Nos. 22-277 and 22-555

In the Supreme Court of the United States

ASHLEY MOODY,
ATTORNEY GENERAL OF FLORIDA, ET AL.,
Petitioners,
v.
NETCHOICE, LLC, DBA NETCHOICE, ET AL.

NETCHOICE, LLC, DBA NETCHOICE, ET AL.,
Petitioners,
v.
KEN PAXTON, ATTORNEY GENERAL OF TEXAS.

On Writs of Certiorari
to the United States Courts of Appeals
for the Fifth and Eleventh Circuits

BRIEF OF PROTECT THE FIRST FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This case is a battle about history. And simply put, the Eleventh Circuit got its history right, and the Fifth Circuit got it wrong. Contrary to the latter court, online services are *not* analogous to Founding-era common carriers, required to take all comers. Indeed, as Judge Newsom, writing for the Eleventh Circuit, correctly stated, online services "have never acted like common carriers." Pet.App. (22-277) 41a.

In fact, online services are much more akin to Founding-era newspapers—a curated vehicle of information subject to editorial discretion. And a study of both English and early American history—from the reign of Queen Elizabeth I, through the demise of English printer licensing laws in 1695, and on into the early 19th-century—shows that the Founding generation understood that publishers like newspapers were not required to take all comers. They were free to include and exclude viewpoints based on morality, business sense, politics, or any other reason they chose. After all, revolutionary Americans were concerned about *government* censorship—not private speakers deciding what to print.

These issues are of particular importance to *amicus* Protect the First Foundation ("PT1"), a nonprofit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable arenas and areas of law. PT1 is concerned about all

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members and its counsel, made any monetary contribution toward the preparation or submission of this brief.

facets of the First Amendment and advocates on behalf of all people across the ideological spectrum, including people who may disagree with the organization's views. PT1 urges this Court to protect the First Amendment rights of all publishers, which have been safeguarded since the Founding generation.

STATEMENT

In 2021, Florida and Texas passed laws directly targeting large online services such as Facebook, X (formerly known as Twitter), and YouTube, for exercising editorial choices with which those states' legislatures disagreed. J.A. (22-277) 1; J.A. (22-555) 2a. Florida's law prohibits online services from choosing whether to ban political candidates and requires intrusive disclosures about disfavored platforms' moderation practices. J.A. (22-277) 15, 32. Texas's law prohibits online services from prioritizing or removing content based on the user's viewpoint and requires these platforms to issue statements and reports on their content removal. J.A. (22-555) 2a-4a.

NetChoice and the Computer & Communications Industry Association represented the affected online services and challenged both laws in federal district courts in their respective states, and both district courts correctly enjoined the laws. Pet. (22-555) iii; Pet.App. (22-277) 68. The Eleventh Circuit correctly affirmed, recognizing that online services—"even the biggest ones"—are "'private actors' whose rights the First Amendment protects, *** that their so-called 'content moderation' decisions constitute protected exercises of editorial judgment, and that the provisions of the new Florida law that restrict large

platforms' ability to engage in content moderation unconstitutionally burden that prerogative." Pet.App. (22-277) 3a (citation omitted). But the Fifth Circuit—after already having had its stay of the district court's injunction vacated by this Court—dissolved the injunction, based on an erroneous reading of the First Amendment. J.A. (22-555) 480a; *NetChoice, LLC* v. *Paxton*, 49 F.4th 439, 447, 455 (5th Cir. 2022).

SUMMARY OF THE ARGUMENT

As this Court has repeatedly made clear, when evaluating First Amendment claims, courts must look to the nation's history and tradition to determine what the First Amendment's guarantees of speech and press require. See, *e.g., Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786, 791-792 (2011). Online services did not, of course, exist at the time of the Founding. But they are closely analogous to early American newspapers. And Founding-era evidence makes clear that the First Amendment, as applied to the press, was meant to protect publishers' editorial discretion as part of the broader marketplace of ideas.

