No. 22-277

In the Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL, STATE OF FLORIDA, ET AL., PETITIONERS

v.

NETCHOICE, LLC, D.B.A. NETCHOICE, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PROFESSOR PHILIP HAMBURGER AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

1. Whether the First Amendment prohibits a State from requiring that social-media companies host third-party communications, and from regulating the time, place, and manner in which they do so.

2. Whether the First Amendment prohibits a State from requiring social-media companies to notify and provide an explanation to their users when they censor the user's speech.

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Philip Hamburger is the Maurice and Hilda Friedman Professor of Law at Columbia Law School and CEO of the New Civil Liberties Alliance. He submits this brief, however, entirely in his own capacity.

1. All parties received timely notice of this amicus and have consented to its filing. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

Amicus became involved with the questions underlying this case in response to a request at a meeting of minority Christians, who felt oppressed by the Platform's censorship. He therefore largely framed a bill that, with some modification, eventually became Section 7 of Texas HB 20—the section barring viewpoint discrimination.

Section 7 was carefully drafted to comply with existing Supreme Court precedent and doctrine on the freedom of speech. *Amicus* believes it would be wrong for this Court—whether in this case or *NetChoice v. Paxton*—to abandon its precedents and doctrine allowing common carrier protection for speech.

Common carrier antidiscrimination principles are the foundation of our civil rights laws. Although the Platforms enjoy many substantial legal privileges, they should not be privileged from complying with the same basic principles that have long applied to other communications carriers.[2]

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2. This case will not be the first time this Court has been exploited to obtain privileges for interactive computer services. The Communications Decency Act of 1996 paired Section 230's permissive advantages for interactive computer services with Section 223's assurances that children would be protected from obscenity. 47 U.S.C. §§ 223 & 230. In other words, fears about the risks to the public from Section 230 were assuaged by the limitations in Section 223. But Section 223's protections for children were not wanted by some influential interactive computer services. So Section 223 was quietly adjusted in the House of Representatives to ensure that key provisions would be held unconstitutional. Harold Furtchgott Roth, *Divining Congressional Intent* at 7, available at https://bit.ly/3yNN9Z0. The desired holding was promptly obtained from this Court in *Reno v. ACLU*, 521 U.S. 844 (1997).

Amicus has a direct interest in the outcome of this case because he relies upon social media as a primary avenue for learning. The ideas and information circulated in one jurisdiction tend to leak out to others. So, he looks to common carrier antidiscrimination statutes to preserve at least a few jurisdictions that are free from the Platforms' viewpoint discrimination.

SUMMARY OF ARGUMENT

This case may seem worthy of certiorari. Although the Florida and Texas free speech statutes are very different, there is a circuit split, and the stakes are profound. But the case comes with risks—for the freedom of speech and even for this Court. So this brief argues neither for certiorari nor against it. Instead, it merely alerts the Court to the dangers. Without necessarily opposing a grant of certiorari, it asks the justices to go beyond their usual caution in deciding whether or not to grant the writ.

The basic problems are twofold. First, the suit was brought up by the Platforms in a posture that leaves the free speech rights of ordinary Americans unrepresented. Second, it comes up on a record that does not include discovery on the depth of government involvement in the censorship.

The Platforms were able to pursue the case without such representation and discovery because they sought a

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Section 230's overt privileges for tech platforms were thus accompanied by a judicially implemented covert privilege from complying with Section 223's protections for children. This Court, in other words, was unwittingly employed to enable passage of Section 230 in a package that allegedly protected "Decency" while in fact privileging the platforms from complying with it.

preliminary injunction against enforcement of the statute before suffering any actual harm. If, in contrast, the case had arisen in an action against the Platforms, the proceedings would have been brought or joined by censored individuals, who would have asserted their individual speech rights and who would have had the opportunity for full discovery about the government's role in the censorship. In the posture of the case as pursued by the Platforms, however, such representation and discovery are missing.

