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.*,
Respondents.

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

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE SUPPORTING PETITIONERS IN NO. 22-277 AND RESPONDENT IN NO. 22-555

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
1628 N. Main St. #289
Salinas, CA 93906
(916) 601-1916
atcaso@ccg1776.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. There is no First Amendment right of censorship. 4

II. Restrictions on censorship by massive internet platforms is not compelled speech. 9

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

303 Creative LLC v. Elenis,
600 U.S. 570 (2023)..1, 12

Americans for Prosperity Foundation v. Bonta,
141 S.Ct. 2373 (2021)...1

Associated Press v. United States,
326 U.S. 1 (1945)..11

Biden v. Knight First Amendment Institute at Columbia University,
141 S.Ct. 1220 (2021)...................................2, 10, 11

Blum v. Yaretsky,
457 U.S. 991 (1982) (Brennan, J., dissenting)........9

Burton v. Wilmington Parking Authority,
365 U.S. 715 (1965)..9

Kennedy v. Warren,
66 F.4th 1199 (9th Cir. 2023) 3

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)...8

Missouri v. Biden,
2023 WL 4335270 (2023) (cert granted, *Murthy v. Missouri*, No. 23-411) 3

National Institute of Family and Life Advocates v. Becerra,
138 S.Ct. 2361 (2018)...1, 12

New York Times Co. v. Sullivan,
376 U.S. 254 (1964)..4, 7

Police Dep't of City of Chicago v. Mosley,
408 U.S. 92 (1972)..9

Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969)..10, 11

Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,
547 U.S. 47 (2006)...12

Twitter v. Taamneh,
598 U.S. 471 (2023)...............................1, 2, 8, 9, 12

West Virginia Board of Education v. Barnette,
319 U.S. 624 (1943)...4

Other Authorities

Agrippa XII, Massachusetts Gazette, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 (John P. Kaminski, et al. eds. 2009).................................6

Candidus II, Independent Chronicle, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Massachusetts No. 2 (John P. Kaminski, et al. eds. 2009).................................6

Cooley, Thomas, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW, (Little, Brown, & Co. 1880) 5

CREATING THE BILL OF RIGHTS (Helen Veit, *et al.* eds. 1991)..6

Declaration of Rights and Other Amendments, North Carolina Ratifying Convention (Aug. 1, 1788), reprinted in 5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987)......6

Franklin, Benjamin, *On Freedom of Speech and the Press*, Pennsylvania Gazette, November 17, 1737 (reprinted in 2 THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN (McCarty & Davis 1840) 4

George Mason's Objections, Massachusetts Centinel, reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Commentaries on the Constitution No. 2 (John P. Kaminski, et al. eds. 2009) 5

History of Congress, February, 1799 7

Letter of George Lee Turberville to Arthur Lee, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 (John P. Kaminski, et al. eds. 2009) 5

Letter of Thomas Jefferson to James Madison, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1 (John P. Kaminski, et al. eds. 2009) 6

Madison, James, *On Property*, Mar. 29, 1792 ....4, 5

New York Ratification of Constitution (July 26, 1788), reprinted in 5 The Founders' Constitution (Philip B. Kurland & Ralph Lerner, eds. 1987)......6

Shapero, Julia, *Former NYT columnist Bari Weiss releases 'Twitter Files Part Two'*, The Hill, December 8, 2022..2, 9

The Dissent of the Minority of the Convention, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Pennsylvania (John P. Kaminski, *et al*. eds. 2009) 6

Thorpe, Francis N., THE FEDERAL AND STATE CONSTITUTIONS (William S Hein 1993)...................5

Virginia Ratification Debates reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 3 (John P. Kaminski, et al. eds. 2009) 6

Wulfsohn, Joseph A., *Twitter Files Part 6 reveals FBI's ties to tech giant: "As if it were a subsidiary"*, Fox News, December 16, 2022 ....2, 9

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that freedom of speech is critical to a functioning republic. The Center has previously appeared before this Court as *amicus curiae* and counsel of record in several cases addressing these issues, *303 Creative LLC v. Elenis*, 143 S.Ct. 2298 (2023); *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373 (2021); and *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018) (*NIFLA*).

