

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 COURTS OF APPEALS
FOR THE FIFTH AND ELEVENTH CIRCUITS**

**BRIEF OF AMICI CURIAE PROFESSORS OF
HISTORY IN SUPPORT OF RESPONDENTS IN
NO. 22-277 AND PETITIONERS IN NO. 22-555**

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RULE

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INTEREST OF AMICI CURIAE¹

Amici curiae are professors who have studied the history of journalism, the press, and the Free Press Clause of the First Amendment. Amici include:

- Joseph M. Adelman, Ph.D., Associate Professor of History at Framingham State University;
- Carl Robert Keyes, Ph.D., Professor of History at Assumption University;
- Robert Parkinson, Ph.D., Associate Professor of History at Binghamton University;
- Jeffrey L. Pasley, Ph.D., Professor of History, University of Missouri;
- Sheila L. Skemp, Ph.D., Clare Leslie Marquette Professor of American History at the University of Mississippi;
- Jeffery Smith, Ph.D., Emeritus Professor of Journalism at the University of Wisconsin-Milwaukee; and
- David Waldstreicher, Ph.D., Distinguished Professor of History at The Graduate Center, City University of New York.

Amici's scholarship has been published by major university presses and in leading journals.

Amici's interest in this appeal arises from the importance of a thorough historical understanding of the scope of press freedom, including the exercise of

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution to this brief's preparation or submission. *See* Sup. Ct. R. 37.6.

editorial discretion. As professors and historians with deep knowledge of the relevant timeframe and subject matter, amici are well positioned to assist the Court in evaluating the original public meaning of the First Amendment's Press Clause.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In upholding the constitutionality of HB 20, a split panel of the Fifth Circuit reasoned that the “history and original understanding” of the First Amendment were consistent with the prohibitions imposed by the law. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 453–54 (5th Cir. 2022). Bound up in that conclusion is the notion that editorial discretion, itself, was not understood to be among the freedoms enjoyed by the press at the Founding. On this basis, the Fifth Circuit (unlike the Eleventh) held that states are free to require certain websites and applications to host content that they would otherwise choose to exclude. As the court explained, invoking a “right to exercise editorial discretion” is “faulty because the Supreme Court’s cases do not carve out ‘editorial discretion’ as a special category of First-Amendment-protected expression.” *Id.* at 463. A close examination of the history of printers and the freedom of the press at the Founding shows that the premise of this holding is incorrect.

Printers were widely understood to be central to, or even synonymous with, “the press” as understood in 1791. Printers published a broad range of materials through books, pamphlets, newspapers and other media. And despite occasional attempts by some printers to portray themselves as “meer mechanics,” their role in publishing was dynamic and discretionary. J. Adelman, *Revolutionary Networks: The Business and Politics of Printing the News, 1763–1789*, at 45 (2019) (hereinafter Adelman). Printers sorted through content gathered in or submitted to their offices, selected the content worthy of publication,

edited that material, and decided when and how to present and distribute it. *See id.* at 5.

Central to all of those tasks was editorial discretion. Printers would select which material to publish (and which *not* to publish), based on a variety of motivations: a desire to serve the public, to avoid harming individuals or their reputations, to reap economic gain, or to serve a favored political cause. But whatever the motivation, editorial discretion (and the right to exclude content) was an integral part of the trade. As one of this nation’s great early printers, Benjamin Franklin, put it, his newspaper was not “a stagecoach, in which any one who would pay had a right to a place.” B. Franklin, *The Autobiography of Benjamin Franklin* 145–46 (2008) (hereinafter *Franklin, Autobiography*). Through their discretion, printers “made their newspapers and other publications the central hub for understanding debates about the imperial crisis” and helped “shape[] the politics of the American Revolution.” Adelman 13, 82. They became “an essential means of communication in a democratic republic, as a ‘bulwark of liberty’ and ‘scourge of tyrants.’” J. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 163 (1988) (hereinafter *Smith, Printers and Press Freedom*). It was against that backdrop that an understanding of the press and freedom of the press crystalized in America.

The Fifth Circuit posited that the historical concept of the free press was limited to “a prohibition on prior restraints and . . . a privilege of speaking in good faith on matters of public concern.” *NetChoice*, 49 F.4th at 453 (quotation marks omitted). But the freedom of the press was understood in far broader terms

at the time of the Founding. “The Constitution [that the Founders] wrote and ratified specifically (in the First Amendment) denied Congress, which was given the sole power to legislate (Article I), *any* authority to abridge freedom of the press . . .” J. Smith, *War and Press Freedom: The Problem of Prerogative Power* 4 (1999) (emphasis added). Benjamin Franklin again put it best when he “stated that . . . he was ‘at a loss to imagine any [checks] that could avoid being construed an infringement of the sacred liberty of the press.’” W. Bird, *Press and Speech Under Assault: The Early Supreme Court Justices, the Sedition Act of 1798, and the Campaign Against Dissent 179* (2016) (hereinafter Bird, *Press and Speech*) (quoting B. Franklin, *An Account of the Supremest Court of Judicature in Pennsylvania, Viz. the Court of the Press*, Philadelphia, Pa., Federal Gazette, 12 Sept. 1789 (hereinafter Franklin, *An Account*)). Thus, as this Court has noted, “the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.” *Bridges v. California*, 314 U.S. 252, 265 (1941).