These lacunae reinforce the view of Judge Oldham in *NetChoice v. Paxton*, 49 F.4th 439 (5th Cir. 2022), that the Platforms are not entitled to pre-enforcement facial relief against common carrier free speech statutes. The missing representation and discovery also are independent and adequate grounds for hesitating to hear this case on this record. Important as are the constitutional questions, it would be a mistake to resolve them without representation of the constitutional interests or on an inadequate record.

This Court therefore should not grant certiorari unless it is confident it can decide the case in a way, first, that does justice to the unrepresented individual free speech interests and, second, that recognizes the government involvement in the censorship, which does not appear in the record.

Some additional considerations also must be mentioned. Third, the parties on one side curate much of the information available to Americans, including the justices, and this may be consequential. Fourth, having cautiously refrained from hearing concerns about voter fraud in this

Court, the justices should not prevent such concerns from being voiced outside the Court.

ARGUMENT

I. THIS COURT SHOULD BE CAUTIOUS IN GRANTING CERTIORARI BECAUSE INDIVIDUAL SPEECH RIGHTS ARE NOT REPRESENTED IN THIS CASE

The Platforms initiated this case, through their trade association NetChoice, by securing a preliminary injunction barring the Florida attorney general and other Florida officials from enforcing the Florida free speech statute. By proceeding in this way, they framed the case in terms of a contest between Florida regulation and what they call their free speech. The speech rights of those whom they censor are therefore unrepresented.

Under the anti-discrimination provisions of the Florida statute, the individuals protected by it have at least statutory speech rights. Common carrier antidiscrimination principles have long been understood to be compatible with the First Amendment, and this protection for speech and debate should not be cast aside.

Even more fundamentally, individuals have First Amendment speech rights that are at risk in this case. As will be seen below (in Part II), there is reason to believe that government has played a constitutionally significant role in the Platforms' censorship. Although the Florida law is inartfully drafted, common carrier antidiscrimination statutes are essential barriers against privatized censorship—against the government's use of private companies to suppress opponents in ways it cannot.

Whereas Florida has a compelling government interest in exercising its *power* to protect speech and open debate, the individuals who rely on the Platforms have their own, more personal interest in their *freedom* of speech and debate. Quite apart from the injury to Florida caused by the Platform's censorship, individuals suffer profound harm when they are barred from sharing and receiving information, argument, and opinion.

If we are to have a free society, individuals must be left to judge all sorts of things for themselves. And to exercise their own judgment, individuals must enjoy a freedom from censorship, whether governmental or private. They need to figure out how to vote in elections, what precautions or medicines to take against health risks, and what conduct they should view with approbation or opprobrium. But when they are censored, they cannot do any of this with confidence.

The Platforms' censorship suppresses academic papers, reports of medical cases, passionate disagreements, moderate colloquies, videos, and cartoons.[3] And because the government has taken a political stance on things such as science, medicine, and elections, the censorship of dissenting views on these matters is the suppression of political opposition.

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3. For the suppression of science, *see, e.g.*, Brian Wang, *Twitter Suppresses Published Results of a Peer Reviewed Study*, NextBigFuture (March 15, 2022), https://bit.ly/3rZjWXn; Robert Zimmerman, *Today's Blacklisted American: World's Top Vaccine Expert Censored by Twitter & LinkedIn and Punished by the CDC,* Behind the Black (Aug. 26, 2021), https://bit.ly/3eCDw8y; *Open letter from the British Medical Journal to Mark Zuckerberg*, The BMJ (Dec. 17, 2021), https://bit.ly/3MCQ8sW.

All of this is like placing tape over the mouths, ears, and eyes of Americans. It prevents them from expressing and receiving what they need in order to sort out their various predicaments, whether political, religious, sexual, cultural, scientific, or merely personal. It treats them as infants, incapable of reaching their own judgments.

