Wabash College Moot Court Competition
Fall 2023 Participant's Guide

Preliminary rounds of the Competition will be on Saturday, October 21. Participants should report to Baxter Hall at 8:30 A.M.; room assignments will be available outside of Baxter 101. The First Round will begin at 9:00 A.M., and the Second Round will begin at 11:00 A.M. Each two-member team will argue in two rounds, once for Petitioners and once for Respondents. **To participate in this competition, you must sign up on the Microsoft form at this QR code:**

If you have problems signing up, please contact Dr. Jeff Drury (druryj@wabash.edu).

I. THE PARTIES:

Party	*Name before Trial Court*	***Result in Trial Court***	*Name in the Court of Appeals*	***Result in the Court of Appeals***	*Name in the Supreme Court*
NETCHOICE LLC d.b.a. NetChoice	Plaintiff	**Won**	Plaintiff-Appellee	**Won**	Respondent
DON REDBEARD, ATTORNEY GENERAL, STATE OF RED, in his official capacity; COMMISSIONERS OF THE RED STATE ELECTIONS COMMISSION, in their official capacities (collectively "the State" or "Red State")	Defendants	**Lost**	Defendants - Appellants	**Lost**	Petitioners

II. THE PROBLEM:

A. The Red State legislature enacted Senate Bill 7072 to stop social medial platforms like Twitter, FaceBook, and YouTube from "censoring" users who "voice views contrary to" what Red State perceives as the platforms' "radical leftist narrative." To this end, S.B. 7072's "content-moderation" provisions—the focus of this litigation—prevent social media platforms from deplatforming (deleting posts from or banning) political candidates or journalistic enterprises; shadow banning (deprioritizing or eliminating exposure) to information about political candidates or from journalistic enterprises; or applying censorship, deplatforming, and shadow banning standards in an inconsistent manner.

One of the Petitioners, the Red State Elections Commission, may enforce the candidate-deplatforming provision via fines up to $250,000. The other Petitioner, the Attorney General of Red State, as well as private litigants may enforce the remaining provisions, yielding up to $100,000 in statutory damages per claim, actual damages, punitive damages, equitable relief, and, sometimes, attorneys' fees.

Respondent, NetChoice LLC, is a trade association representing social media companies like Facebook, Twitter, Google (YouTube's owner), and TikTok. NetChoice sued the Red State officials charged with enforcing S.B. 7072, seeking to enjoin enforcement of the content-moderation provisions because they violate the social media companies' right to free speech under the First Amendment. The district court preliminarily enjoined enforcement of all the content-moderation provisions.

The State appealed to the 14th Circuit, arguing S.B. 7072 doesn't violate the First Amendment because the platforms aren't engaged in protected speech. Rather, the State asserted that the Act merely requires platforms to "host" third parties' speech, which, it says, they may constitutionally be compelled to do under two Supreme Court decisions—*PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"). Alternatively, the State said, the Act doesn't trigger First Amendment scrutiny because it reflects the State's permissible decision to treat social media platforms like "common carriers."

NetChoice responded that platforms' content-moderation decisions – i.e., their decisions to remove or deprioritize posts or deplatform users, and thereby curate the material they disseminate – are "editorial judgments" the First Amendment protects under longstanding Supreme Court precedent, including *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986) ("*PG&E*"), *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner* "), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). NetChoice said the law fails any form of heightened scrutiny because there is no legitimate state interest in equalizing speech and because the law isn't narrowly tailored. NetChoice contended that a First Amendment violation is a quintessential irreparable injury for injunctive relief purposes.

The 14th Circuit agreed with Net Choice that S.B. 7072's content-moderation restrictions limit social media platforms' ability to exercise editorial judgment—to engage in speech within the meaning of the First Amendment—thereby triggering scrutiny under that Amendment. The Court applied intermediate scrutiny and determined that the State had failed to establish either that S.B. 7072's content-moderation provisions serve a substantial governmental interest, or that the provisions are narrowly tailored to further that interest. Accordingly, the 14th Circuit upheld the district court's injunction.

Petitioners now make the same arguments they made below, asking the U.S. Supreme Court to lift the injunction and allow them to enforce S.B. 7072. The Supreme Court has granted the petition for certiorari and set the case for oral argument.

B. The case is to be decided on the merits. The issue as stated in the petition for certiorari is:

1. When social media platforms curate the content they disseminate, do they engage in activity the First Amendment protects against state regulation?

2. Or do social media platforms lack First Amendment protection because they are hosts or "common carriers" whose conduct the government may freely regulate?