Even if the Free Press Clause could be read more narrowly, it still would encompass the right of editorial discretion. As an initial matter, research has revealed no Founding-era laws requiring printers to carry material they wished to exclude—laws this Court would later confirm are anathema to First Amendment freedoms. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). That fact is strong evidence that such regulations were considered inconsistent with the original public meaning of the First

Amendment. Even under a view of the right as limited to precluding prior restraints, the freedom still “signifie[d] a liberty to publish, free from previous restraint, any thing and every thing *at the discretion of the printer only . . .*” Report of the Minority on the Virginia Resolutions (1799) (emphasis added). In other words, freedom of the press encompassed the right to editorial discretion. The Fifth Circuit’s judgment based on a contrary view should be reversed, and the Eleventh Circuit’s judgment should be affirmed, in recognition of that fundamental, historical right.

ARGUMENT

I. The Founding Generation Understood that Editorial Discretion Was an Essential Right Exercised by the Press

A. The Printing Press Was Transformative for the Founding Generation

The advent of the printing press forever changed the way information spread and the way liberty could be maintained. Future Constitutional Convention delegate William Livingston discussed the critical impact of this new technology in an influential 1753 essay he published titled *Of the Use, Abuse, and Liberty of the Press*.

In his essay, Livingston stated that one of the great benefits of the printing press was that “the Press” could be used by “Writers of every Character and Genius,” “however impoverished” including “the Philosopher, the Moralist, the Lawyer, and men of every other Profession and Character, whose Sentiments may be diffused with the greatest Ease and Dispatch

. . . .” W. Livingston, *Of the Use, Abuse, and Liberty of the Press*, New York, N.Y., *Indep. Reflector*, Aug. 30, 1753, reprinted in W. Livingston, *The Independent Reflector* 336–37 (M. Klein ed., 1963) (hereinafter Livingston). “The Patriot can by this Means,” Livingston explained, “diffuse his salutary Principles thro’ the Breasts of his Countrymen, interpose his friendly Advice unasked, warn them against approaching Danger, unite them against the Arm of despotic Power, and perhaps, at the Expence of but a few Sheets of Paper, save the State from impending Destruction.” *Id.* at 337.

It is in this way that the printing press was understood as an indispensable conduit for transporting information. Or, in Livingston’s colorful framing: “as the glorious Luminary of the Heavens, darts its Rays with incredible Velocity, to the most distant Confines of our System, so the Press, as from one common Center, diffuses the bright Beams of Knowledge, with prodigious Dispatch, thro’ the vast Extent of the civilized World.” *Id.* This power meant that a great privilege was assumed by “the Press,” which “is for ever in the Mouths of Printers” *Id.* at 341.

B. Printers Were Not “Meer Mechanics” Doing No More than Setting Type and Operating Presses

“When the First Amendment was written, journalism as we know it did not exist.” D. Anderson, *Freedom of the Press*, 80 *Tex. L. Rev.* 429, 446 (2002) (hereinafter Anderson, *Freedom of the Press*). But that does not mean the “press” had no substance at the time. To the contrary, “the term ‘Press’ had multiple and overlapping significances that were deeply

influenced by the ratifying generation’s actual experiences with printing.” S. West, *The “Press,” Then & Now*, 77 Ohio St. L.J. 49, 89 (2016) (hereinafter West).

Indeed, although there is some disagreement as to the precise metes and bounds of the “press” at the Founding, there is no doubt that printers were part and parcel of it. *See, e.g., id.* at 88 (“The press the framing generation knew . . . lay in the hands of printers.”); Anderson, *Freedom of the Press* 446–47 (noting “[t]he press in the eighteenth century was a trade of printers,” and that “the printing industry as the Framers knew it no longer exists”); E. Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. Pa. L. Rev. 459, 463 (2012) (hereinafter Volokh) (“[P]eople during the Framing era likely understood the text as . . . securing the right of every person to use communications technology, and not just securing a right belonging exclusively to members of the publishing industry.”); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 390 & n.6 (2010) (Scalia, J., concurring) (explaining “[t]he freedom of ‘the press’ was widely understood to protect the publishing activities of individual editors and printers” and that “[t]he press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion” (citation omitted)).

What is perhaps less obvious is that printers undertook a whole host of editorial activities at that time. Of course, they undertook the mechanical tasks of setting type and operating presses. In that sense, printers could serve as conduits who took in content originally written by others, reduced those works to a print medium, and circulated them near or far. *See,*

e.g., Adelman 45 (noting the “strategy” of printers describing themselves as “artisans who set type and pulled the press but nothing more” “reigned during the colonial period as a fairly logical business reaction”). But the portrait of printers as “meer mechanics”—an image they, themselves, sometimes tried to paint—is incomplete. *Id.* at 91.

