest from these handful of companies, the power that they have, but I don't think that the way that Texas and Florida have approached at least what we call, or what I call the must carry provisions, what I imagine Professor Lessig would call the anti-discrimination provisions of these laws.

[00:04:00.1] Alex Abdo: I don't think that's the right approach, at least to the curated portions of these sites, because I think the curated portions of these sites reflect editorial decisions on behalf of the platforms and in service of their users' interests that the First Amendment protects. That said, I think there is space for regulating the platforms, particularly when it comes to things like transparency and privacy and interoperability, and maybe even in some instances direct regulation of their content moderation decisions. So that's how I see the stakes of the case. Maybe worth pointing out that the parties have litigated the case in diametrically opposed ways. The states say the First Amendment is irrelevant to the consideration of these laws, and the platforms say the First Amendment is essentially an asupral barrier to any regulation. And I think that dichotomy is wrong. And so I imagine that maybe we'll all agree on that here, but where in between is, I suppose, the fight.

[00:04:54.9] Jeffrey Rosen: Larry, your brief in support of the respondents is very powerful and suggests that the stakes are quite high. You say non-discrimination laws applied to private industries are essential features of state police power over the past 140 years. And in a part of your brief called out in oral argument, you say that a ruling for NetChoice could render dozens of efforts to regulate child social media unconstitutional and create a major barrier for regulating AI. Tell us about these important arguments.

[00:05:23.4] Larry Lessig: Well, I think that the core difference in how you could view this sort of law or any law regulating in the context of online technology is whether algorithms deserve the same protection as editorial judgments by editors on a newspaper. I think there's two important issues. I think Alex has rightly framed whether we're going to call this a must carry provision or a discrimination provision. Let's put that to one side for a second. The other distinction that's important is that NetChoice defends the freedom that they demand the First Amendment afford them on the basis of the editorial judgments that they say these platforms are engaged in. And I think it's important just to interrogate what we mean by editorial judgments. I think it's absolutely clear that newspapers or other things run by humans where humans are making a judgment about what speech is appropriate to associate with a platform or a publication.

[00:06:32.6] Larry Lessig: The New Republic wants to have an editorial by Jeff Rosen, but not one by Larry Lessig. That is the core protection the First Amendment ought to afford. But if we say that every time an algorithm makes a decision whether content is promoted or suppressed, that is First Amendment editorial judgment, we have decided that the internet can't be regulated. We've decided that the future of the internet is just whatever these technology platforms want it to be. And that's the critical framing issue that we've gotta get clear on if we're going to understand how we should be developing doctrine in this context. We insisted in our brief that it's better to liken this to the kind of regulations that typically applied in the context of malls, if we remember malls from the old days where the malls would make their space open to the public to come in and buy and sell.

[00:07:31.6] Larry Lessig: And they would also say you could have stands where you could promote certain ideas, and states would say those stands would have to be regulated by neutral principles. You couldn't say Republicans are allowed, but Democrats are not, or vice versa, and those laws in a case called PruneYard were upheld as traditional non-discrimination principles that assure that we have open access to these public spaces, that's the better analogy I think, for thinking about this type of activity rather than imagining, we're thinking about the New York Times editorial board deciding whether my tweet goes up or your tweet goes up.

[00:08:10.2] Jeffrey Rosen: Alex, Larry's brief calls out your argument and your brief. The Knight Institute argues that content moderation decisions are protected by the First Amendment 'cause they reflect the exercise of editorial judgment, but existing regulated utilities could argue new technologies allow them to amplify speech, and that's why utility non-discrimination rules are needed, tell us about why you think it's right that content moderation decisions are protected by the First Amendment and this is less like a shopping mall and more like a broadcast network.

[00:08:46.3] Alex Abdo: Well, I suppose I fit somewhere in between those two extremes. I certainly don't think they're identical to newspapers or traditional news media, nor do I think that the social media platforms anyway are like malls. I think platforms exercise judgment about the kind of speech and the kind of expressive communities they want to foster. And it's true they implement those decisions in a variety of ways, including through algorithmic ranking and also algorithmic identification of content that violates their policies, the fact that they do so algorithmically to my mind is relevant to the relationship they have to the speech on their

platforms, because they do certainly have an attenuated relationship to the speech on their platforms, but nonetheless, I think the decisions they make reflect expressive considerations that the First Amendment ought to protect, even if not to the same extent that might protect analogous or potentially analogous decisions made by the newspapers.

[00:09:52.5] Alex Abdo: But I'm sympathetic to the idea, to the concern that allowing platforms to have that control might result in a public sphere that is fragmented in many ways with some people, and some ideas simply kept out and also distorted in the economic interests of the platforms. To my mind, those concerns would best be addressed through competition policy, 'cause I think the reason why we ought to be so concerned about the platforms exercising that control is because there are so few of them doing so. I think it'd be far better if there were many more, much smaller platforms whose services inter-operated in a way that allowed people to join the communities that they wanted, without having to give up their ability to connect with people who were on different services. And just to give you a concrete example of why I think it matters that platforms be able to design the communities that they're choosing, it should be constitutionally permissible for a platform to decide, notwithstanding Texas's wish to the contrary, to set up a site that is meant for Christians only, or for Jews only, or for Muslims only.