SUMMARY OF ARGUMENT

The Internet discussion platforms affected by the laws at issue are not speakers. Twitter (now X), Facebook, and Google are no more "speakers" than a wireless cell-phone provider. These platforms were designed, and advertised, as places where subscribers could speak. One does not subscribe to Facebook to find out what Mark Zuckerberg is thinking about today or Twitter (or X) to check in on the latest pronouncements by Elon Musk. Although users of X can subscribe to Elon Musk's feed, the platforms themselves are not speakers.

While they started off advertising themselves as places where people could speak their minds, the plat-

[1] In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

forms have in recent years decided to police what people could say acting as censors or even banning speakers. Even in this, however, the platforms were not speakers for First Amendment purposes. In all but the most outrageous cases (such as when Twitter banned the President of the United States, *Biden v. Knight First Amendment Institute at Columbia University*, 141 S.Ct. 1220, 1221 (2021) (Thomas, J. concurring)), their actions were taken in secret. Subscribers did not know who had been banned or what posts had been censored. No message was sent by the platforms. They did not speak.

The censorship may have started out as a private act, but government agencies were quick to get in on the action. Although not mentioned by the Solicitor General in her amicus brief, federal government officials pressure social media outlets to suppress ideas and even truthful information that runs counter to the government-backed narrative. Reporters Matt Taibbi, Michael Shellenberger, and Bari Weiss, who were given access to the "Twitter Files," have written about how government officials pressured Twitter to suppress unwanted viewpoints and even deplatform some speakers. *See*, *e.g.*, Julia Shapero, *Former NYT columnist Bari Weiss releases 'Twitter Files Part Two'*, The Hill, December 8, 2022[2]; Joseph A. Wulfsohn, *Twitter Files Part 6 reveals FBI's ties to tech giant: "As if it were a subsidiary"*, Fox News, December 16, 2022[3]. United States Senator Elizabeth Warren used

[2] https://thehill.com/policy/technology/3768087-former-nyt-columnist-bari-weiss-releases-twitter-files-part-two/ (last visited August 22, 2023).

[3] https://www.foxnews.com/media/twitter-files-part-6-reveals-fbis-ties-tech-giant (last visited August 22, 2023).

her office to pressure Amazon to suppress a book backed by current presidential candidate Robert Kenney, Jr. that was critical of government policies concerning Covid-19. *Kennedy v. Warren*, 66 F.4th 1199, 1204 (9th Cir. 2023). The current administration continues to work with Facebook to suppress unwanted points of view. *Missouri v. Biden*, 2023 WL 4335270 at *2 (WD LA 2023) (cert granted, *Murthy v. Missouri*, No. 23-411). But none of this is protected by the First Amendment. The Free Speech Clause protects speech, not censorship.

The state laws under consideration in these combined cases prohibit viewpoint discrimination by the internet platforms and require notice to users whose speech has been censored. The Florida law also requires the platforms to disclose the standards it uses to censor users' speech. As noted above, there is no First Amendment right of censorship. The platforms do not create speech, they convey the speech of others and sell advertisers access to their users.

Further, the prohibition on viewpoint discrimination does not constitute compelled speech. The laws do not require platforms to create any speech for other parties. Instead, the only requirement is for the platforms to refrain from censoring speech of others based on viewpoint.

ARGUMENT

I. There is no First Amendment right of censorship.

The Freedom of Speech and Press enshrined in the Constitution testify to the "profound national commitment to the principle that debate on public issues should be uninhibited and robust. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). This accords with the original understanding of these constitutional protections. The First Amendment preserves the natural right to liberty of conscience—that right to one's own opinions, and to share those opinions with others to sway them to your point of view. James Madison, *On Property*, Mar. 29, 1792 (Papers 14:266-68) ("A man has a property in his opinions and the free communication of them."). Without this right, the people lose their status as sovereign and officials in power "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). As Benjamin Franklin put it, freedom of speech is a fundamental pillar of a free government that, when "taken away, the constitution of a free society is dissolved." Benjamin Franklin, *On Freedom of Speech and the Press*, Pennsylvania Gazette, November 17, 1737 (reprinted in 2 THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN (McCarty & Davis 1840) at 431).