The Founding generation had learned by hard experience the importance of protecting editorial discretion. For much of English history before American Independence, the press had not been free. Instead, it functioned as a common carrier, strictly controlled and censored through a system of licensure. However, this system ended in 1695, and what followed was a free-market system where anyone could start and run their own newspaper as they saw fit. Though there was still a censorship regime over seditious libel, the newspaper was free to print what it

wanted—and suffer any legal consequences *after* the fact, not before.

When the United States became an independent country, the understanding of the press as a business managed through printers' editorial freedom expanded in the new nation. Printers were not treated as "dumb pipes" required to disseminate the views of anyone who came along: they were free to choose what views to print based on their own political, moral, or business considerations.

The Texas and Florida laws act as censorship of platforms that are analogous to the Founding-era printing press and are an unconstitutional restriction on First Amendment rights. This Court should find the Texas and Florida laws to be unconstitutional under the First Amendment because this restriction of freedom of the press has no basis in the history and tradition of this nation and its Constitution—and indeed, contravenes that history and tradition.

ARGUMENT

As this Court has repeatedly instructed, constitutional guarantees must be interpreted in light of our nation's history and tradition. *E.g.*, *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 24-25 (2022) (discussing restrictions on speech); *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (Establishment Clause). And our nation's history and tradition—and the history and tradition of English law, from which our own system developed—make clear that the First Amendment guarantees publishers the right to editorial discretion.

Indeed, in English law at the time of the Founding, newspapers were seen—not as public forums or common carriers—but rather (with some modest limitations) as private speakers with broad rights to print whatever they chose. But it had not always been that way: As shown below, there was a time in English history when printers and publishes were subject to heavy regulation by the Crown. But English law had moved decisively away from that model well before the American Founding. American printers, both before and after adoption of the First Amendment, could and did choose to include and exclude viewpoints based on politics, morality, business concerns, or other reasons of their choosing. That history decisively refutes the contemporary effort to treat social-media platforms as common carriers.

I. Pre-Founding English History Rejected the Doctrine of Prior Restraint and Informed the Founding Generation's Understanding That Publishers Retained Editorial Discretion.

The relevant English history begins with the early development of the printing industry and licensure laws during the reign of Queen Elizabeth I and extends through the American colonial period.

1. Between the reign of Queen Elizabeth I and the lapsing of printer licensing laws in 1695, the printing press was tightly controlled under a system of licenses and censorship.[2] During that period, any commercial printing press had to be approved for a license by the Stationers' Company, a chartered guild.[3] The Stationers' Company, acting on behalf of the government, strictly censored what could be printed and even controlled how many employees a printing press could hire.[4] The printing presses were also subject to warrantless searches by the Stationers' Company for violations of their license agreement, and

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[2] See Edward Lee, *Freedom of the Press 2.0*, 42 Ga. L. Rev. 309, 321-328 (2008) (discussing the different licensing regimes in England from the early 1500s until 1695).

[3] *Id.* (citations omitted).

[4] *Id.* at 323 (citations omitted); *Charles II, 1662: An Act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Bookes and Pamphlets and for regulating of Printing and Printing Presses* II, XII, in *5 Statutes of the Realm: 1628-80* (London, Gr. Brit. Rec. Comm'n 1819) (*5 Statutes of the Realm*), available at https://www.british-history.ac.uk/statutes-realm/vol5/pp428-435#h3-0011.

any violations would be met with the destruction of the press.[5]

Though the first licensure system was started by King Henry VIII, the full regime was enacted under Queen Elizabeth via the Star Chamber Decree of 1586.[6] That licensure scheme was abandoned with the rise of the Parliamentarians during the English Civil War, but Cromwell eventually created his own version of the Decree by limiting the number of printing presses.[7] After the restoration of the monarchy, the decree returned with the Printing Act of 1662, which was renewed periodically until it lapsed in 1695.[8]

2. Key to Parliament's decision to let the Press Act lapse was the personal lobbying of John Locke, the great Enlightenment philosopher. Locke's influence on Parliament's decision is well established, and Locke's reasoning was substantially similar to what the House of Commons would ultimately give as their reasoning for allowing the law to lapse.[9]

In one of Locke's memoranda sent to a member of Parliament, Locke's reasoning predominantly focused on the poor quality and high price of printed materials under the Company of Stationers.[10] However, his

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[5] Lee, *supra* note 2, at 321 (citation omitted).