III. DIVISION OF THE ARGUMENT:

A. Petitioners (Officials of Red State): The Court of Appeals is wrong and should be reversed.

1. **First Petitioners' counsel:** The Court of Appeals relied on a line of this Court's cases—*Miami Herald*, *PG&E*, *Turner*, and *Hurley* – that they believe establish an "editorial-judgment principle" under which a private entity has a First Amendment right to control "whether, to what extent, and in what manner to disseminate third-party-created content to the public." They say this principle applies to the platforms' censorship of their users and renders S.B. 7072 unconstitutional. But the cases do not recognize this principle. Instead, each case explains how the challenged regulation either compelled or restricted the "editor's" own *speech*. In other words, these cases are better categorized as "compelled speech" cases because the rules examined there "interfere[d] with a speaker's desired message." *See FAIR*, 547 U.S. at 64. That feature is absent here. As second petitioner's counsel will discuss in more detail, all the platforms do is host the speech of others. See, *FAIR*. S.B. 7072's rules governing that hosting do not interfere with the platforms' own message because the platforms have no message. The platforms don't act like the newspaper editor in *Miami Herald* or the cable operator in *Turner* – they do not select which material they desire to "publish" beforehand. They just use algorithms to censor certain information from users' feeds after other users publish it – that is not "editing." S.B. 7072 does not implicate the First Amendment. The Court of Appeals not only erroneously concluded that S.B. 7072 triggers First Amendment scrutiny, but it also misapplied the scrutiny. Ensuring public access to a wide range of news from a wide range of sources is a substantial governmental interest. About half of all Americans get their news from the largest social media platforms. Political candidates and journalistic enterprises cannot disseminate information effectively if they are deplatformed. S.B. 7072 is also narrowly tailored. Contrary to the 14th Circuit's assertion, the Act would not force a platform to host pornography. The Act permits any content moderation federal law allows, and federal law allows platforms to remove "obscene, lewd, lascivious, [or] filthy" material, if they do so in "good faith."

2. **Second Petitioner's counsel:** S.B. 7072 requires platforms to host certain speech they might otherwise prefer not to host. But mandatory hosting regulates conduct, not speech, and therefore, "does not violate [the] freedom of speech." *FAIR*, 547 U.S. at 68; *see also PruneYard at* 88. S.B. 7072 is like the laws upheld in *PruneYard* and *FAIR*. Just as no one was likely to confuse the views of the handbillers for the views of the shopping center owner in *PruneYard*, there is little likelihood that the public will misattribute a user's speech to the platform. Also, as in *PruneYard*, S.B. 7072 does not require platforms to host any particular message; it requires platforms to host all candidates and journalists—regardless of message. And S.B. 7072 is less intrusive than the law upheld in *FAIR*. That law not only required law schools to allow military recruiters to interview on campus, but it also required the schools to send e-mails and post notices on the military's behalf just as they would do for any other employer. The same is not true of S.B. 7072's hosting regulations; they only require platforms to refrain from squelching user posts under limited circumstances. The Court of Appeals also erred in failing to recognize the platforms as common carriers. The platforms fall squarely within the historical scope of the common carrier doctrine which allows the government to impose nondiscrimination legislation upon businesses like railroads, utilities, telegraph, and telephone companies that are "affected with the public interest." The platforms (1) hold out their communications medium for the public to use on equal terms, and they (2) play a huge, and well understood social and economic role as facilitators of *other people's* speech. They are indispensable conduits for transporting information. It makes no sense to say that the platforms provide much of the key communications infrastructure on which the social and economic life of this Nation depends and yet conclude every communication transmitted through that infrastructure still implicates the

platforms' own speech for First Amendment purposes. S.B. 7072 does not violate the First Amendment. This Court should lift the injunction and allow Red State to enforce its law.

B. Respondents (NetChoice): The Court of Appeals opinion is right and should be affirmed.

1. **First Respondent's counsel:** The Court of Appeals correctly determined that S.B. 7270 violates the platforms' First Amendment rights. This Court's decisions in *Miami Herald*, *PG&E*, *Turner,* and *Hurley* establish that a private entity's decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are First-Amendment-protected editorial judgments. Social media platforms' content moderation—their curation of posts and users—constitutes the same sort of editorial judgment and thus triggers First Amendment scrutiny. These editorial decisions are also inherently expressive conduct; platforms use editorial judgment to convey some messages but not others and to cultivate different types of on-line communities that appeal to different users. Any reasonable person reviewing the platforms' content-modification activities would conclude that the platforms are attempting to convey "some sort of message." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (14th Cir. 2018). That the Red State legislators perceive bias in platforms' content-moderation decisions is compelling evidence that those decisions are expressive and demand First Amendment scrutiny. The Court of Appeals also correctly applied intermediate scrutiny. S.B. 7072's content-moderation restrictions do not further any substantial governmental interest. A state may not burden the speech of others to tilt public debate in a preferred direction – not even in the direction of a more level playing field. And even if the State could show that it has a substantial interest in ensuring a wide distribution of information from a wide range of candidates and sources, S.B. 7072 is not narrowly tailored so as to impose no greater burden on the platforms than is necessary to further that interest. To the contrary, the provisions are so broad that platforms would be prohibited from removing soft pornography or a video of a mass shooter's killing spree if an entity that qualifies for "journalistic enterprise" status reposted such materials.