Even when (sometimes) a claim of misinformation clearly is correct, the suppression of free speech and debate is profoundly harmful to individuals. The censorship deprives individuals of their voice and their hearing. It converts matters of opinion into certainties dictated from above, whether by the Platforms or ultimately the government. And it leaves individuals wondering what inputs they are missing. In such ways, it undermines their confidence in their own informed judgment. No longer independent participants in society and government, they become the intellectual equivalent of sheep, mentally herded by their keepers in the Platforms and the overseers in the government.

The censorship is rapidly redefining American society. Each of us are affected by what we don't hear. Many are afraid to say what is on their minds, lest they be censored or even permanently barred from participating in discussion. Others, in contrast, confidently assume only reprehensible opinions or persons are silenced — not realizing that much of what was censored has turned out to be prophetically correct.[4] Censorship breeds a poisonous combination of fear and censoriousness.

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4. *See, e.g.*, Apoorva Mandavilli, *The CDC Concedes That Cloth Masks Do Not Protect Against the Virus as Effectively as Other*

The free speech and debate of individuals is therefore crucial for understanding the constitutionality of at least well-drafted common carrier statutes barring viewpoint discrimination by the Platforms. Even if, improbably, the Platforms have speech rights in their censorship, it is even clearer that individuals and their associations have speech rights. Yet because of the way the Platforms initiated the case, individuals and their First Amendment rights are unrepresented in this case.

The justices therefore should not think about this case merely as a dispute between regulation and the Platforms' speech rights. At the very least the case is a contest between the speech rights of Americans and the strange speech freedom of the Platforms, which has no basis in precedent and which eats up the freedom of individuals. More accurately, it is a contest between the speech rights of individuals and the government-backed censorship of the Platforms. So if the novel speech claims of the Platforms are upheld, the well-established speech claims of all others will be defeated.

The lack of representation for the speech rights of Americans—in contrast to the ample representation of the alleged speech rights of the Platforms—may or may not be reason to deny certiorari. But it is ample reason for this Court to go out of its way to prevent the slanted posture of this case from affecting the outcome. The justices

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Masks, N.Y. Times (Jan. 14, 2022), https://nyti.ms/3TE9sIz; Jon Miltimore, *Natural Immunity Offered More Protection Against Omicron Than 3 Vaccine Doses, New England Journal of Medicine Study Finds*, Foundation for Economic Education (July 18, 2022), https://bit.ly/3MQuIsD.

need to keep the freedom of Americans in mind—in granting certiorari and throughout any subsequent proceedings.

Censorship in the guise of speech is an interesting paradox. But Americans cannot afford to have this Court decide that question without carefully attending to their freedom of speech.

II. CAUTION ALSO IS NECESSARY BECAUSE THE GOVERNMENT INVOLVEMENT IN THE CENSORSHIP IS MISSING FROM THE RECORD

Another reason for caution in this case is that the record does not include significant discovery or other evidence about the government participation in the censorship. This evidence of the role of government is crucial. It confirms the point in Part I, that the case is centrally about the free speech of individuals, whose rights are not represented. It also shows the compelling need for common carrier laws, such as the Florida and Texas free speech statutes, to prevent government from privatizing its censorship.

A. Evidence Absent from the Record Reveals Massive Government Participation

The evidence missing from the record here is critical, as it reveals the details and depth of government's role. The discovery in *Missouri v. Biden*, No. 3:22-cv-01213 (W.D. La.), and other documentation—all absent from this case—show not merely generic attempts at influence, but a massive governmental–private partnership to silence people who don't conform.