[6] *Id.*

[7] Moira Goff, *Early English Newspapers and the Law: 17th-18th Century Burney Collection Newspapers* 1 (2007), https://tinyurl.com/wv5htdm9.

[8] Lee, *supra* note 2, at 322, 327 (citations omitted).

[9] Ronan Deazley, *On the Origin of the Right to Copy* 2-4 (2004).

[10] Justin Hughes, *Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies)*, 27 Cardozo Arts & Ent. L.J. 555, 556 (2006).

words also conveyed his vision of the press as a private enterprise with broad freedoms to print what they chose, rather than as a common carrier required to publish all comers. Locke thus wrote, "I know not why a man should not have liberty to print whatever he would speak; and to be answerable for the one, just as he is for the other, if he transgresses the law in either."[11]

Locke also attacked the licensing system as one in which "England loses in general," and which served only the "lazy, ignorant Company of Stationers" and functioned to prevent the established Anglican Church from being "disturbed in her opinions or impositions by any bold inquirer from the press."[12] The system whereby printers were subject to searches for unlicensed works was called "a mark of slavery."[13]

Finally, Locke directly called the Licensing Act "an invasion of the trade, liberty, and property of the subject," one that would have never been renewed if not for the "joint endeavour of Church and Court."[14] Even as he couched most of his reasoning in economic terms, Locke revealed a clear disdain for the government taking a right that should belong to printers and giving it to any other party for their own benefit.

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[11] Lord King, 1 *The Life of John Locke, with Extracts from his Correspondence, Journals, and Common-Place Books* 376 (London, Henry Colburn & Richard Bentley 1830), available at http://onlinebooks.library.upenn.edu/webbin/book/lookupid?key=olbp37471.

[12] *Id*. at 384 (emphasis omitted from third quote).

[13] *Id*. at 385.

[14] *Id*. at 386 (emphasis omitted from second quote).

3. The lapsing of the Licensing Act ended the era of government-controlled press and introduced a free market for newspapers to develop. Although newspapers focused on a variety of subjects, the largest change was the creation of the political press. Newspapers formed that were associated with one of the two parties in England and aggressively presented views supporting their political party while attacking opposing views.[15] And English politicians embraced this new free market press system by working with political newspapers to push their agenda, seemingly without qualms that these papers were not printing the views of their opponents.[16]

Even in the new post-Licensing Act era, English newspapers continued to suffer some censorship. Printers remained vulnerable to "seditious libel" charges by the government if they printed materials that could be seen as overly critical of the government—that is, enough to create contempt or hatred.[17]

However, after 1695, the press was no longer merely treated as an agent of the state, required to carry government-approved news. Even if some censorship remained, the press now had a presumptive right to exercise editorial discretion—only *after* which they could be held accountable for what they printed.[18] This was a dramatic change from the regime under the Licensing Act, which empowered the state to control all aspects of publishing, including

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[15] Deazley, *supra* note 9, at 11-12.

[16] *Id*. at 12.

[17] *Id*. at 5.

[18] *Id.*

through prior restraint. The press was freed from most of the shackles of government regulation the Crown had exercised and began to operate as a private business.

That reality is an important consideration in determining the proper application of the First Amendment to social media companies.