[00:11:07.7] Alex Abdo: And to decide on the expressive character of the community that they want to set up, and while I don't think those decisions at the scale that the current platforms are operating again, is quite the same as what we're used to with traditional media. It does reflect the kind of decision that I think the First Amendment ought to protect. I think there is though a middle ground between the brief that we submitted and the brief that Professor Lessig and professors Teachout and Wu submitted because the platforms offer multiple services to the public. Take Facebook, one is the newsfeed, which is the algorithmically sorted core of the platform. That's what you see when you first log on. That's where Facebook most directly engages in the kind of content moderation that we're talking about.

[00:12:02.3] Alex Abdo: They also offer the service of constructing and maintaining a social graph, which is literally a list of people who are users on the platform. The connections between those people and the data that flow across those connections, I think it might very well be constitutional for Congress to require the platforms to open up their social graphs to everyone, to all comers, to require them to give an account to everyone, even if the platforms maintain a First Amendment right to decide which views and which people show up in the curated newsfeed, and this is an argument that's similar in many ways to one that Professor Eugene Volokh has made in an article where he distinguished between curating and mere hosting. And maybe that's the bridge between our arguments. I'd be curious to hear if Professor Lessig has any reactions to that possibility.

[00:12:57.6] Jeffrey Rosen: Larry, thoughts on that possibility? And then thoughts about the court's reception to your argument that the case is controlled by the PruneYard case. Just to remind listeners, that was a case of high school students who wanted to oppose a UN resolution against Zionism. They put a petition in a shopping mall, and the court held that the California constitution's protection for speech and petitioning even on privately owned shopping centers was within California's power, because it didn't unreasonably intrude on the rights of property

owners, several justices took up the point, including Justice Kavanaugh. How did your argument fare in the court?

[00:13:36.5] Larry Lessig: Well, let me first of all take up Alex's invitation, 'cause I think it's a helpful and constructive bridge between our positions. I think what drove our argument was actually how Facebook and Twitter and these other platforms are right now. They opened themselves up and insist they are platforms for anybody to comment, to speak, and in that context, I don't think it's appropriate to analogize the platform to a Christian website, if a Christian website wants to set itself up as the Christian website and say, "We're going to have Christian conversations here on this website." I don't think it's appropriate for the state to come in and say, "No, you have to have Jewish conversations on their website." Just like if a church opens itself up to the public and says, "We invite people in to come to worship." It would be perfectly appropriate for them to say, "I'm sorry, if Devil Worshiper, you're not allowed to be in our church during the time that we are worshipping Jesus Christ."

[00:14:36.0] Larry Lessig: That's the character of the site. And the point about Facebook or Twitter I refuse to call it any other name, the point about those sites is that they define themselves as open public spaces where anybody can come and say what they want, which means that when somebody goes onto Twitter and says something crazy, I don't think that it's Elon Musk that's saying that. I think it's the crazy person who just tweeted something that's saying that, as opposed to if the New York Times publishes something, I think the New York Times is responsible for what they publish. They make a judgment and it's associated with them, and it's their brand which is being affected, and that's why it's important to protect the First Amendment interest in the context of New York Times, and not in the context of PruneYard, and not in the context of Facebook or Twitter.

[00:15:40.3] Larry Lessig: As to how the court reception is, Jeff I think I just am too skeptical and too burned by my misunderstanding of what the court is actually thinking as the court as you see them answering and asking questions, Kavanaugh's intervention, I think, was quite significant. Not surprising, but I really am eager to see how they talk it through when they sit down at conference and actually try to wrestle with what's at stake here. I hope they hear a point that it doesn't seem Alex is disagreeing with. The importance of recognizing we have to preserve the sovereign ability of the states and federal government to regulate in this digital environment, because so much of our life is in this digital environment. And if we have no capacity because of the strictures of the First Amendment to do anything significant in this context, then we've basically decided that private corporations have the right to regulate us unconstrained by the state.

[00:16:43.6] Larry Lessig: That's why Texas referred to our brief and said that Lessig, Wu, and Teachout have written it on our side. It's not typical that they write to support Texas. That's true we don't typically write to support Texas. But just before that, he made what I think is the really important point. If you say that anytime you attempt to regulate what is in effect an algorithm, you trigger the First Amendment that is *Lochner* On Steroids. People listening to this podcast,

I'm sure will know what *Lochner* is, but *Lochner* refers to this period in American constitutional history, which both sides left and right agree was a terrible mistake in the evolution of American constitutional doctrine, where the courts forced ordinary regulation through an extremely heavy set of requirements to be upheld.