Printers did far more than set type and font. Their very role required them to assess and substantively evaluate a broad “range of material.” *Id.* at 4. This included personal requests, also referred to as “job printing,” which effectively “entailed custom orders for broadsides and other small items.” *Id.* In addition, “early printers produced other publications that . . . focused on matters of public concern such as periodicals and almanacs,” West 83, the latter of which “was the most popular print medium in the colonies and a sure steady seller,” Adelman 4. Some printers published books, though relatively few given the expense. Adelman 4. Many more published pamphlets, “longer works that could be produced quickly and were typically sold unbound.” *Id.*

In addition, “because demand for the[ir] services ebbed and flowed, printers relied on newspapers as a steady product to bring in revenue and to make the public aware of the printers’ skills, products, and availability for other jobs.” *Id.*; *see also id.* at 7 (“[P]rinters played [a]n active role in filtering and managing the process of news production.”). Indeed, “the printing press overlapped meaningfully with the growing concept of the ‘press’ as a community of newspapers and the men who made them.” West 82; *but see, e.g.*, Volokh 502 (“Thomas Cooley, the leading American constitutional commentator of the second

half of the nineteenth century, wrote in 1880 that “[b]ooks, pamphlets, circulars, &c. are . . . as much within [the freedom of the press] as the periodical issues.” (quoting T. Cooley, *The General Principles of Constitutional Law in the United States of America* 282 (1880)). The “typical newspaper comprised news items, advertisements and notices, government proclamations, announcements, and essays,” with “news items includ[ing] correspondence and other reports not only from the town in which the newspaper was printed but also from Europe and elsewhere in America.” Adelman 5.

Publishing these various writings required printers to make myriad substantive and editorial judgments. For example, printers assessed which pieces of news, and which accounts of various news items, merited inclusion in light of their readership and related economic and political imperatives. *See infra* Pt. II.B; *see, e.g.*, Adelman 5 (“They had to sift through an enormous amount of information, clipping stories from other newspapers, organizing oral reports into newsworthy paragraphs, and excerpting letters from friends and associates.”); R. Weir, *The Role of the Newspaper Press in the Southern Colonies on the Eve of the Revolution: An Interpretation*, in *The Press & The American Revolution* 102 (B. Bailyn & J. Hench eds., 1980) (“[B]y the 1760s printers were regularly postponing or excluding items on the basis of length, character, or political priorities.”). Along similar lines, a printer had to determine what non-news material that came into his or her shop was worthy of publication. *See, e.g.*, P. Charles & K. O’Neill, *Saving the Press Clause from Ruin: The Customary Origins of a “Free Press” as Interface to the Present and Future*,

2012 Utah L. Rev. 1691, 1702 (2012) (hereinafter Charles & O'Neill) (“The fact remains that there was the intermediate step of obtaining the permission of the printer or editor before any writing became published.”). “[T]he press of the founding generation was not merely an instrument for transmitting any kind of message to one and all.” West 84.

Printers also served as editors. “As part of the ordinary course of business, printers learned how to edit and select items for publication—most importantly newspapers but also texts for publication as pamphlets, broadsides, and other printed material” Adelman 3; *see also, e.g., id.* at 112 (“In the case of imperial news, printers were typically editing personal correspondence addressed to them or to a close associate.”), 108 (“Boston newspapers began publishing full accounts of the [Boston Tea Party] on December 20, and by then Patriots and printers had had time to process the events and edit their accounts for broader consumption.”). Certain printers also editorialized in their publications. For some this meant that the printer would “use[] an impersonal voice common in newspapers,” or “interject[] his editorial voice.” *Id.* at 71. Sometimes a printer could indulge in “wry political commentary.” Smith, *Printers and Press Freedom* 125–26.

Although subject to certain technical limitations, printers also determined how best to organize and prioritize information within their publications. Adelman 5–6 (noting that “technological reality . . . shaped how printers laid out text on the page,” but they nonetheless “decided . . . how to lay out the newspaper”), 69 (“In structuring reports of the Stamp Act protests, chroniclers organized the sequence of events

into an ordered narrative.”). They also made determinations about advertisements and payments more broadly. *See, e.g., id.* at 6 (“[B]oth advertisers and printers preferred to have [advertisements] run for several weeks in a row.”), 33 (“To encourage merchants and tradesmen to advertise, printers often gave discounts for advertisements repeated over the course of several weeks . . .”).

Printers also gathered and disseminated information—sometimes of their own finding, though often in the form of reproduced writings from other printers. *See, e.g., id.* at 6 (explaining printers included “news recently arrived by ship”), 7 (noting a printer “select[ed] which . . . paragraphs in a given newspaper [he] wanted to reprint in his own [paper]”). To do so effectively, “[p]rinters sought to establish connections with three categories of people: other members of the printing trade, local elites, and long-distance information suppliers.” *Id.* at 38. And, in turn, “members of the [printing] trade . . . shared specific knowledge about how to . . . circulate and spread the information that came through the hubs that were their print shops.” *Id.* at 14.

The combination of these skills—*i.e.*, “the small-scale practice of editing, collecting, and reprinting within their offices”—with “the broader-scale commercial practice of circulating print and information” “create[d] a set of networks” that proved highly influential leading up to the Revolution. *Id.*; *see also id.* at 15–16 (noting “[b]y 1773, the networks that printers had developed for their businesses and then mobilized for political purposes had become extraordinarily effective”), 82 (“By replicating conversations, letters and other manuscript sources, and excerpts from

newspapers and pamphlets, printers made their newspapers and other publications the central hub for understanding debates about the imperial crisis.”); West 81 (“[Printers’] efforts [responding to the Stamp Act] brought public attention to the importance of the printers’ work and their ability to unite through shared information.”). Indeed, “from 1763 to 1776, [printers’] networks . . . be[gan] to crystallize into a new American infrastructure of political communications.” Adelman 20.