Importantly, the First Amendment does not "grant" freedom of speech. The text speaks about a right that already exists and prohibits Congress from enacting laws that might abridge that freedom. U.S. Const. Amend. I. As Thomas Cooley noted, the First Amendment's guaranty of free speech "undertakes to

give no rights, but it recognizes the rights mentioned as something known, understood, and existing." Thomas Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW, (Little, Brown, & Co. 1880) at 272.

The impulse to protect the right of the people to share their opinions with each other was nearly universal in the colonies. In 1776, North Carolina and Virginia both issued Declarations of Rights protecting freedom of the press. Francis N. Thorpe, 5 THE FEDERAL AND STATE CONSTITUTIONS (William S Hein 1993) at 2788 (North Carolina) (hereafter *Thorpe*); 7 *Thorpe* at 3814 (Virginia). Both documents identified this freedom as one of the "great bulwarks of liberty." Maryland's Constitution of 1776, Georgia's constitution of 1777, and South Carolina's constitution of 1778 all protected liberty of the press. 3 *Thorpe* at 1690 (Maryland); 2 *Thorpe* at 785 (Georgia); 6 *Thorpe* at 3257 (South Carolina). Vermont's constitution of 1777 protected the people's right to freedom of speech, writing, and publishing. 6 *Thorpe* at 3741. As other states wrote their constitutions, they too included protections for what Madison called "property in [our] opinions and the free communication of them." James Madison, *On Property*, *supra*.

The failure to include a free speech guaranty in the new Constitution was one of the omissions that led many to argue against ratification. *E.g.*, *George Mason's Objections*, Massachusetts Centinel, reprinted in 14 The Documentary History of the Ratification of the Constitution at 149-50; *Letter of George Lee Turberville to Arthur Lee*, reprinted in 8 The Documentary History of the Ratification of the Constitution at 128; *Letter of Thomas Jefferson to James Madison*, re-

printed in 8 The Documentary History of the Ratification of the Constitution at 250-51; *Candidus II*, Independent Chronicle, reprinted in 5 The Documentary History of the Ratification of the Constitution at 498; *Agrippa XII*, Massachusetts Gazette, reprinted in 5 The Documentary History of the Ratification of the Constitution at 722.

A number of state ratifying conventions proposed amendments to the new Constitution to cure this omission. Virginia proposed a declaration of rights that included a right of the people "to freedom of speech, and of writing and publishing their sentiments." *Virginia Ratification Debates* reprinted in 10 The Documentary History of the Ratification of the Constitution at 1553. North Carolina proposed a similar amendment. *Declaration of Rights and Other Amendments, North Carolina Ratifying Convention* (Aug. 1, 1788), reprinted in 5 The Founders' Constitution at 18. New York's convention proposed amendment to secure the rights of assembly, petition, and freedom of the press. *New York Ratification of Constitution*, 26 July 1788, *Elliot 1:327--31*, reprinted in 5 The Founders' Constitution, *supra* at 12. The Pennsylvania convention produced a minority report putting forth proposed amendments including a declaration that the people had "a right to freedom of speech." *The Dissent of the Minority of the Convention,* reprinted in 2 The Documentary History of the Ratification of the Constitution. Importantly, nobody argued for a right of public or private censorship.

Madison ultimately promised to propose a Bill of Rights in the first Congress. CREATING THE BILL OF RIGHTS (Helen Veit, *et al.* eds. 1991) at xii. Although

Madison argued that a Bill of Rights provision protecting speech rights would not itself stop Congress from violating those rights, Jefferson reminded him that such a guaranty in the Constitution provided the judiciary the power it needed to enforce the freedom. Madison repeated this rationale as he rose to present the proposed amendments to the House of Representatives. *The Firstness of the First Amendment*, *supra*, at 467-68.