The discovery in *Missouri* reveals that at least 45 government officials have been in communication with the Platforms, some on a regular basis in monthly meetings, regarding Covid-19 "Content Modulation and/or Misinformation."[5] The *Missouri* discovery, combined with discovery in another case and a FOIA request, disclose that "[a]t least 11 federal agencies, and around 80 government officials, have been explicitly directing social media companies to take down posts and remove certain accounts that violate the government's own preferences and guidelines for coverage on topics ranging from COVID restrictions, to the 2020 election, to the Hunter Biden laptop scandal."[6]

The government regularly held "Be On The Lookout" meetings with Platforms to discuss Covid misinformation.[7] Platforms updated the government on their efforts to suppress information and waited for authorization from the Center for Disease Control before removing certain posts and accounts.[8] Even the White House directly asked Facebook to have at least one account "pulled

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5. *Missouri v. Biden*, Defendant's Combined Objections and Responses to Plaintiffs' First Set of Expedited Preliminary-Injunction Related Interrogatories, USDC W Dist La, Civil Action No. 22-cv-1213, at 16–18; Jenin Younes, *The U.S. Government's Vast New Privatized Censorship Regime*, The Tablet (Sept. 21, 2022), https://bit.ly/3SeSy2h; Christopher Hutton, *CDC and White House Regularly Discussed Censorship with Social Media, Emails Show,* Washington Examiner (Sept. 1, 2022), https://washex.am/3MOQf4F.
6. Younes, *supra.*
7. Press release from Missouri Attorney General Eric Schmitt (Sept. 1, 2022), available at https://bit.ly/3TAPEGF.
8. *Id.*

down."[9] The government's sense of its role is suggested by a text between employees of the Cybersecurity and Infrastructure Security Agency: "Platforms have got to get more comfortable with gov't. It's really interesting how hesitant they remain."[10] Such evidence, however, has not been part of this case.

Perhaps conscious that its privatization of censorship would not really shield it from the First Amendment, the government outsourced not merely the censorship, but even the demands for censorship. It worked with a consortium called the Election Integrity Partnership. The private organizations belonging to that consortium conveyed expectations for censorship to the private Platforms, which in turn often acted on such suggestions. This was a double layer of privatization. A recent news article explains: "A consortium of four private groups worked with the departments of Homeland Security (DHS) and State to censor massive numbers of social media posts they considered misinformation during the 2020 election, and its members then got rewarded with millions of federal dollars . . ."[11] The groups "set up a concierge-like service in 2020 that allowed federal agencies . . . to file 'tickets' requesting that online story links and social media posts be censored or flagged by Big Tech."[12] The consortium's own report "boasted it flagged more than 4,800

9. *Id.;* https://bit.ly/3CRu0GL.

10. Younes, *supra.*

11. Greg Piper & John Solomon, *Outsourced Censorship: Feds Used Private Entity to Target Millions of Social Posts in 2020*, Just the News (Sept. 30, 2022), https://bit.ly/3Sj66K8.

12. *Id.*

URLs—shared nearly 22 million times on Twitter alone—for social media platforms."[13] And it will be "back in action again for the 2022 midterm elections."[14]

All this evidence—and undoubtedly there is more to come—shows a range of pressures, badgering, and cooperation. Even the cooperation that seems voluntary was not merely voluntary. The badgering has been widespread and persistent, and the cooperation has taken place in the shadow of government power—indeed, in the shadow of government threats that it will be used against the Platforms.

Even if the censorship were entirely voluntary—not at all in the shadow of power and threats—the government participation is profoundly dangerous because it serves as a means of coordination. A Platform cannot successfully censor material if another Platform will publish it. The government, however, solves this problem by offering coordination, which allows the Platforms to align their censorship—so individuals suppressed on one Platform cannot express themselves on another.

The resulting censorship cannot be considered merely private. The companies may be private, but much of their censorship has been privatized government suppression.

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13. *Id.*

14. *Id.* The consortium responded to these charges with the narrow protest that it did not complain to social media companies "on behalf" of the Department of Homeland Security or the Cybersecurity and Infrastructure Security Agency. A Statement from the Election Integrity Partnership (Oct. 5, 2022), https://bit.ly/3sb3dAq. But the whole point of the privatization was to have the requests for censorship come from private entities, not from or on behalf of government.

This Court therefore needs to recognize the role of government—a complex web of participation that does not appear in the record and that is central to this case.