And it was against that backdrop—one in which printers selected and edited a wide variety of writings and were a critical means by which information and ideas were shared across the new Nation—that an American understanding of the press and a free press came to be.

C. Editorial Discretion Was an Essential Feature of Printers’ Activities

The through line linking all of the many roles printers played was editorial discretion. Printers were called upon to determine “what news fit [a] medium, how it should be published, and when and where.” Adelman 111–12. And while there were some norms, there were no rules. Virtue, ideology, and economics all influenced the ways in which a printer conducted his business and the choices he made. The exercise of discretion was thus highly individualistic.

One norm leading up to the Founding was the idea of a “free and open press,” “which meant that the press would be both ‘free’ of government restrictions and ‘open’ as a forum for debate in the public interest.” *Id.* at 45. In advocating for this norm, printers “disavowed ultimate authority over the political content of

their newspapers and attempted to shift responsibility to the authors of pieces, who were usually anonymous, or to the field of public opinion.” *Id.* at 49. In this way, printers sought to position themselves as “impartial or disinterested observers who facilitated debate.” *Id.* at 50. But this openness was neither mandated nor wholly altruistic; rather, it stemmed from a “business strategy” aimed at “protect[ing] a fragile printing market” by placing printers “outside the realm of political combat.” *Id.* at 45, 48–49. Subscribers kept the candles burning, and isolating customers was (at least at the time) bad business. See Smith, *Printers and Press Freedom* 126–27 (noting that in the face of readers with competing political views, “printers had to print for both sides or starve”).

Nor, for that matter, was the press ever really “open.” The principle of openness “did not mean that a free press permitted the publication of anything or everything.” Charles & O’Neill 1730. “[O]rder and decorum” needed to be maintained. Adelman 50. So while “[v]irtuous printers subscribed to the tenets of impartiality,” they also exercised discretion to “ensure[] their newspaper’s contents were respectable.” Charles & O’Neill 1731. And to retain respectability, printers “censored on their own a variety of material they considered unsuitable.” Adelman 48 (citing B. Franklin, *Apology for Printers*, Philadelphia, Pa., Pa. Gazette, June 10, 1731 (hereinafter Franklin, *Apology for Printers*)). Again, Benjamin Franklin’s famous “stagecoach” analogy captures the point—“his newspaper was not a stagecoach, with seats for everyone.” *Columbia Broad. Sys., Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 152 (1973) (Douglas, J., concurring)

(quoting F. Mott, *American Journalism* 55 (3d ed. 1962)).

Franklin believed that editorial discretion should be exercised for the benefit of the public. To that end, he noted that “Printers do continually discourage the Printing of great Numbers of bad things, and stifle them in the birth.” Franklin, *Apology for Printers*. And for his part, Franklin claimed that he “had ‘constantly refused to print any thing that might countenance Vice, or promote Immorality,’ although he might have earned considerable profit by doing so.” Adelman 48 (quoting Franklin, *Apology for Printers*); *see also* Smith, *Printers and Press Freedom* 164 (“Benjamin Franklin . . . tried to pursue the republican ideal of political impartiality . . . , but often chose to reject false and defamatory statements affecting an individual’s reputation.”). As he later argued, “[b]y not carefully curating the views that made it into the public prints, . . . printers might ruin the new nation.” Adelman 195. But that was Franklin’s choice, not any colonial or imperial mandate.

Franklin was not alone in his views. Writing in 1782, Eleazer Oswald, printer of the *Independent Gazetteer*, wrote that printers had a duty to judge “the Propriety, Nature and Tendency” of what they published and stated that “[w]ithout a Capacity to judge in these Essentials, [a printer] is not qualified for his Business.” Smith, *Printers and Press Freedom* 38 (quoting E. Oswald, *Philadelphia, Pa., Indep. Gazette*, Apr. 13, 1782).² Daniel Fowle, writing in 1756,

² A number of printers acted in accordance with this perceived professional duty. For instance, Bartholomew Green was a

introduced the public to his New-Hampshire Gazette “with a typical editorial salutatory saying that he intended to uphold freedom of expression while not encouraging divisive, immoral, or scurrilous contributions.” *Id.* at 49. And Thomas Whitmarsh, writing in the first issue of his South-Carolina Gazette in 1732, “told the readers . . . that he detested personal scandal and that the paper would be neither ‘High Church, nor Low Church, nor Tory, nor Whig.’” *Id.* at 125 (quoting T. Whitmarsh, Charleston, S.C., S.C. Gazette (Jan. 8, 1732)).

colonial printer in Boston who was “generally known and esteemed” for “his keeping close and diligent to the work of his calling; his meek and peaceable spirit; [and] his caution of publishing any thing offensive, light or hurtful.” I. Thomas, *History of Printing in America with a Biography of Printers, and an Account of Newspapers* 91 (2d ed. 1810) (hereinafter Thomas). Then there was Christopher Sower, who owned the *German-towner Zeitung* and was regarded as “a very conscientious printer.” *Id.* at 274, 281. When called upon to publish certain material, Sower replied: “My Friend . . . I do not print everything. If irreligious, or otherwise dangerous, I always refuse.” *Id.* at 281.