An early experiment in censorship confirmed the purpose of the speech guarantees in the First Amendment. In the Sedition Act of 1798 Congress outlawed publication of "false, scandalous, and malicious writings against the Government, with intent to stir up sedition." The supporters of the law argued that it was needed to carry out "the power vested by the Constitution in the Government." *History of Congress*, February 1799 at 2988. Opponents rejected that justification as one not countenanced by the First Amendment. In an earlier debate over the nature of constitutional power, Madison noted "'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 ANNALS OF CONGRESS, p. 934 (1794)." *New York Times Co. v. Sullivan*, 376 U.S. at 275.

The Virginia Resolutions of 1798 also condemned the act as the exercise of "'a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto.'" *Id*. at 274. The particular evil in the Sedition Act, according to the Virginia General Assembly, was that it was "'levelled [sic] against the right of

freely examining public characters and measures, and of free communication among the people thereon.'" *Id.*

The Sedition Act expired by its own terms in 1801 and the new Congress refused to extend or reenact the prohibitions. For his part, Jefferson pardoned those convicted and fines were reimbursed by an act of Congress based on Congress' view that the Sedition Act was unconstitutional. *Id.* at 276.

This Court in *New York Times Co.*, noted that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* More important than the "court of history," is the apparent political judgment at the time that the enactment was inconsistent with the Constitution. Where one Congress attempted to insulate itself from criticism, the subsequent Congress immediately recognized that attempt as contrary to the First Amendment. Congress and the President did not merely allow the law to lapse—they took affirmative action to undo its effects through repayment of fines and pardons. This is the clearest indication we have of that the people intended the First Amendment's speech and press clauses to be much broader than a simple bar on prior restraints. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J. concurring) (evidence of original understanding of the Constitution can be found in the "practices and beliefs held by the Founders").

The First Amendment does not protect censorship. It certainly does not protect censorship that is the product of a public-private partnership of the type revealed by reporters Matt Taibbi, Michael Shellenberger, and Bari Weiss. These journalists were given access to the "Twitter Files," and have written about

how government officials pressured Twitter to suppress unwanted viewpoints and even deplatform some speakers. *See*, *e.g.*, Julia Shapero, *Former NYT columnist Bari Weiss releases 'Twitter Files Part Two'*, The Hill, December 8, 2022[4]; Joseph A. Wulfsohn, *Twitter Files Part 6 reveals FBI's ties to tech giant: "As if it were a subsidiary"*, Fox News, December 16, 2022[5]. As this Court has held, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). It does not gain such a power when it works with massive internet platforms "to restrict expression because of its message, its ideas, its subject matter, or its content." At the very least, the restrictions on viewpoint discrimination and the disclosure requirements must be upheld when the censorship is the product of a public-private partnership. Government may not accomplish through private actors that which it cannot do on its own. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 723-24 (1965); *Blum v. Yaretsky*, 457 U.S. 991, 1028 (1982) (Brennan, J., dissenting).

II. Restrictions on censorship by massive internet platforms is not compelled speech.

The internet social media platforms are massive. As this Court noted, people have posted billions of messages and opinions on the platforms to share with others. *Twitter v. Taamneh*, 598 U.S. 471, 480 (2023).

---

[4] https://thehill.com/policy/technology/3768087-former-nyt-columnist-bari-weiss-releases-twitter-files-part-two/ (last visited August 22, 2023).

[5] https://www.foxnews.com/media/twitter-files-part-6-reveals-fbis-ties-tech-giant (last visited August 22, 2023).