B. This Case Was Brought Up in a Way that Excluded Such Evidence

Although government involvement has been suspected all along, the extent of the government participation was not publicly understood when the Platforms initially brought this case. And this case was brought as a suit for a preliminary injunction against the Florida attorney general and other Florida officials. So it was not obvious that there could be discovery in those expedited proceedings to uncover the role of the federal government (which was not a party) in suppressing the free-speech rights of Americans (who were not parties).

Now, through discovery in other cases, notably *Missouri v. Biden,* it is clear there has been widespread government involvement. Even the *Missouri* case, however, only concerns government suppression of dissenting views about Covid-19. Government involvement to suppress other sorts of dissent—on politics, on election fraud, on sex and gender, and so forth—have yet to be a matter of systematic discovery.

So it is unclear how the relevant evidence can be brought into the record of this case at this late stage. The full range of government coordination and pressure is relevant to this case. But none of it is in the record of this case, and the only systematic discovery of suppression that an *amicus* brief could introduce relates to Covid-19. Briefs could cite media articles on other suppression, but the justices quite reasonably will have greater confidence

in a judicially developed court record. So because of the way the Platforms brought this case, it is coming to this Court without a record of key underlying facts.

C. The Evidence Reinforces the Compelling Need for Common-Carrier Statutes Barring Viewpoint Discrimination

The government's use of the Platforms to censor Americans violates the First Amendment. But even to the extent current doctrine is ambiguous on this question, the evidence of government involvement would show the compelling need for common-carrier antidiscrimination statutes. Such statutes are essential for protecting individuals and their speech be from government interference with the Platforms. But the evidence showing the danger is not part of this case.

Rather than just regulation, common carrier law is an essential protection against discrimination. As applied to communications carriers, it is a crucial shield against government pressures for censorship.

Censorship is difficult to impose in a free society without a partnership between government and dominant private entities. Therefore—whether in seventeenth-century England or twenty-first century America—government has often relied on private entities to do what, for practical or constitutional reasons, it couldn't entirely do itself. In such circumstances, common carrier doctrine and statutes have long been valuable. By tying the hands of communications carriers, such laws protect individuals from the full range of overt and more subtle government pressures for suppression.

But this vital role of common carrier statutes, including the Florida free speech statute, is unlikely to be adequately understood when the record does not include evidence of government's role in the censorship.

The evidence of government involvement matters at a minimum because government generally cannot avoid responsibility for violating rights by getting private entities to do its dirty work. If the Secretary of the Interior hires a private firm to bulldoze your house, it does not circumvent an unconstitutional taking of your property. When the Department of Education reaches an understanding with a university to censor your speech, it has not avoided violating your freedom of speech—even though the arrangement is entirely voluntary. Similarly, when the government asks the Platforms to censor on its behalf, it does not escape the First Amendment. Government may not suppress rights by working through private entities. And this is especially clear when it uses private Platforms to impose a massive system of censorship.

Even if this general point about the evasion of rights were doubted, the unconstitutionality of privatizating censorship through the Platforms is clear from the First Amendment's very text. Whereas the amendment bars Congress from making laws "prohibiting" the free exercise of religion, it forbids Congress from making laws "abridging" the freedom of speech. The amendment thus doesn't merely condemn blunt government prohibitions of the freedom of speech. Rather, it more broadly forbids government from *abridging* or reducing the freedom of speech—even in the absence of a prohibition.

Put more concretely, free exercise violations exist only when there is at least some degree of government pressure. It need only be very mild economic pressure—as seen in *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017)—but some pressure seems requisite. By contrast, free speech violations can exist without pressure. All that is necessary is a government abridgment or reduction of one's freedom. Thus, even when the government merely cooperates with the Platforms—let alone, when it secures their cooperation under the shadow of its power—its actions diminishing or otherwise abridging the freedom of speech are still unconstitutional.