[00:17:36.0] Larry Lessig: And the consequence of that is to shift enormous power, both to the judges and to the private industries that get to basically construct the world that they want without any effective regulation by the state, that's a disaster in the context of the internet, and it's not just in the context of neutrality laws on Facebook. It's going to be the wide range of areas where you already see NetChoice raising this issue in the context of privacy regulations. In California, when we start seeing efforts to regulate AI, the same issue is going to be raised. We have to be able to regulate in this space. And the mere analogy between what an algorithm does and what the editors at the New York Times do is not enough to establish that James Madison meant this to be off the regulatory table.

[00:18:20.5] Jeffrey Rosen: Alex, I'm going to remind listeners what Justice Kavanaugh said. He said on the editorial control point, you really want to fight the idea that editorial control is the same thing as speech itself. You've emphasized PruneYard, but we have a whole other line of cases like *Hurley* and *Tornillo* and so forth, which emphasize editorial control as being fundamentally protected by the First Amendment.

[00:18:40.0] Jeffrey Rosen: Alex, what did you make of Justice Kavanaugh's suggestion that PruneYard might not apply because this is a case about editorial control and not non-discrimination. And then did you hear any sympathy on the court to Larry's argument that ruling against Texas and Florida would be *Lochner* On Steroids? And I'll just close this question by noting that Justice Kagan, a few terms ago, had worried about First Amendment *Lochnerism*. Might she and other justices be sympathetic to Larry's argument?

[00:19:06.0] Alex Abdo: I don't think anybody on the state side was counting on Justice Kavanaugh's vote. At least if you read the tea leaves from his time on the DC circuit when he expressed a lot of skepticism of, if not ruled against the constitutionality of net neutrality laws, and hard to see how a justice who is skeptical of the constitutionality of net neutrality laws would view Texas' and Florida's laws as potentially constitutional. So I don't think that was ever the path to five for Texas and Florida. I think there was some concern among a number of the justices about the concentration of power that these platforms exercise over speech because they do have a lot of power, they do get to decide what views will spread. Not the most important maybe, and certainly not the only important form for discourse, but one of the most important forms for public discourse today.

[00:20:20.0] Alex Abdo: I think Justice Kagan expressed some sympathy. Certainly Justice Jackson did, justices Alito and Gorsuch did. But how exactly they rule, I mean, I absolutely agree with what Professor Lessig said earlier. It's very hard to predict how they're going to come out based on what they said at argument. And I would love to be a fly on the wall during their internal conference to see what is really going to motivate their decisions. But it wouldn't surprise me if the court tries to rule very narrowly at the beginning of the argument, it felt a little

bit like the argument last term in the Gonzalez case when the court took this case on Section 230 which is a law that immunizes the platforms for the speech of their users. And people thought that the court was going to use the Gonzalez case as a referendum on the broad scope of Section 230 immunity, which many people had been complaining about, but became immediately apparent at argument that the court had buyer's remorse.

[00:21:03.0] Alex Abdo: And you got a sense of that from the very beginning of the first argument in the net choice cases. But I think by around the time that Paul Clement took the podium in representing the states, in representing netchoice. It seemed as though a majority of the court seemed likely to rule on the merits, even if narrowly, but I'd be surprised if they ruled very broadly in favor of netchoice. I think they'll rule narrowly because I think a lot of them do have the concern that Professor Lessig is articulating, which I agree with that it can't be that the most important forums for our democracy today are out of the reach of democratic accountability that wouldn't serve First Amendment values well, it wouldn't serve our democracy well.

[00:21:55.0] Alex Abdo: And it wouldn't serve people well in engaging in discourse and getting their news. I think the difference between people who have that concern is mostly about what we view as the right approach to solving, to addressing that concern. To my mind the right approach it's just to diversify the speech environment to make it so that we no longer have such a small number of gatekeepers. I do understand the instinct that Professor Lessig that to instead turn the gatekeepers we have into custodians of a public trust. I understand that instinct too. If it turned out that the platforms were in fact immune as a practical matter from the kind of regulation that I want to see, which would open them up to interoperability and competition, if it turned out that they were immune to that and, we're always going to exercise monopoly power effectively, or near monopoly power over public discourse, then I would be very sympathetic to the constitutionality of a law like Texas', which forbids censorship on the basis of viewpoint on these platforms.

[00:23:06.9] Alex Abdo: I'm not there in my own thinking and don't think we've shown as a society that we can't yet pass narrower laws that open these platforms up. But maybe I'm being naïve.

[00:23:18.8] Jeffrey Rosen: Larry, your brief in support of the respondents says that you think it's an extremely important case, like your passionate advocacy of net neutrality. You think it's urgently important to preserve the ability to have non-discrimination rules. Tell us why you think the proposed net choice trigger of editorial judgment is misplaced and why a ruling for net choice based on editorial judgment would sweep very broadly implicating, nascent AI regulation, anti-monopoly laws and social media laws?