Other printers, such as Peter Timothy, publisher of the South-Carolina Gazette, came up with workarounds that resulted in the information being released to the public while not being attributed to the printer himself. For while Timothy would “act cautiously when his contributors indulged in self-interested politics and personal libell, i]n order to put distance between himself and such writings, he sometimes required the party tirades and attacks on private character be paid for as advertisements.” Smith, *Printers and Press Freedom* 125–26. In 1772, Timothy announced his retirement after thirty-three years and “told his readers that he loved his country and that he had often sacrificed his private interest to his chief concern, ‘the Public Good.’” *Id.* at 145.

But there were, of course, printers who were more motivated by money than by virtue. As William Livingston explained, “Private Interest indeed has, with many [printers], such irresistible Charms, and the general Good is so feeble a Motive.” Livingston 342. One such printer offered a remarkably honest account of his motives in a public letter written in response to being called a traitor for having printed for England. The printer stated:

I never was, nor ever pretended to be a man of character, repute or dignity. . . . I do hereby declare and confess, that when I printed for Congress, and on the side of Liberty, it was not by any means from principle, or a desire that the Cause of Liberty should prevail, but purely and simply from the love of gain. . . . It is pretended that I certainly did in my heart incline to the English, because that I printed much bigger lies and in greater number for them, than for the Congress. That is a most false and unjust insinuation. It was entirely the fault of the Congress themselves, who thought fit . . . to be much more modest, and keep nearer the truth than their adversaries. Had any of them bro’t me in a lie as big as a mountain it should have issued from my press.

Thomas 412–13. This passage serves as a colorful example of why “the economic concerns of printers . . . had a profound impact on the construction and circulation of political arguments” Adelman 15. At the end of the day, though, printers had the discretion to create a printing platform that was motivated by “Liberty” or the “love of gain.”

The economic incentives supporting editorial decisions became all the more acute around the time of the Revolution. After 1765, choosing to provide open access “became increasingly untenable and unattractive for printers as the imperial crisis shifted the landscape of commercial interests for them,” making partisanship more profitable. Adelman 49. “With increasing competition in the trade, the pressures placed on the colonies by the French and Indian War, and the ideological confrontations of the American Revolution, printers were driven toward making political choices.” Smith, *Printers and Press Freedom* 129; *see also id.* at 37.

With the post-Revolution partisan press, “[t]he printers’ control was evident through the suppression of news, in the closing of his columns to the political articles of the opposition, or in the refusal to print pamphlets or broadsides inimical to the cause he favored.” West at 87 (quotation marks omitted). So in the time leading up to the Founding, printers routinely exercised editorial discretion by refusing to print certain material for various reasons. That was wholly and completely their choice.

And what of the spurned individuals whose material a printer refused to publish? They were not without recourse. One option was to have the material printed elsewhere. This could often be a laborious endeavor, as the nearest printer willing to publish the material could often be far away, sometimes even in a different state (or country). *See* Thomas 417–18. But it could be done. And for his part, Franklin explained that whenever he was “solicited to insert anything of that kind [libeling and personal abuse], and the writers pleaded, as they generally did, the liberty of the

press . . . [his] answer was, that [he] would print the piece separately if desired, and the author might have as many copies as he pleased to distribute himself, but that [he] would not take up on [him] to spread his detraction.” Franklin, *Autobiography* 145–46.

Another option was to go public with the refusal and attempt to sully the printer’s reputation as an impartial disseminator of information and arbiter of debate. Such conduct could lead to a public spat over the reason for the refusal or a dispute over whether the printer in fact had refused to print. *See* Thomas 415–17 (highlighting a back-and-forth between a printer and person whose material was not published).

Going public could also lead to vindication for the spurned. For example, during the Stamp Act debates of 1765, Samuel Chase led demonstrations by predecessors to the Sons of Liberty, and, in response, “the printer of the Maryland Gazette, which had published what Chase called ‘the most inveterate and false reflections’ against him, ‘refused to give [his response] a place in his paper.’” *See* Bird, *Press and Speech* 224 (quoting S. Chase, *To the Publick, Annapolis, Md., Md. Gazette*, 16 July 1766, p. 1 (hereinafter Chase)). Chase then “responded with a broadside that provided his ‘vindication,’ benefitting from the press even while criticizing it.” *Id.* (quoting Chase 1).