It therefore is essential for the record in this case to include the evidence of government involvement in the censorship. Such evidence reveals the necessity of applying common carrier antidiscrimination rules to communications carriers—to force communications carriers to resist government demands for censorship and thereby protect the free speech of individuals. Common carrier statutes, including those in Florida and Texas, create structural obstacles to the privatization of censorship.

The rights-protecting role of common carrier laws (including even the poorly framed Florida free speech statute) is no less important when First Amendment doctrine is ambiguous about privatized censorship. Although the First Amendment itself bars government from pressuring, inducing, or merely cooperating with private entities to carry out suppression, the caselaw on the subject is thin and sometimes ambiguous. The jurisprudence of this Court has yet to catch up with the realities of how government uses private organizations to violate constitutional

rights with impunity. So, in the meantime, common carrier antidiscrimination duties can fill the gap in constitutional doctrine by protecting communications carriers and those who rely upon them from government efforts to secure censorship through private entities. *See* Eugene Volokh, *Profs. Adam Candeub & Philip Hamburger on The Common Carrier Cure for First Amendment Uncertainty*, Reason: Volokh Conspiracy (June 20, 2022, 11:23 A.M.), https://bit.ly/3yYpsxf.

Put another way, if this Court cannot clarify the limits on privatized violations of the First Amendment, it should not prevent states from offering protection against this danger. The federal government increasingly evades the Bill of Rights by working through private parties. So, unless this Court can effectively prevent such evasions, it should permit states to use common carrier antidiscrimination statutes to repair the breach.

The evidence missing from the record in this case thus remains important even amid doctrinal ambiguity. The argument that common carrier statutes are essential to fill the doctrinal gap can be stated abstractly. But the point would be much more compelling on a record that includes the evidence of massive government interference.

Such evidence would dramatically show the danger of allowing government to evade the First Amendment by working through private organizations. It would persuasively convey the profound risk to individual speech and public debate. It would show the compelling, even existential value of at least well-drafted antidiscrimination statutes.

The outcome of this case, and its implications for artfully framed common carrier statutes, such as the Texas free speech law in *NetChoice v. Paxton*, 49 F.4th 439 (5th Cir. 2022), are thus likely to rest on evidence of government involvement that is missing from the record in this case. The censored are not represented, and the evidence of the government role in the censorship is also missing. The Platforms brought this case in a way that left out the censored and the evidence, and that will present this Court with serious difficulties if it grants certiorari.

III. THE JUSTICES SHOULD BE CAREFUL ABOUT THE PLATFORM'S ECHO CHAMBER

There are additional reasons for caution in the case, including the risk that the parties on one side curate publicly available information.

The justices have a profound duty to exercise their own judgment and follow the law.[15] They therefore listen to learned arguments in court, not the cacophony of popular opinions. Yet even while admirably refusing to be swayed by public opinion, the justices need to understand not only the law, but also the world. They cannot shut their eyes to the world as it is, and the information available to them therefore matters for their decisions — not directly, but as background knowledge.

Although their perceptions of the world are sometimes formally stated as a matter of judicial notice, their perceptions more typically are left unstated. Judges regularly rely on their knowledge of contemporary life, and this background information is not insignificant.

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15. *See* Philip Hamburger, *Law and Judicial Duty*, *passim* (2008).

None of this would ordinarily be of much concern. But one side in this case—the Platforms—shape the preeminent avenues for communication in this country. There consequently is a risk that the justices, like other Americans, live at least partly in an echo chamber adjusted by one of the parties.

A. The Silent and Silenced Majority

Many of the individuals whose speech is most at risk and least represented in this case are members of the silent majority—indeed, the silenced majority. Even in ordinary circumstances, the phenomenon known as the silent majority means that the justices typically get much of their information from only a small fraction of the public. Most of the public are not members of the class whose voices dominate the media.

In this case, however, the danger that many voices are beyond audible range of the justices is exacerbated by the censorship. The Platforms that are asking this Court to protect their censorship have been stifling the voices of the many persons who are most likely to offer an alternative view of freedom of speech.