[00:23:50.3] Larry Lessig: Yeah, so let me introduce that. The answer to that question though, by again, building a little bit on what Alex said. We might have the same preference that we have many more platforms and it's through competition that we achieve the type of balance that a healthy speech environment requires. But we don't have any confidence or I don't have any confidence that the economics of platforms will produce that. So rather than shut off one

regulatory response because the First Amendment is now placed it off the table, I think we should have a full range of regulatory responses available to make sure that we can assure democratic accountability in the context of these crucial speech environments. Now it would be shut off. We would be shutting off an important regulatory response if we saw these as editorial judgments.

[00:24:51.1] Larry Lessig: When anybody who thinks about the technology here recognizes that to call this a "editorial judgment" is to make an extraordinary leap of analogical reasoning, right? It is editorial judgment in just the sense that there is some entity of intelligence that's choosing one thing over another, but the entity of intelligence that's choosing one thing or another has nothing to do with the traditional entities that we protect when we protect free speech. It's not a human that's making that judgment. It's not a person that has a political view or is advancing some ideological agenda. It's an algorithm responding to a program set of objective functions like maximize engagement or minimize exposure of the following kinds of content. And I'm not saying that therefore those kinds of judgments deserve no protection. I don't think the government can make a viewpoint based regulation about those algorithms and how they function.

[00:25:57.5] Larry Lessig: But I do think we should pause before we extend to these machines, the same kind of dignity and respect that we extend to other humans through a protection of the First Amendment. I wrote a piece a year ago called First Amendment Does Not Protect Replicants. And the intuition here is that it's easy to begin to see First Amendment protection, draw down the line of these increasingly intelligent AI like technologies, but at some point we need to draw a line and say, the presumptive unregulability of certain kinds of speech acts is fine when we're talking about human judgments that we hold someone responsible for, as distinct from judgments that are being made by entities, which none of us yet are willing to call humans. Now, you might call me a speciesist for that, but I'll admit I'm a speciesist. I think the First Amendment extends to humans. That's where it reaches. And if we want to extend it to robots, let's wait 'till we give them the vote and they can vote to extend the protection to them.

[00:27:04.2 Jeffrey Rosen: That's such a powerful suggestion that the First Amendment extends to humans, and it captures the idea that the First Amendment protects the exercise of reason and machines cannot exercise reason. And that was the core meaning of freedom of conscience that is enshrined in the First Amendment. And that supports your distinction of editorial judgments from non-discrimination rules. And you say that unlike newspapers, social media platforms hold themselves out as open spaces of public discourse for any user to express themselves. Alex, what's your response to Larry's distinction between editorial judgment and non-discrimination and his claim That the First Amendment extends to reasoning human beings and not machines.

[00:27:48.2] Alex Abdo: I agree that the First Amendment extends to humans. I think the difference between us is, and how we understand what the platforms are doing and what the role is of humans. It is human judgment that goes into Facebook's decision, for example, to forbid vaccine disinformation on its site, or to forbid disinformation about the 2020 election, or to

forbid hate speech or to forbid all sorts of different kinds of speech that they don't want on their platforms. Now, they affect that human preference through the use of algorithms, but the fact that they're using algorithms does not, to my mind, eliminate the expressive character of the decision that they've made in the first instance. I don't think it adds to it either. I don't think their use of algorithms somehow makes it more constitutionally protected. It just doesn't eliminate, to my mind the constitutional protection for the underlying expressive choices being made.

[00:28:47.8] Alex Abdo: I will also say that I tend to care a whole lot more about Facebook's users than the expressive interests of Facebook's users than the expressive interests of Facebook itself. I think a reason why it matters, I want you to know, the main reason to my mind why it matters that we recognize that the decision to exclude, say, vaccine disinformation is an expressive one, is because Facebook has made that decision in response to its user's interests, generally expressed through market pressure, through their decision to use the platform or not. And it matters that people want to live in digital environments that they like they don't want to inhabit a digital environment that is a cesspool of hate and intolerance and disinformation. They want their curated newsfeed to reflect their own values.

[00:29:47.1] Alex Abdo: And I think it's consistent with, in service of the First Amendment, to allow people to have the choice to have curated news feeds that support their expressive preferences. And that's why I might draw a distinction like I did before, between how the First Amendment relates to the newsfeed and how the First Amendment relates to the underlying social graph or the underlying service of hosting. And I think you might be able to draw a distinction between those constitutionally that maybe accomplishes the goal of opening up the platforms in some general sense to everyone without forcing the platforms to turn their curated feeds into environments that their users don't actually want to inhabit. That's how I view the conflict of interests here and how I would, I think, reconcile them.

[00:30:48.5] Jeffrey Rosen: Larry, any responses to that observation? And then tell us more about your claim that neutral non-discrimination laws are an essential feature of the state's police power. You talk about how in the 19th and 20th Century Farmers Alliance and Grangers pressed for non-discrimination laws, and you say for that reason, neutral non-discrimination laws are crucially different than right to apply or must carry laws.

[00:31:17.1] Larry Lessig: Right Well, of course, the preference which Alex describes that the platform wants to feed stuff that the people on the platform want to hear, and we're just giving them the ability to choose the world view that they want to hear equally could have been raised in the context of Skokie. When Skokie was forced to allow Nazis to march through the town, Skokie a town filled with Jews, many of whom suffered the consequences of the Holocaust.