II. The Founding Generation Embraced Publishers' Rights of Editorial Discretion.

Given these developments in English history, it is not surprising that, both before and after the Founding, Americans typically viewed the freedom of publishers to include the right to choose which viewpoints to include—and exclude. In the words of Benjamin Franklin, Englishmen had thought the pre-1695 system of licensing laws was an "intolerable Hardship,"[19] and early Americans had no desire to bring that hardship back. Even during colonial times, therefore, printers in America were free to choose what they included, considering factors such as

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[19] Benjamin Franklin, *Statement of Editorial Policy*, Pa. Gazette (July 24, 1740), *reprinted in Founders Online*, Nat'l Archives, available at https://founders.archives.gov/documents/Franklin/01-02-02-0056 ("Englishmen thought it an intolerable Hardship, when (tho' by an Act of their own Parliament) Thoughts, which should be free, were fetter'd and confin'd, and an Officer was erected over the Nation, call'd a *Licenser of the Press*, without whose Consent no Writing could be publish'd. Care might indeed be taken in the Choice of this Officer, that he should be a Man of great Understanding, profound Learning, and extraordinary Piety; yet, as the greatest and best of Men may have *some* Errors, and have been often found averse to *some* Truths, it was justly esteem'd a National Grievance, that the People should have Nothing to read but the Opinions, or what was agreeable to the Opinions of ONE MAN.").

political ideologies, morality, and plain business sense. That freedom is evident through an analysis of the actions and writings of early American printers and their supporters, both before and after adoption of the First Amendment.

1. Given that his principal profession was printing, it is not surprising that Franklin would have thought and written a good deal about these issues. And he clearly and unambiguously refuted the idea of a newspaper being akin to a common carrier. "In the conduct of my newspaper," he wrote, "I carefully excluded all libeling and personal abuse, which is of late years become so disgraceful to our country."[20] The writers of the excluded content responded much the same way as Florida and Texas: they asserted "that a newspaper was like a stagecoach, in which any one who would pay had a right to a place[.]"[21] But Franklin made clear that his newspaper was *not* like a stagecoach, expected to take all comers: although the author might choose to distribute his opinions himself, Franklin "would not take upon me to spread his detraction."[22]

To be sure, even Franklin did not suggest that a choice to publish a view implied, in every circumstance, an endorsement of that view. As he wrote in 1731 after offending some of his readers with his printing choices: "[I]t is unreasonable to imagine Printers approve of every thing they print, and to censure them on any particular thing accordingly;

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[20] Benjamin Franklin, *The Autobiography of Benjamin Franklin* 110 (N.Y., Am. Book Co. 1896), available at https://www.loc.gov/item/14005955/.

[21] *Id.*

[22] *Id.*

since in the way of their Business they print such great variety of things opposite and contradictory." But he cautioned early Americans against the opposite conclusion too: "It is likewise as unreasonable what some assert, *That Printers ought not to print any Thing but what they approve*; since if all of that Business should make such a Resolution, and abide by it, an End would thereby be put to Free Writing, and the World would afterwards have nothing to read but what happen'd to be the Opinions of Printers."[23]

Consequently, according to Franklin, printers often "acquire[d] a vast Unconcernedness as to the right or wrong Opinions contain'd in what they print; regarding it only as the Matter of their daily labour[.]"[24] And that "unconcernedness" often made printers choose for themselves to print the ideas of all comers, printers being "educated in the Belief, that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick."[25] Indeed, for many printers, it made a great deal of business sense to "chearfully [sic] serve all contending Writers that pa[id] them well, without regarding on which side they are of the Question in Dispute."[26]

But, likewise, according to Franklin, morality permitted discrimination of what a printer chose to print. Printers would "continually discourage the

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[23] Benjamin Franklin, *Apology for Printers*, Pa. Gazette (June 10, 1731), *reprinted in Founders Online,* Nat'l Archive , available at https://founders.archives.gov/documents/Franklin/01-01-02-0061.