Sometimes the threat of going public was itself sufficient to persuade the printer to publish. For example, in 1757, after “the [Pennsylvania] Assembly moved to punish one of its perennial critics, William Moore, by charging him with misconduct as a justice of the peace[, t]he Pennsylvania Gazette printed the charges and Moore prepared a spirited reply which he

asked David Hall to print in the paper.” Smith, *Printers and Press Freedom* 133. After Hall refused to publish the piece due to concerns about its tone, “one of Moore’s friends complained to him that he would be denying liberty of the press.” *Id.* “Fearing that he would be labelled a partisan printer if he did not publish Moore’s reply, Hall conferred with three members of the Assembly who agreed with him that he should publish the statement in order to avoid being accused of not maintaining a free and open press.” *Id.*

Other times the threats had no effect. Hall once “traced [Joseph] Galloway’s ‘Malice and Ill-will’ toward him to the week before the Assembly election of 1764 when Galloway had asked him to print an attack on John Dickinson, an opponent of the movement toward royal government in the province.” *Id.* at 139. “Dickinson found out about the piece, asked to see it, and requested an opportunity to reply.” *Id.* When Galloway refused to allow Hall to show Dickinson the essay, Hall “informed Galloway that he did not think he could print his article.” *Id.* When Galloway became angry and accused Hall of being partial, “Hall replied that no man on Earth could make him print what he thought was wrong.” *Id.*

Hall paid a price for his editorial decisions. In one instance, “he angered Philadelphians by failing to join other newspapers in printing fervent essays against the [stamp] tax.” *Id.* at 136 (citing D. Hall, Letter to Benjamin Franklin, Sept. 6, 1765, in *The Papers of Benjamin Franklin* (Yale Univ. ed.)). “Before the act took effect, Hall lost more than five hundred subscribers who resented his moderation and did not want to purchase stamped newspapers.” *Id.* The response had a major impact on Hall, who suspended the

Gazette on the last day he could legally print without stamps, and helped raise a crowd that prevented a supply of stamped paper from being unloaded into the city. *Id.* at 137.

In short, printers were not immune from blowback for their editorial decisions. They could be labeled partisan, they could lose subscribers, and their business could suffer. *See* P. Maier, *Ratification: The People Debate the Constitution, 1787–1788*, at 73 (2010) (“In the end, proponents of the Constitution found an effective alternative to threats of tar and feathers and other forms of physical punishment: They could influence editorial policy by canceling or threatening to cancel their subscriptions to ‘offending’ newspapers.”). But these were ultimately the printer’s choices, and the court of public opinion was the forum in which he would be charged and convicted.

II. The Freedom of the Press Protected Editorial Discretion

A. The Founding Generation Understood the Freedom of the Press To Be Broad

Contrary to the Fifth Circuit’s cramped view of the First Amendment at the Founding, the Founding generation espoused a broad view of freedom of the press, understanding the right to secure far more than just freedom from prior restraint and the ability to make “well-intentioned statements of one’s thoughts.” *NetChoice*, 49 F.4th at 453–54. They saw the press as the “bulwark of liberty” in the new nation, possessing the right to select a range of topics for publication, without punishment. D. Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455, 491 (1983) (hereinafter Anderson, *The Origins*); accord W. Bird, *The*

Revolution in Freedoms of Press and Speech 281 (2020) (hereinafter Bird, *The Revolution*) (quoting J. Quincy, *Reports of Cases* 275 (1768)).

The freedom of the press has its roots in English law. In 1695, the English licensing law imposing prior restraints on publications expired—leading to the flourishing of an unrestrained press, followed by the strengthening of the law of seditious libel, then a correspondingly “thunderous” call for stronger press freedoms. Bird, *The Revolution* 92–93, 156. By the 1760s, Britons predominantly endorsed a broader view of press freedom as safeguarding against punishment both before and after publication. *See id.* at 155–62.

In contrast to this prevailing view, William Blackstone in 1769 declared that “liberty of the press . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.” 4 W. Blackstone, *Commentaries on the Laws of England* *151. Despite the unequivocal phrasing of this oft-cited pronouncement—one the Fifth Circuit relied on in this case—commentators have recognized that Blackstone “was not summarizing the common law of freedoms of press and speech,” but “manufacturing it.” Bird, *The Revolution* 27. For political and personal reasons—including to curry favor with the crown and boost royalties from his *Commentaries*—Blackstone selected “the narrowest (and least common) definition of the liberty of the press” in England. *Id.* at 25, 31. As scholars have written, though, Blackstone’s pronouncement was inconsistent with the more broadly accepted understanding of what it meant to have a free press both in England and, more critically, in the colonies in the decades leading up to the Founding. *See generally*

Bird, *The Revolution* (debunking the notion that Blackstone’s narrow view of free press was broadly accepted at the Founding); Bird, *Press and Speech* (same); Smith, *Printers and Press Freedom* (same); A. Griffin, *First Amendment Originalism: The Original Law and a Theory of Legal Change as Applied to the Freedom of Speech and of the Press*, 17 *First Amend. L. Rev.* 91 (2019) (hereinafter Griffin) (same); Anderson, *The Origins* (same).

Tracing the history of a free press in the Colonies confirms that Blackstone speaking in England in the 1760s did not speak for his contemporaries—let alone for the colonists and the Founding generation. The seminal colonial free press case of John Peter Zenger confirms the breadth of the Founders’ understanding of freedom of the press. In 1735, Zenger, a printer, was tried criminally on charges of seditious libel, after being arrested for publishing an article in his newspaper that criticized New York’s royal governor. Bird, *The Revolution* 225. Observers of the trial decried the possibility that “the liberty of men will not long survive the liberty of writing, and the liberty of the press.” *Id.* at 226. Zenger’s attorney pressed the argument that public reporting could not be libelous if it were true. *See* *The Tryal of John Peter Zenger* 12 (1736), online at https://history.nycourts.gov/wp-content/uploads/2018/11/History_Tryal-John-Peter-Zenger.pdf (as visited December 6, 2023). After the trial, in just a “small time,” the jury acquitted Zenger to the sounds of “huzzas.” *Id.* at 30; *see also* Bird, *The Revolution* 228. This episode confirms that Blackstone’s view of a narrow free press did not prevail on the ground in the colonies and simultaneously spurred “call[s] for broader liberties of press and

speech than English common law allowed.” Bird, *The Revolution* 229.