[00:31:43.6] Larry Lessig: They said, we don't want to live in a world where we have to confront that kind of speech. And the response was, well, that's the First Amendment. And similarly here, I think what the non-discrimination rule is trying to say is, we actually in certain contexts, and this is critical because it I think, finds a ground for us to have an agreement because not all contexts, just certain context, the state should have the ability to say, we want the speech in this environment to be the full range of speech, not the daily me that you've edited and

selected to be just exactly what you want. Now, we could have arguments about whether the particular way in which that objective was advanced through these laws was good or not. I said, I wouldn't have supported this law. I don't like the law.

[00:32:32.9] Larry Lessig: I think it stupid in all sorts of ways, but we need to shift away from believing that every stupid law is therefore unconstitutional. Because what that does is weaken the capacity for reflective and decent interventions that can advance important interests, including democratic interest of assuring that people have an understanding of a wider range of views than they have right now. Polarization is the effective construction of radically different worldviews because the people in those worldviews want that exclusion of alternative views in that space. And so I think the state's ability to try to intervene to do something about that is an essential power to support and more generally to respond directly, Jeff, to your question about neutrality regulation, we have seen historically that market power or monopoly power often flows or historically has maybe practically always flowed from the ability of dominant players to discriminate in the service which they are providing.

[00:33:32.6] Larry Lessig: One of the most important unrecognized decisions in the history of the internet was when the Clinton administration relaxed the non-discrimination rule that applied in telecommunication's context, permitting these services to develop that are based essentially on discrimination, Amazon price discriminates all over the place, both in to producers and to consumers. Google advertising has price discrimination built into the auction structure. All of those are good for the producer to capture all of the consumer surplus, but it's not necessarily good for producing competitive vibrant platforms where we don't create enormous power on one side that can't be effectively resisted either by government or by the people. So the structure of discrimination regulations is an effort to assure, to protect against the concentrations of power. I know, Jeff, you're writing and your history with Brandeis, will recognize many of these techniques that are being deployed for the purpose of assuring democratic society with small d that means basically none have enormous power concentrated or affected through structures which the market allows them to deploy.

[00:35:14.0] Larry Lessig: Non-discrimination is the most effective technique historically for assuring that doesn't occur.

[00:35:26.3] Jeffrey Rosen: It's so important to remember Brandeis's warnings against the curse of bigness, Alex Abdo do you believe that all non-discrimination provisions designed to fight that curse are impermissible, or would you evaluate more contextually and tell us about your argument to distinguish, Texas and Florida laws both includes in individualized explanation requirement that demand social media companies give an explanation for every post they remove. Florida goes further and gives users a private cause of action. According to your brief, the court should strike down that part of the Florida law while upholding the Texas one. Tell us more about that distinction.

[00:35:58.3] Alex Abdo: Yeah, so on the first question, I think context matters in analyzing non-discrimination laws, even as applied to the platforms. And I think you saw some of the concerns about this in the questions from the justices during the oral argument, where some of them were

wondering about the constitutionality of more traditional non-discrimination laws. Laws that forbade the platforms from discriminating on the basis of race gender, national origin, religion, et cetera, in deciding which users to allow on their sites. My instinct is that those laws would very likely be constitutional, because I don't think the expressive interest of the platforms and here in the race, gender, religion, etcetera, of their users, but instead in the viewpoints that they're allowing their users to engage in. But I do want to just respond to what I think is the very powerful point they made by Professor Lessig about desiring a world in which, or a public sphere in which people are forced to confront the views that they don't like.

[00:37:06.5] Alex Abdo: I absolutely agree with that, and I would treat the platforms like the sidewalks in Skokie, Illinois for following the analogy. If the platforms were, again, like I said earlier, unbreakable monopolies, if their control over the public square, the digital public square, were durable in the way that Skokie's is over its sidewalks.

[00:37:38.0] Alex Abdo: I think I would support laws of the sort that Professor Lessig thinks are constitutional, or I think they're constitutional. One of the important differences, though, between platforms and sidewalks is that platforms are always going to have to have a curated feed for users to find them useful. There are just too many posts made per day, per hour, per second on these platforms for them to be useful without some kind of sorting of the feed, whatever their conception of the feed is.

[00:38:13.5] Jeffrey Rosen: I don't know what a viewpoint neutrality law like Texas' looks like when you have a feed that requires some selection going on. And if you have to have some selection going on, then I think the better answer from a First Amendment perspective is to let 1000 flowers blossom, to allow people to have choice in what kind of selectivity they want to see reflected in their curated social media feeds, rather than to, I think, reinforce the dominance of these platforms by essentially eliminating one of the main ways in which other services could compete with them, which would be through the kinds of algorithmic sorting and filtering they engage in.