[24] *Id.*

[25] *Id.*

[26] *Id.*

Printing of great Numbers of bad things, and stifle them in the Birth."[27] And Franklin himself admitted to having "constantly refused to print any thing that might countenance Vice, or promote Immorality," despite potential monetary gain.[28]

While Franklin emphasized the necessity of having opinions published to serve the marketplace of ideas and the value of having the opportunity to be heard, there is no suggestion that this could appropriately be regulated or mandated by the government. Rather, printers worked according to their own business goals and moral compasses. A marketplace of ideas itself suggests action by the people, not the government.

2. Colonial printers acted consistent with that marketplace of ideas. They faced myriad considerations, both practical and moral, that informed their decisions about what to print.

First were practical business considerations. With the flooded newspaper market in America, most printers could not afford to alienate their readers by being too partisan. The majority of colonial printers thus "focused on the physical products and mechanical processes of printing rather than the content of what they printed" and "tried hard to operate as if their product had no more political import than the shoes, barrels, and candles that other artisans made."[29]

But some printers still concerned themselves with bettering society through what they printed, or excluding materials they thought would endanger

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[27] *Id.*

[28] *Id.*

[29] Jeffrey Pasley, *The Tyranny of Printers: Newspaper Politics in the Early American Republic* 27 (2001).

public virtue. Thus a few years before the Revolution, John Adams praised the important service of printers in furthering freedom in the nation, saying, "And you, Messieurs Printers, whatever the tyrants of the earth may say of your paper, have done important service to your country, by your readiness and freedom in publishing the speculations of the curious. *** Be not intimidated therefore, by any terrors, from publishing with the utmost freedom, whatever can be warranted by the laws of your country; nor suffer yourselves to be wheedled out of your liberty, by any pretences of politeness, delicacy or decency."[30]

In some situations, this morality motivated printers to be more open to printing all ideas. For example, in 1748, Boston's *Independent Examiner* announced to the public, "We purpose to insert every thing of that Nature that may be pertinently and decently wrote *** [O]ur paper shall be free *** [F]ree to Truth, good Manners, and good Sense, and at the same time free from all licentious Reflections, Insolence and Abuse."[31] And in the exercise of that freedom, even before adoption of the First Amendment, some printers placed limitations on printing political opinions, such as refusing to print Anti-Federalist papers without an author's name.[32]

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[30] John Adams, *V. "A Dissertation on the Canon and the Feudal Law," No. 3*, Bos. Gazette (Sept. 30, 1765), *reprinted in Founders Online*, Nat'l Archives, available at https://founders.archives.gov/documents/Adams/06-01-02-0052-0006.

[31] Isaiah Thomas, 2 *The History of Printing in America* 50 (Albany, N.Y., J. Munsell 1874), available at https://tinyurl.com/2bz4pp8y.

[32] See, *e.g.,* 19 *The Documentary History of the Ratification of the Constitution* lxiv (John P. Kaminski et al. eds., 2003).

But rather than show a requirement or affirmative duty to provide a space for all comers, these practices show that Founding-era newspaper printers were free to exercise editorial freedom however they saw fit. Indeed, even the most polemic issues were permitted or rejected based on printers' judgment.

3. Early Americans' rejection of the common-carrier model is likewise clear in the history of the battle between Tory and Whig papers during the Revolution.

For example, John Adams (as "Novanglus") wrote on this topic in response to a certain "Massachusettensis," who complained that the press was not free because the Whig "party has gained the ascendency [in the newspapers] so far as to become the licencers of it."[33] Adams, however, was unconcerned about the uneven split of partisan newspapers as long as there was left at least one newspaper, though not even a profitable one, that printed Tory ideas. He wrote:

> [p]rinters may have been less eager after the productions of the tories than of the whigs, and the reason has been because the latter have been more consonant to the general taste and sense, and consequently more in demand. Notwithstanding this, the former have ever found one press at least devoted to their

[33] John Adams, *III. To the Inhabitants of the Colony of Massachusetts-Bay, 6 February 1775*, *reprinted in Founders Online*, Nat'l Archives, available at https://founders.archives.gov/documents/Adams/06-02-02-0072-0004.