B. A Curated Echo Chamber?

The Platforms subsidize a vast array of sources of information. The Platforms have spread out their business among major law firms, and even those firms that don't get the business often want it. The Platforms subsidize many think tanks and intellectuals, including law professors of multiple perspectives. Facebook even draws leading law professors into its internal censorship court, the Oversight Board. So when the Platforms also censor

speech, it is just the last and most substantial step in tilting information.

Their censorship largely determines what information rises to the surface of the Web and what voices are heard and how loud they seem. So, even if the justices are only unconsciously affected by what they hear, they must ask themselves, are they hearing America? Are they hearing the full range of scientific and medical information? Or are they hearing mostly an echo chamber framed by one of the parties?

None of this is to say that the recent voices favoring "editorial discretion" would not have been as loud without the Platforms' funding. Nor is it to say that the Platforms necessarily are boosting their speech claims on the Web or censoring those who question their speech claims. But there is no way of knowing.

The power of the Platforms to shape the national conversation became clear from their suppression of news about Hunter Biden's laptop in the weeks before the last presidential election.[16] Of course, this Court's decision-making is the very opposite of an election. But perhaps the Platforms' censorship and other manipulation of information also affects the conversation about what they call their "free speech." Again, there's no way of knowing.

For example, if the justices hear an on-line chorus singing a relevant theme—such as that the censorship is merely private "editorial discretion" or that only "misinformation" has been suppressed—it cannot assume this

16. Cristiano Lima, *Hunter Biden Laptop Findings Renew Scrutiny of Twitter, Facebook Crackdowns*, The Washington Post (Mar. 31, 2022), https://wapo.st/3yJwPs3

is more than what the algorithms have elevated to prominence. The feedback loop is largely controlled by the one of the parties.

This risk of slanted inputs is one of the predictable dangers of censorship—for judges as much as other individuals. So this Court needs to be self-conscious about the Platforms' power over the national conversation, including their power over information relevant to this case.

This *amicus* cannot sufficiently emphasize that he is not suggesting judges should or do attend to public opinion. Rather, he merely is pointing out that, if background information matters, the justices need to be aware of the degree to which information is controlled by one of the parties. This problem is difficult, but it would be irresponsible and untruthful not to mention it. The Amicus therefore merely hopes he has done so thoughtfully, with full respect for both this Court and the Platforms.

IV. HAVING CAUTIOUSLY HESITATED TO PROTECT THE VOTE, THIS COURT SHOULD NOT INCAUTIOUSLY INTERFERE WITH LEGISLATIVE PROTECTIONS FOR VOICE

Voting and voice are intimately related. The one cannot be intelligently exercised without the other. And because the justices cautiously refrained from hearing about voter fraud in this Court, it would be incautious for them to prevent concerns about voter fraud from being voiced outside the Court.

The Platforms are not uninvolved in elections. In the past few years, the owner of at least one Platform has paid vast sums to local governments to shape their election

practices—with the evident goal of affecting election outcomes.[17] The Platforms have censored important stories in ways that may have altered election results—as when (apparently at the instigation of the FBI) they stifled the news about Hunter Bidens laptop.[18] The Platforms subsequently have censored complaints about election fraud on the theory that it is "misinformation."[19] And this Court has refused to hear the complaints about election fraud. *See King v. Whitmer*, 141 S. Ct. 1449 (2021).

This Court therefore must tread carefully. It is one thing to refuse to hear complaints about election fraud after the election has been certified. But it is quite another to refuse to hear complaints about election fraud and then overturn a law that would protect the freedom to discuss election fraud.

Speech is a crucial fallback remedy—not because the complaints are necessarily justified, nor because the speech will predictably obtain justice, but at least because it diminishes tensions. Albert Hirschman famously wrote

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17. Steven Nelson & Bruce Golding, *Zuckerberg's Election Spending Was 'Carefully Orchestrated' to Influence 2020 Vote: Ex-FEC Member*, The N.Y. Post (Oct. 14, 2021), https://bit.ly/3TpgMaS.