[00:39:02.9] Alex Abdo: Let me turn to your second question, though, which was about the transparency provisions in the law. So the laws have a lot of different transparency provisions. The Supreme Court accepted review just of what it called the individual explanation provisions of the law. And they're a little bit different. Florida law requires a thorough rationale explaining every decision to suppress speech. And it defines suppress very broadly to include not just deleting a post or an account, but deprioritizing a post or account. That would impose a pretty enormous burden because the platforms do that all the time. Every single decision to put a post in the second spot in a news feed is a decision to deprioritize it from the top. And explaining every single one of those decisions with a thorough rationale just, to me, seems entirely unworkable and would make it impossible for the platforms to operate.

[00:39:56.0] Alex Abdo: Texas' law is quite different. It requires an individual explanation for every decision to take down a post or to cancel an account. And my understanding is that that could be complied with in a relatively straightforward way using the same algorithms that are

enforcing the platform's content moderation policies. They could identify which provision of the terms of service the platforms decided to delete the post or account on account of. That kind of transparency requirement, I think, is likely constitutional because I think it would survive what I think of as the applicable standard of constitutional review for commercial transparency laws, which is very different than the one that NetChoice thinks applies to those kinds of laws.

[00:40:40.6] Alex Abdo: The standard that I think applies in that context comes from a Supreme Court case called *Zauderer*, which was about commercial transparency. And the key insight of that case was to recognize that consumers benefit from more speech about the products that they're using. And so it is constitutional for legislatures to force companies to give their consumers more information about those products so long as the laws are not unduly burdensome of speech.

[00:41:06.0] Alex Abdo: I think that is fundamentally the right standard. I think it's flexible enough to account for the relevant First Amendment interests, but there is a big debate within the First Amendment community about whether that's right or not.

[00:41:18.8] Jeffrey Rosen: Larry, what is your reaction to Alex's moderate argument? He says that both Florida and Texas must carry provisions that are unconstitutional because they override the platform's editorial judgment and fail even intermediate scrutiny. But he distinguishes between the Florida and Texas individualized explanation provisions says that Florida should be struck down, but the Texas one properly construed survives. What do you think?

[00:41:48.7] Larry Lessig: Yeah, I'm not sure I agree that the right way to think about these laws is as must carry laws. The traditional must carry context is the regulation, for example, cable television. And those laws would say, you must carry local broadcast television or certain other categories of speech to assure vibrancy of the broadcast community and whatever other economic interests you have. Those judgments inherently involve judgments of value. And that's what makes them problematic from a First Amendment perspective, because now you've got the government putting its thumb on the scale of certain content on the basis of its view of its value as opposed to others. And that's troubling. Non-discrimination rules don't require that. They just say, don't discriminate. Doesn't require them saying this category of speech is good and that category is bad. It's just saying, don't discriminate on them.

[00:42:45.4] Larry Lessig: I thought it was very interesting in Alex's response, and I'd love to kind of engage on this, that he said, look, if this were the only way, then maybe it would make sense to allow this kind of regulation. If we can only have these types of few dominant platforms. But rather, he would rather see a thousand flowers bloom. And I guess my question would be like, when do we know what's actually economically possible? I mean, the internet started with 10,000 flowers blooming and the business model of engagement and advertising had obvious network effects, wildly bigger network effects, even than in the operating system market that drove to this concentration.

[00:43:35.9] Larry Lessig: And so long as that's the business model, I'm just not sure I see how economically you can imagine going back to a world of 10 or 20 of these different types of platforms. And so if it's not plausible to imagine getting to a world of multiple competing

platforms and allowing competition to serve the function of assuring that kind of diversity that we want to assure exists, then why shouldn't we be able to let the other shoe drop and have the regulation that's necessary to assure the vibrant public space that isn't narrowed by the individual preferences of the bubble that they want to be occupying?

[00:44:19.6] Larry Lessig: Again, you could disagree with a particular way in which it's done. And I think the difference between Florida and Texas is a good place to express disagreement. But what we need here is more experimentation, not the constant fear of a First Amendment lawsuit and all the accompanying legal fees that would go with that.

[00:44:41.7] Jeffrey Rosen: Alex, your engagement on Larry's questioning about what the right metaphor is. And then in addition to distinguishing among the Texas and Florida laws at the oral argument, the justices also talked about whether we should think about this as editorial discretion, common carriers are in between. And then there were a couple other big focuses of inquiry, including the relevance of section 230 of the Communications Decency Act and the question of how public accommodation laws and the 303 creative case fit in. Maybe give us your guide to the big questions in the oral argument and how the court is thinking about the case.

[00:45:18.9] Alex Abdo: Yeah, so let me start on the first point. So Professor Lessig fairly asks, how do you know when we've tried enough to overcome the network effect that the platforms enjoy, which is the basis for their dominance? And I think we would know if we had made any kind of legislative effort to go after the network effect. What I would like to see is legislation directly designed to go after the network, the beneficial effect that the platforms get from users having more value in being on platforms that their friends use.

[00:45:51.5] Alex Abdo: I think there are a lot of ways you could do that. A lot of people have proposed interoperability, which I think would directly go after the network effect. Another possibility, maybe this is just a way of implementing interoperability, is to do something that some people have called unbundling, to pass regulation that would forcibly disentangle the underlying social graph that the platforms construct to allow their users to engage from the various services that the platforms offer on top of the social graph.

[00:46:26.0] Alex Abdo: So again, going back to Facebook, the two main services Facebook offers are the newsfeed, which is its curated version of all the different data that its users are exchanging, posts, advertisements, etcetera, and the underlying list of users and their contacts. And one possibility would be to have a compelled licensing scheme that would require Facebook to open up its social graph to any competitor that wanted to build services for Facebook's users on top of that exact same social graph. And those competing services could sell advertisements on their versions of the newsfeed. There could be the NPR newsfeed that is built on top of the same social graph, the Fox newsfeed, there could be the National Constitution Center newsfeed, which would probably be mine. You could have a lot of different services offered on top of that same social graph. And I think you would then separate what has been sticky about these platforms, which is people want to be where everyone else is, from the services that the platforms can offer on top of that sticky infrastructure.

[00:47:32.7] Alex Abdo: I don't know whether that would work. I think it would be technically challenging. I think it'd be very difficult to pass that kind of law without also passing a privacy law, because there are real privacy implications to opening up the underlying social graph to a compelled licensing scheme, or really any kind of interoperability requirement.

[00:47:54.3] Alex Abdo: And there may also be economic challenges. Maybe it wouldn't, in fact, allow the kinds of competitors I'm hoping it would. And so maybe there are all sorts of reasons why that wouldn't work, but we haven't yet tried it. I would love to see a state experiment with that kind of law. Now, maybe a state couldn't, maybe there would be dormant commerce clause problems or federal preemption problems with a state passing that kind of a law. I don't know, but I would love to see that kind of experimentation.

[00:48:26.2] Alex Abdo: Professor Lessig knows a whole lot more than I do about what the underlying technical challenges of that kind of law would be, and certainly the underlying, maybe intellectual privacy challenges of that kind of approach. I'd love to hear if that idea is a non-starter, but I would love to see that kind of experimentation. And if it turned out that we could not, if it turned out that we could not break up the network effect, then we're stuck with a handful of dominant platforms. And I think we should make sure that we have a First Amendment that accounts for that possibility and would be more sympathetic to Texas' style of regulation in the event that we can't break up the dominance of the platforms.

[00:49:03.7] Jeffrey Rosen: Larry, responses on this crucial point, and then maybe both of you could bring the discussion back to the court and how you heard the justices dividing.

[00:49:17.4] Larry Lessig: Yeah, so it's a very clever and interesting idea. And I'm in general in favor of regulatory strategies that force unbundling in the context of dominant players. That's of course what gave us the internet when AT&T was forced into a similar kind of structure of unbundling. The anxiety I have about it in the context of social media is that I fear it might just exacerbate the incentives that already have made it such a poisonous environment. So imagine you start unbundling and NPR can have its feed and Fox News can have its feed and the National Constitution Center can have its feed. And it turns out the National Constitution Center's feed is not as addictive as Fox News' feed is. Now National Constitution Center could then just like hire somebody and say like, how do we make this more addictive? And they could start figuring out what contents would be more passionate or more angry or whatever to drive engagement to make sure that the engagement is as high as it needs to be to pay the very high licensing fee that they've got to pay to Facebook to be able to have access to that social graph. So the point is that if we are worried as I think we should be worried, the social media is producing bubble culture where we have deep rabbit hole crazies on 50 dimensions of social life. I am not convinced that this solution wouldn't exacerbate that problem rather than dampening that problem.

[00:50:56.0] Larry Lessig: I'm also of the view that the Texas solution which is saying, let's kinda turn off a certain dimension of discrimination is resisted number one, because I think that the platforms fear it will turn down engagement. If I've got to listen to a whole bunch of stuff I don't want to listen to, I'm not going to be engaged as much. But that might actually have the

consequence of neutralizing or negating the polarizing effect of these platforms. Because what we know about polarization psychology is that I just need to know there's another side to the argument in order to be more open. I don't have to agree with the other side. I just have to actually see that there's something else out there. And so I'm not sure that's the right solution, but I'm more confident that producing environments where we're exposed to a wider range of content is more likely to address the polarization problem than one where we're able to drill down and double down on the ability to build bubbles.

[00:52:00.2] Jeffrey Rosen: Superb. Well, it's time for closing thoughts in this great discussion. And to bring it back to the court, Alex, as you imagine how the justices might rule, tell us what a broad and a narrow ruling might look like and what the implications would be.

[00:52:21.1] Alex Abdo: Well, the broadest ruling in favor of the states would be one that held that the First Amendment has little, if anything, to say about government efforts to dictate who must be on these platforms or who can be kept off these platforms or what kinds of decisions the platforms can make about the kinds of speech and viewpoints they want to allow. And I worry about that kind of a ruling because I think that would replace the centralized power that the platforms exercise over the speech that takes place on their sites with the centralized power being exercised by the government. A broad ruling in favor of the platforms would make it virtually impossible for democratically elected legislatures to pass laws designed to improve public discourse or to safeguard the important role that public discourse plays in underwriting our democracy.

[00:53:30.8] Jeffrey Rosen: And I worry about that because I entirely agree with Professor Lessig that we can't have a First Amendment that makes the internet off limits, that insulates it entirely from democratic oversight and accountability. And so what I would much prefer to see is a First Amendment that recognizes that the First Amendment is implicated by regulations of the content moderation decisions of the platforms, but is flexible enough to allow for thoughtful and carefully drafted laws designed to protect democracy from the kinds of dominance that we've seen in the social media market. I have no idea whether that's the direction in which the Supreme Court is going, but I will say that I left the oral argument or turned off my stream of the oral argument, feeling at least a little bit encouraged that the court was more thoughtfully engaging with the questions than I worried that they might be. The details will matter. Of course, we have to wait to see what the decision says, but I'm at least for the moment more hopeful than I was in advance of the argument.

[00:54:43.0] Jeffrey Rosen: Thank you so much. Larry, last word in this wonderful discussion. To you, what would a broad and a narrow ruling look like? What did you hear before the court and what might the implications be?

[00:54:54.9] Larry Lessig: Well, I think that I would hope that the broad ruling that Alex described, where the court said the First Amendment didn't have much to say about regulations of content moderation, would at least cabin that First Amendment free zone by pointing to the character of the kind of platforms we're talking about here. It certainly shouldn't be the case that the New Republic or Reason Magazine needs to worry about this kind of regulation, even though

I think it's perfectly appropriate for the public sphere of shopping malls or Facebook to be subject to this regulation. So I actually think that would be a fine conclusion and I would resist the throwaway line Alex had in characterizing that when he said, that's just shifting the power from the private actors to the government. It's not quite the same power in the hands of the government as in the hands of the private actor. And the private actor, it's the ability to steer the conversation one way or the other. It's the ability to make the world view Palestine one way or Israel one way. And the public has no conception of the other because the platform has been steered like that. What's being recognized as the government power is simply the ability to say you have to be neutral. That's not steering the conversation one way or the other. That's just making sure that the conversation in some sense reflects the contributions of those that are in the conversation.

[00:56:30.7] Larry Lessig: I'm not hopeful the court gets the right answer. I think that's the right answer. I'm not hopeful the court gets the right answer. That's just my general pessimism about the court. But I do agree with Alex that I think the whole series of arguments this term have been extraordinary demonstrations of the court at its best. I'm not sure that the opinions are the best, but I have been enormously impressed with the seriousness and care and respect that the justices are showing each other as they grapple with these questions. And maybe they're doing that because they feel the pressure of an institution that is increasingly met with skepticism in the general public. But I think it does deliver a sense of, okay, whether I agree with you or not, at least I feel like you've engaged in the right way.

[00:57:23.7] Larry Lessig: And I do also want to say, I'm always anxious and skeptical about getting on conversations like this. And even though Jeff Rosen, I can never say no to Jeff Rosen, I was especially skeptical and fearful about this conversation here because it's easy to be very extreme in talking about this subject. And in particular, in talking about our brief as the internet will demonstrate. But Alex, I've been enormously grateful for your incredible care and sophistication and subtlety in thinking through the issues.

[00:57:58.1] Larry Lessig: And I think we need more conversations where the objective is as you were demonstrating to find bridges and understanding as opposed to ways to vilify and to separate. So I'm grateful to you for that.

[00:58:10.5] Alex Abdo: That's so kind of you to say.

[00:58:14.7] Jeffrey Rosen: Care, sophistication and subtlety and building bridges. That's exactly what we're trying to achieve here. And it is an honor to convene both of you for this sophisticated and nuanced conversation about a crucially important issue. Thank you both so much, Larry Lessig and Alex Abdo for shining the light of reason on this crucial constitutional question. Larry, Alex, thanks so much for joining.

[00:58:38.2] Larry Lessig: Thanks, Jeff.

[00:58:38.4] Alex Abdo: Thanks for having us.

[00:58:44.2] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Bill Pollock and Samson Mostashari. It was engineered by Bill Pollock. Research was provided by Samson

Mostashari, Cooper Smith, and Yara Daraiseh. Friends, thank you so much for your notes and letters about the pursuit of happiness. I so appreciate it and am so honored when anyone asks to send a book plate. So please keep the notes coming, jrosen@constitutioncenter.org. And if you'd like a book plate for the pursuit of happiness, I would be honored to send one to you. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate, sign up for the newsletter at constitutioncenter.org/connect. And always remember that the National Constitution Center is a private nonprofit. Wonderful discussions like the one we just heard that I was honored to host, depend on the generosity of people from across the country who are inspired by our nonpartisan mission of constitutional education, illumination, and debate. Support the mission by becoming a member at constitutioncenter.org/membership or give a donation of any amount to support our work, including the podcast at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.