> service, and have used it as licentiously as they could wish.[34]

For Adams, as for Franklin and other American leaders during this period, the access to an avenue to print one's ideas was therefore important, but not so much to force all newspapers to open their presses to diverse ideas.

4. Early Americans' rejection of the common-carrier model was also apparent in debates over the new Constitution and in the immediate aftermath of the adoption of the First Amendment. In early political conflicts of the new nation, partisans took full advantage of the freedom of the press, and printers chose sides. "[O]nly twelve out of the nation's 100 newspapers supported the Anti-federalists."[35] That was because, for printers, "[m]aking their pages available to the Anti-Federalists posed a financial risk [i.e. loss of advertising revenue] that few newspaper owners or editors could afford."[36] And as scholar Anthony Gaughan notes, "Even before George Washington's first term as president had ended, a full-blown war for public opinion erupted between the Federalists and the Republicans. Both sides poured money—including, remarkably, money from government sources—to any newspaper editor willing to promote the Federalist or Republican party lines."[37]

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[34] *Id.*

[35] Anthony J. Gaughan, *James Madison, Citizens United, and the Constitutional Problem of Corruption*, 69 Am. U. L. Rev. 1485, 1512 (2020).

[36] *Id.*

[37] *Id.* at 1515.

With newspapers being used in such a clearly partisan way, it would be incongruous to suppose that the freedom of the press required newspapers to print any and all ideas proffered them. Rather, freedom of the press necessarily encompassed the freedom of editors to print the ideas they chose and wrote.

5. The same pattern continued "[t]hrough most of the nineteenth century," as one scholar explains, and "party factions battled furiously to control key newspapers. When political alliances fell apart, the sure sequel was the founding of a new newspaper."[38]

This was seen in the political battles between Andrew Jackson and his opponents, in which each vied for the editors of newspapers to support their positions, resulting in many editors being appointed to office afterwards. Far from being neutral public forums, party newspapers "contributed in fundamental ways to the very existence of the parties and to the creation of a sense of membership, identity, and common cause among political activists and voters."[39] So much so that Tocqueville argued in 1835 that newspapers and political associations were necessarily connected because "newspapers make associations, and associations make newspapers."[40]

In sum, a survey of early American thought and practice shows that printers enjoyed the editorial freedom to follow their business, moral, and political ideologies. Rather than creating a common carrier

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[38] Pasley, *supra* note 30, at 9.

[39] *Id.* at 11.

[40] Alexis de Tocqueville, *Democracy In America, Book Two, Chapter VI: Of The Relation Between Public Associations and Newspapers* (1835).

requirement, freedom of the press allowed printers the autonomy to control what they published in their newspapers. Such freedom was at the heart of how revolutionary newspapers operated. As Benjamin Franklin wrote regarding freedoms of expression in his own revolutionary newspaper, "This sacred Privilege is so essential to free Governments, that the Security of Property, and the Freedom of Speech always go together; and in those wretched Countries where a Man cannot call his Tongue his own, he can scarce call any Thing else his own."[41]

CONCLUSION

Online services like X and Facebook are publishers, just like the newspapers that existed in the Founding era. And since 1695, Americans and their English forebears have rejected the common-carrier model, instead recognizing that publishers retain editorial discretion to include or exclude viewpoints based on any reason they choose. Under this Court's precedents, that understanding must be seen as part of the press freedom protected by the First Amendment. And that is one important reason why the Texas and Florida laws at issue in this case violate that Amendment.

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[41] Benjamin Franklin, *Silence Dogood, No. 8, July 1722*, New-Eng. Courant (July 9, 1722), *reprinted in Founders Online,* Nat'l Archives, available at https://founders.archives.gov/documents/Franklin/01-01-02-0015.

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