The Founding generation answered those calls. Nine of the eleven state constitutions adopted in the Revolutionary era secured the right of a free press, making it one of the most commonly adopted provisions. See Smith, *Printers and Press Freedom* 67; Bird, *The Revolution* 302. “[E]very one of those states described that right in the broadest terms,” and “not one state limited the new freedom to nonseditious publications or to” a ban on prior restraints. Bird, *The Revolution* 302. Massachusetts, for example, adopted the provision that “liberty of the press . . . ought not, therefore, to be restricted,” which was understood “to mean that ‘[e]very measure then that has the most minute tendency to prevent, suppress, or restrain, the publick papers, or the liberty of the press, is repugnant to the [Massachusetts] constitution.’” *Id.* at 317 (quoting Lucius, *To the Citizens of the Commonwealth* [Part I], Boston, Mass., *Mass. Centinel*, 18 May 1785, pp. 1–2); accord Lucius, *To the Citizens of the Commonwealth*, *Salem Gazette*, 24 May 1785, p. 1.

Outside state houses, writers forcefully argued that “the press should by no means be restrained.” Bird, *The Revolution* 306 (quoting Candid, Mr. Oswald, Philadelphia, Pa., *Independent Gazetteer*, 14 Dec. 1782, pp. 2–3); see also Anderson, *The Origins* 463 (discussing the Continental Congress’s declaration that “the freedom of the press . . . [contributes to] the advancement of truth, science, morality, and arts” and restrains “oppressive officers” of government (quoting *An Appeal to the Inhabitants of Quebec* (1774))). Overall, “[t]he prevalent conclusion reached

by American writers was that freedoms of press and speech were broad protections, very much unlike the narrow protections” Blackstone outlined. Bird, *The Revolution* 275. “[M]any if not most advocates of the Blackstonian sense were loyalists who would soon leave, while the broader sense of liberty of press was closely associated with the advocates of colonial rights.” *Id.* at 286.

Soon after, in the debates over the federal Constitution, “[o]ne of the points of greatest controversy was the absence of a bill of rights; and of all the omitted guarantees, few were decried more than the lack of a provision ensuring freedom of the press.” Anderson, *The Origins* 467. On both sides of the issue, people shared a strong view of press freedom, even as they disagreed on how best to secure it. At the Constitutional Convention, while some delegates supported adopting a bill of rights with a free-press provision, others countered that “[i]t is unnecessary—The power of Congress does not extend to the Press.” *Id.*; see J. Madison, *Notes on the Debates in the Federal Convention* (Sept. 14, 1787). When the Constitution was sent to the states, three proposed their own bills of rights with free-press provisions. Anderson, *The Origins* 471.

As the First Congress met to discuss adopting a Bill of Rights, press freedom remained front-of-mind. In the House, James Madison proposed strong language reading “the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.” *Id.* at 478; 1 *Annals of Cong.* 451 (1789). The Senate, meanwhile, rejected a proposal to protect press freedom merely “in as ample a manner as hath at any time been secured by the common law”—language that

would have permitted the government to imprison its critics. Anderson, *The Origins* 480; see *Journal of the Senate of the United States of America* 70 (Sept. 3, 1789); accord Bird, *The Revolution* 353. Congress then adopted the current-day First Amendment and sent it to the states with the rest of the Bill of Rights. Anderson, *The Origins* 485–86; Bird, *The Revolution* 353. In the view of its drafters, the First Amendment “was meant as a positive denial to Congress, of any power whatever on the subject” of the press. J. Madison, *The Report of 1800*, in 17 *The Papers of James Madison* 303 (D. B. Mattern et al. eds. 1991).

In the debates over ratification, the Federalists and Anti-Federalists continued to discuss the best way of securing strong press freedoms. Anti-Federalists raised the specter that, without a press clause, the federal government might seek to restrain the press or prosecute seditious libel. See Bird, *The Revolution* 355. Federalists countered that the press was already entirely secured from such government interference and that to define the extent of press freedom risked drawing the lines too narrowly. *Id.* Alexander Hamilton wrote, “Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?” *The Federalist* No. 84, p. 470 (E. H. Scott ed. 1898) (A. Hamilton); see also *The Federalist* No. 41, p. 230 (E. H. Scott ed. 1898) (J. Madison) (“A power to destroy the freedom of the press . . . must be very singularly expressed by the terms ‘to raise money for the general welfare.’ But what color can the objection have, when a specification of the objects alluded to by these general terms, immediately follows; and is not even separated by a longer pause than a semicolon?”).

Amid these discussions, the states ratified the Bill of Rights and its press clause, codifying “the dominant position supporting an expansive protection of freedoms of press and speech and supporting an effective security against punishment of words censuring government and its officials.” Bird, *The Revolution* 356.

Overall, the record makes clear the Founding generation had a broad conception of freedom of the press, as securing against far more than prior restraints. That freedom necessarily encompassed the right of publishers to decide what went into their publications. Benjamin Franklin, in a satire published just before the ratification of the First Amendment, “stated that liberty of the press was so extensive that for checks against its ‘abuse of power’ ‘there are none,’ and he was ‘at a loss to imagine any that could avoid being construed an infringement of the sacred liberty of the press.’” Bird, *Press and Speech* 179 (quoting Franklin, *An Account*).

B. Editorial Discretion Was Protected Even Under a Narrow Understanding of Freedom of the Press

Even if some in the Founding generation took a narrower view of freedom of the press, that freedom nonetheless entailed the right of printers to decide what went into their publications. The Founders evidently drew no distinction between pre-publication licensing and laws requiring that the press publish material or voices it would otherwise exclude. Had they drawn such a distinction, one would expect to find numerous Founding-era examples of such laws—*e.g.*, laws requiring that pamphlets include particular messages within their pages, or laws requiring that

papers open their columns to opposing viewpoints or government speech. But research has revealed none. *Cf. Miami Herald Pub. Co.*, 418 U.S. at 261 (White, J., concurring) (“[W]e have never thought that the First Amendment permitted public officials to dictate to the press the contents of its news columns or the slant of its editorials.”).

This absence is striking, especially because the Founding era did see *other* efforts to regulate the press. In 1798, amid rising tensions with France and a partisan war of words at home, the Federalist Congress passed the Sedition Act, making it a crime to “print, utter or publish . . . any false, scandalous and malicious writing . . . against the government of the United States.”³ Act of July 14, 1798, 1 Stat. 596 (expired 1801); *see* Bird, *Press and Speech* 253. Yet Congress did not *compel* the converse: It did not require newspapers and pamphleteers to publish pro-government pieces. And it did not do so despite a “crisis atmosphere” in which “the fragile new government seemed to many to be easily toppled.” Bird, *Press and Speech* 253.

The fact that research has revealed no such laws—not even by legislatures that had every reason to pass them—is “relevant evidence” that such a law was thought “inconsistent with the [Constitution].” *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S.

³ The constitutionality of the Sedition Act was never tested in court, not because it was unquestioned, but because the Act was roundly rejected in the court of public opinion with the electoral defeat of the Federalists, the ascendancy of the Republicans, and President Jefferson’s subsequent pardoning of all who had been convicted under the Act. *See* Griffin 125–28.

Ct. 2111, 2131 (2022). And the fact that Congress *did* restrict the liberty of the press when it felt the political order was at stake, “but did so through materially different means,” reinforces the conclusion that a law telling printers what voices or ideas they had to include in their pages could not be reconciled with the Press Clause.⁴ *Id.*

The Federalists themselves acknowledged as much. Writing in defense of the Sedition Act, the Federalist minority of the Virginia House of Delegates explained (in language often attributed to John Marshall) that “the liberty of the press . . . signifies a liberty to publish, free from previous restraint, any thing and every thing *at the discretion of the printer only*, but not the liberty of spreading with impunity false and scandalous slanders which may destroy the peace and mangle the reputation of an individual or of a community.” Report of the Minority on the Virginia Resolutions (1799) (emphasis added). Thus, according to some Federalists’ own narrow view of freedom of the press (at the time), Congress had the power to punish newspaper editors and pamphleteers for statements they *chose*, “at [their] discretion . . . only,” to

⁴ The freedom to decide what went into one’s publication was also a corollary of the threat of post-publication punishment. Under the narrow view of freedom of the press, according to which a printer could be sanctioned for the contents of his publications, printers needed full editorial discretion to protect themselves from liability. Recall the story of Samuel Chase. “The printer of the Maryland Gazette, which had published what Chase called ‘the most inveterate and false reflections’ against him, ‘refused to give [Chase’s response] a place in his paper’ because Chase’s libelous vitriol would ‘subject him to prosecutions’” Bird, Press and Speech 224 (quoting Chase 1). Editorial discretion was therefore baked into the very idea of post-publication liability.

put out into the world. Congress had no power, however, to fetter that editorial discretion up front.

CONCLUSION

Printers played an essential role in the American press at its inception. From robust political commentary to local news to advertisements, their publications were central in American communities and discourse. A core part of printers' task was to select what content to publish and, correspondingly, what not to publish—choices they made for a range of reasons, from supporting a partisan cause to boosting business to hewing to notions of impartiality or decency. That choice rested solely with the printers, not the government. The Founding generation shared a broad view that press freedoms secured liberty not only from prior restraints but also from laws aimed at constraining the right to publish what printers saw fit. The Founding generation enshrined these liberties in the First Amendment's Press Clause, which was widely conceived as protecting against all government interference with the press. This history and tradition undercuts the Fifth Circuit's conclusion that the freedom of the press offers no protection to editorial discretion. For the foregoing reasons, the decision of the Fifth Circuit should be reversed and the decision of the Eleventh Circuit affirmed.

Respectfully submitted,

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December 7, 2023