2. **Second Respondent's counsel:** The Court of Appeals was right to reject both the State's hosting argument and its common carrier argument. This Court's hosting cases do not control here. *PruneYard* is inapposite because the shopping center owner did not argue that the hosting regulation at issue interfered with his own right to speak. FAIR, while a bit closer factually, doesn't control here because social media platforms warrant First Amendment protection on both of the grounds the Court held law school recruiting services didn't. S.B. 7072 interferes with social media platforms' own "speech" within the meaning of the First Amendment. The Solomon Amendment did not do the same to the law schools. And social media platforms are engaged in inherently expressive conduct of the sort the Court found lacking in *FAIR*. The State's common carrier argument is equally flawed. The Court of Appeals correctly determined the platforms are not currently common carriers. First, they have never acted like common carriers; they hold themselves open to all members of the public, but they require users, as preconditions of access, to accept their terms of service and abide by their community standards. Social media users, accordingly, are not freely able to transmit messages of their own design because platforms have always made individualized decisions about whether to publish particular messages or users. Second, this Court's precedent strongly suggests that social media platforms aren't common carriers. *See, Turner*. And finally, Congress has distinguished internet companies from common carriers in the Telecommunications Act of 1996 that explicitly differentiates "interactive computer services"—like social media platforms—from "common carriers or telecommunications services." To the extent Red State is arguing that they are free to designate the platforms as common carriers and regulate them as they choose, they cannot do so. Because, as the Court of Appeals found, social media platforms exercise—and have historically exercised—inherently expressive editorial judgment, they aren't common carriers, and a state law can't force them to act as such. The Act violates the platforms' First Amendment rights. This Court should uphold the injunction.

C. Special Note for Fall 2023: The problem has a strong majority opinion and a strong dissent, but they sometimes talk past each other. The majority opinion spends more time on the "editorial discretion" argument, and the dissent focuses more closely on the "common carrier" argument. Both opinions focus on the *FAIR* case; all four litigants need to be able to talk about it. There is enough information in the case to make four strong arguments, but you need to study the entire problem to find all of it. Please read the whole problem, including footnotes, at least once before you try to formulate any arguments. Then read it again.

IV. OUTSIDE RESEARCH:

A. *Outside research is NOT required. It is entirely optional.* Time is much better spent on understanding and refining the arguments presented than on doing outside research. Suppress, if you can, the desire to find the "gotcha" or killer authority, statistic, or quotation. There's plenty of "ammunition" for the arguments in the two opinions you have.

B. The problem is based on *NetChoice LLC v. Moody*, 34 F.4th 1196 (11th Cir. 2022) (ruled for NetChoice) and *NetChoice LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (ruled for the State). On September 29, 2023, the U.S. Supreme Court granted certiorari on two issues that arise in both cases, including the issue at the center of our problem. The Court is expected to hear a combined argument oral argument in early 2024.

V. ORAL ARGUMENT PROCEDURE:

- You will argue before a panel of three judges, usually made up of a mixture of practicing attorneys, professors, and judges who have had moot court, trial, and appellate experience.

- Contain your argument in a manila folder or a nice folder/padfolio. It is NOT a crutch. DO NOT READ FROM IT VERBATIM. Use it for reference and to keep your place in your argument. Your folder should contain relevant facts, summaries of legal authorities or concepts, and other pertinent information.

- When you enter the room, put your name and the side you will be arguing on the blackboard. If you are in a "courtroom" without a blackboard, the judges will ask your name and the respective side you are arguing and will write it on their evaluation sheets.

- The Petitioners (here the Red State officials referred to as the State) always argue first. When the judges ask if you are ready to proceed, respond "Yes, Your Honor."

- The introduction both sides should use is "May it please the Court. My name is _____, and I represent _____, the [Petitioners or Respondents] in this appeal." The Petitioners are allowed rebuttal and MUST reserve rebuttal time. Unless a judge asks you prior to the start of the round, you ask for rebuttal immediately after your introduction: "At this time, I would like to reserve (1 to 3) minutes of my time for rebuttal." That time will be deducted from the ten minutes of your first speech.

- You will be timed by one of the three (3) judges. The timekeeper will remind you how much time you have left. EACH person gets ten minutes. This may sound like an eternity, but it will go by quickly once you get into your argument. You will get a "5 minutes" left signal card, and "2 minutes" left signal card, and "1 minute" left signal card and a STOP card.

- When the STOP card is flashed, it means STOP regardless of where you are in your argument, but don't stop mid-sentence. The best way to handle this is to say, "I see my time has expired. May I have

a moment to conclude?" The judge will then grant you additional time quickly to finish your thought and cut to your prayer. More about the prayer later.

- Pay respect to the Court. Be deferential, but assert your client's position. Never interrupt a judge – let him/her get the question out before you answer. Listen carefully to the question to ensure you are really answering it. Never get mad at a judge or be argumentative – be respectful and assertive. Converse with the judges – don't run over them with a truck and call it advocacy!

- Refer to each of the judges – regardless of gender, profession in the non-moot-court world, or age – as "your Honor" or "Justice (fill in the individual's last name)."

- DON'T talk too fast. Speak clearly and in a moderate tone of voice. Don't dance behind the lectern. It is distracting, unprofessional and makes you appear nervous and tentative. Appear confident and collected (even if you don't feel it). Be calm and alert – you'll be amazed with how much it will enhance your argument.

- Dress in a suit and tie. If you don't own a suit, please borrow a jacket and tie from a friend or from Career Services. Don't let lack of attire keep you from participating.

VI. PREPARING A SUCCESSFUL ARGUMENT:

- An oral argument has three parts – the introduction, the body of the argument, and the prayer.

- The Petitioners may briefly state the RELEVANT facts of the case which should only last about one to two minutes. They must be fair, but they can be slanted toward your theory of the case. Don't give facts not contained in the record. Do not be surprised if a judge asks a question before you get through your facts. If it happens, answer and move on with the argument. Your focus should, however, be on the APPLICATION OF THE LAW TO THE FACTS.

- The Respondents should do one of the following: (1) accept the Petitioners' statement of the facts; (2) make corrections in the Petitioners' statement of facts; (3) clarify or point out any ambiguity in the Petitioners' statement of the facts; or (4) make any necessary additions to the Petitioners' statement of the facts. Take issue with the facts to suit your theory of the case. Be brief! DON'T ARGUE THE FACTS: ARGUE THE LAW! That said, this case demands that all litigants have an excellent command of the relevant facts to make the most effective arguments. DO NOT MAKE UP FACTS. YOU MUST STAY WITHIN THE PROBLEM ITSELF.

- Road map your argument. State the issues for the court to consider in clear, concise terms. For example: "There are three reasons our client should prevail. First, . . ." BE PERSUASIVE. That is the whole object of an appellate argument. Tell the Court why you should win. "The Court of Appeals erred in finding for the Respondents because…" or "the ruling of the Court of Appeals should be upheld because…" (The word "erred" is pronounced so that it rhymes with "bird").

- After you have "road mapped" your issues for argument, go back to point one and begin your analysis of each point/reason why you should win.

- When you end, offer a Prayer/Request: Tell the Court in one sentence what you want them to do for your client. "We respectfully request that this Court reverse/affirm the Court of Appeal's decision." After your prayer, close your folder and sit down.

- For rebuttal, do not be verbose. Only one of Petitioners' attorneys gives a rebuttal. Your rebuttal should include one or two strong points. Listen to the Respondents' argument closely to pick up on what the judges are questioning him about. If it favors your side, hit it hard in your rebuttal. An example

might be the correction of a case that the Respondents did not analyze or apply correctly. Rebuttal is very important because it is a great way to win points.

- EYE CONTACT IS VERY IMPORTANT! Look directly at the judges as much as possible, especially when answering questions. This will also help you appear confident in your argument and enhance your overall advocacy style.

- The most important thing to keep in mind is that you are very familiar with your case, and you know what you are talking about. The best way to avoid feeling nervous is to prepare your argument well, think clearly, and HAVE FUN!

- The judges will give you feedback after the entire argument, including rebuttal, is complete. These helpful hints and comments will be invaluable in the next round.

VII. WHY SO MANY QUESTIONS?

- The judges will ask EVERYONE questions about the case. The purpose is not to humiliate or confuse you. To the contrary, the judges need your help in figuring out how to decide this case. That is why they ask questions. Also, in a moot court competition, they want to determine how well you know your material, how well you can think on your feet, and how well you respond and return to the flow of your argument.

- Anticipate what questions might be and prepare to respond to them. BUT don't try to write out answers and read them back. Answer the question briefly, and then get back into your argument. Remember, YOU control the flow of your argument as much as possible, so don't open yourself up to distractions and interruptions by silently fumbling around trying to figure out what to say next.

- Remember to listen to EACH question before you answer it. It may not be as difficult as you think. If you do not hear or do not understand what a judge is asking, it is acceptable to ask him/her to repeat the question so long as you do so politely and on a limited basis.