18. Katrina Trinko, *Facebook Suppressed Hunter Biden Laptop Story after FBI Warning*, The Daily Signal (Aug. 25, 2022), https://dailysign.al/3EXzdiO.

19. *See, e.g.*, Steven Overly, *Facebook Curtails Misleading Posts, Live Video as Election Misinformation Spreads*, Politico (Nov. 5, 2020), https://politi.co/3TyzahL; *see also* Shannon Bond, *Twitter Expands Warning Labels to Slow Spread of Election Misinformation*, NPR (Oct. 9, 2020), https://n.pr/3D35IuS; Sarah E. Needleman, *Twitter Bans President Trump's Personal Account Permanently*, The Wall Street Journal (Jan. 8, 2021), https://on.wsj.com/3s0etQ2.

that individuals have three options: exit, voice, or loyalty.[20] It would be very dangerous for this Court to cut off the option for voice.

When there are election irregularities and censorship, many people will worry that the truth will never be thrashed out. They will harbor the deepest fears about elections. But if there is free speech, they will know that they have a good chance to get to the bottom of it.

This is not to defend exaggerated or false complaints about election fraud. But if one hopes that Americans will get over their fears of election fraud, there is no better way to do this than to secure freedom of speech. And if one does not secure freedom of speech, one should not be surprised that destabilizing fears of election fraud remain rampant.

The fatal combination of cutting off both the judicial and the public hearing of concerns about voter fraud would be especially dangerous in this case because the Platforms are asking the Court actively to change its doctrines. To overturn the decision below, this Court would have to cast aside its principles on facial challenges. *See NetChoice*, 49 F.4th at 8–9 (5th Cir. 2020). The Court would have to transform its relatively recent and modest ideas of "editorial discretion" into a robust doctrine reconfiguring First Amendment law. *See* Adam Candeub, *Editorial Decision-Making and the First Amendment* at 2–3, available at https://bit.ly/3CEU47R. The Court would have to abandon the traditional application of common

20. Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Princeton Univ. Press 1970).

carrier antidiscrimination doctrine to communications carriers. And it would have to ignore the compelling state interest in common carrier antidiscrimination legislation. Such activism on behalf of censorship, coming on the heels of the Court's restraint in avoiding involvement in voter fraud, would look rather odd.

In short, this Court cannot afford to refrain from hearing about election fraud and then actively overturn the protections for speaking about such fraud. This would protect neither the vote nor voice about it. So perverse a combination would seem almost calculated to ensure instability. And it would undermine confidence in our institutions, including this Court.

V. NO EASY SOLUTION

This brief does not presume to say what the justices should do in these circumstances. No solution is satisfactory.

In theory, this Court could reserve any question to the extent it would be invidious to decide it. It could reserve any question involving the speech rights of individuals (or their associations) against the Platforms because their interests and arguments are not represented in this case. The Court also could reserve any question that would turn on knowing the full extent of government involvement in the Platforms' censorship. But the reservation of these questions would mean reserving almost the entire case.

At the very least, the justices should proceed cautiously. If they grant certiorari, they will have to decide the case in a way that recognizes what the case omits. They will have to recognize the speech rights that have no

representation in this case. And they will have to understand the depth of government involvement in the censorship, even though that involvement has not been subject to discovery. What's more, the justices will have to recognize the unrepresented speech rights and missing information in a way that satisfies the half of Americans who resent the censorship that they have been heard and that their speech rights and the underlying government pressures have been fully understood.

This is not an enviable task.

At stake is the most extensive system of censorship in the nation's history. So, whatever this Court does, it should pause before being rushed into judgment in a case in which individual speech rights are unrepresented and the government involvement is missing from the record.

CONCLUSION

The Court should be cautious in granting a writ of certiorari.

Respectfully submitted.

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