Every minute of the day, "approximately 500 hours of video are uploaded to YouTube, 510,000 comments are posted on Facebook, and 347,000 tweets are sent on Twitter." *Id.* The social media giants provide these platforms not to spread their own message. Instead, they sell advertisers access to their subscribers. *Id.* at 480-81. The platforms use algorithms to match users with other users and advertisers with users. *Id.* at 499. These algorithms are "agnostic as to the nature of the content," even matching terrorist organizations with other terrorists. *Id.* This matching of users with other users and with advertisers is merely "infrastructure" and does not constitute expressive conduct by the platforms. *Id.*

Justice Thomas has noted that these "digital platforms" not only "provide avenues for historically unprecedented amounts of speech," but also concentrate control of that speech in the hands of only a few private parties. *Biden v. Knight*, 141 S.Ct. at 1221, 1224 (Thomas, J., concurring). This gives these social media platforms "enormous control over speech." *Id.* at 1224-25. There are no alternatives to those platforms. *Id.* at 1225.

This makes the platforms that are subject to the laws at issue similar in many respects to the radio and television broadcasters in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). That case examined the constitutionality of the Fairness Doctrine's right of reply in light of the limited spectrum of available broadcast channels. This Court found that the fairness doctrine worked to "enhance rather than abridge the freedoms of speech." *Id.* at 375. Because of limited access to the broadcast spectrum, this Court ruled that broadcaster had no "right to snuff out the free speech

of others." *Id*. at 387 (*citing Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

The vast increase in alternate modes of "broadcasting" has made the *Red Lion* decision something of an anachronism in terms of radio and television broadcasts. However, its reasoning applies to digital platforms whose ownership is concentrated in the hands of only a few private parties and for which there are no alternatives. *Biden v. Knight*, 141 S.Ct. at 1221, 1224-25.

The Court in *Red Lion* was motivated by scarcity of broadcast frequencies and how that interacted with the purpose of the First Amendment. The purpose of the protections for free speech is "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion*, 395 U.S. at 390. As such, the First Amendment will not countenance "monopolization of that market." *Id*. The Court looked at the right to receive information as well as the right to send out that information. *Id*.

Red Lion recognized that the Fairness Doctrine created a tension with the First Amendment rights of broadcasters. But that tension does not exist here. There is no right of pure censorship in the First Amendment. The digital platforms covered by the Florida and Texas laws are not speaking – their subscribers are the speakers. And it is the speech of the subscribers that the states are trying to protect. These laws enhance freedom of speech. There is no "right to snuff out the free speech of others." *Red Lion*, 395 U.S. at 387

Neither of the laws requires social media platforms to "create" speech with which it disagrees. *See 303*

Creative LLC v. Elenis, 600 U.S. 570, 586 (2023). The platforms do not "create" anything. They merely provide an infrastructure by which their subscribers can create their own posts and share their own ideas. *See Twitter*, 598 U.S. at 499. Unlike the wedding website designer in *303 Creative*, subscriber posts do not involve any speech by the social media platforms. *Compare 303 Creative*, 600 U.S. at 587-88 *with Twitter*, 598 U.S. at 499.

Nor are the state law restrictions on censorship content-based regulations. They do not require any specific topic to or subject matter of speech. Instead, they prohibit viewpoint-based discrimination. Thus, these laws are quite different from the law this Court examined in *NIFLA*. There the state law required the clinics to post a specific message created by the government. *NIFLA*, 138 S.Ct. at 2371. Indeed, the clinics were required to post a "government-drafted script." *Id.*

Here, however, the platforms are prohibited from censoring their subscribers' postings, in specified circumstances. Nobody will mistake the posting as the speech of the social media platform. That platform only provides the infrastructure for the subscribers to communicate with each other. *Twitter*, 598 U.S. at 1226-27. If there is no speech by the platform, the prohibition of censorship cannot interfere with the social media platforms' "desired message." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 63-64 (2006) ("The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate.").

The platforms are not responsible for the speech of their subscribers. *Id.* There is no evidence that anyone believes that a subscriber's Facebook post represents the viewpoint of Facebook itself. Subscribers believe that they are communicating with other subscribers. The prohibition on secret censorship does not require the social media platforms to utter any speech at all.

CONCLUSION

This case represents somewhat of a reversal of roles. The state laws seek to protect speech while the social media platforms seek to protect censorship. There is no First Amendment right of censorship and the challenges to the state laws should be rejected.

January 2024 Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
1628 N. Main St. #289
Salinas, CA 93906
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae