No. 22-3573

In the United States Court of Appeals for the Sixth Circuit

MARK CHANGIZI, *et al.*,
Plaintiffs-Appellants,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio
Case No. 2:22-cv-01776

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF PLAINTIFFS/APPELLANTS AND REVERSAL

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None known.

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INTEREST OF THE *AMICUS*[1]

Amicus curiae Foundation for Moral Law ("the Foundation") is a 501(c)(3) non-profit, non-partisan organization dedicated to defending religious liberty, God's moral foundation upon which this country was founded, and the strict interpretation of the Constitution as intended by its Framers who sought to enshrine both. To those ends, the Foundation directly assists, or files *amicus* briefs, in cases concerning religious freedom, the sanctity of life, and others that implicate the fundamental freedoms enshrined in our Bill of Rights.

The Foundation has an interest in this case because it believes that free speech, as properly understood by the Framers, is a necessary antecedent to every other right. The First Amendment's free speech clause was ratified to protect the citizenry from exactly the kind of federal government censorship on speech that has occurred in this case. Whereas the Founding generation had independent printmakers using the printing press to speak their minds and publish their ideas on matters relevant to the public, in our modern age, corporate media easily dominates the conversation—now,

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[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

only the internet provides the chance for the individual citizen to exercise his or her right to free speech in a way analogous to what the Founders were familiar with. If today's federal government can censor and suppress speech critical of its actions or that it omnipotently deems "misinformation," through colluding with or intimidating internet publishing companies such as Twitter, then the Founder's federal government would have been able to censor political speech by colluding with or intimidating independent printmakers like Benjamin Franklin.

The Foundation argues that both instances of federal government censorship are absolutely barred by the First Amendment's free speech clause as intended by the Founders. The Foundation believes that the government's handling of Covid-19 has led to unprecedented infringements on our fundamental freedoms secured by the Constitution. Thus, the Foundation further believes that the people of the United States must be free to criticize the government's handling of Covid-19 or else these infringements will become the norm. The original meaning of the Constitution and its First Amendment affirms these truths.

ARGUMENT

Throughout the past two years, the federal government, via Appellees and the Biden Administration as a whole, have not simply decried "fake news," but have actively sought to limit the spread of speech they deem "misinformation." Appellants plead facts that showed Appellees made statements that specifically threatened social media companies with adverse consequences unless such misinformation was controlled. Under the original meaning of the First Amendment, the Department of Health and Human Services has abridged Appellants' rights to free speech, and Appellants' claims should be allowed to proceed to discovery.

The Foundation fully supports the arguments of Appellants and will not duplicate those arguments. Rather, the Foundation provides this Court with a historic examination of free speech and prior restraints at the Founding, how the Sedition Act of 1798 frames our understanding of the free speech clause, how the Supreme Court has addressed these issues, and how Appellees have unconstitutionally infringed Appellants' speech under the original meaning of the free speech clause of the First Amendment.

I. The Meaning of Free Speech at the Founding Was Based on Criticizing Government Action to Prevent Tyranny.

"Congress shall make no law … abridging the freedom of speech, or of the press." U.S. Const. amend. I. America's Founders used these words

with a strong understanding that they were building on a centuries long common law tradition from their English heritage. The English Bill of Rights of 1689 provided, in pertinent part: "That the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of parliament." English Bill of Rights § 9 (Dec. 16, 1689), *reprinted in 2 The Founders' Constitution*, at 319. The Founders followed this lineage through colonial charters, state constitutions, the Articles of Confederation, and finally the Constitution of the United States.[2] The freedom of speech thus has a rich common law development in England, the American colonies, and America after Independence leading to the eventual ratification of the First Amendment.

a. Common Law Origin of Free Speech and "Prior Restraint"

Prior the First Amendment's ratification in 1792, the freedom of speech already had a lineage that spanned over 300 years since the first printed materials in England—though the first couple of hundred years featured mostly censorship by the Church of England and Crown. Michael I. Meyerson, *The Neglected History of The Prior Restraint Doctrine: Rediscovering The Link Between The First Amendment And The Separation*

[2] "Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress …." Articles of Confederation, art. V, para. 5 (1781), reprinted in 2 The Founders' Constitution, at 323. The Constitution continued the tradition: "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other place." U.S. Const., art. I, § 6, cl. 1.

of Powers, 34 IND. L. REV. 295, 298-303 (2001) (hereinafter, "The Neglected History"). The government accomplished this censorship primarily through requiring licenses to publish any speech at all which were doled out selectively to favored printers. *Id.* English intellectuals began to identify these "prior restraints" as the primary offense to freedom of speech with greater and greater success until ultimately it became widely recognized in England that prohibiting prior restraints was key to the freedom of the press.

As William Blackstone would describe,

> [t]he liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

William Blackstone, *Commentaries* 151-52 (1979). Similarly, Jean Delolme wrote, "[l]iberty of the press consists in this: that neither courts of justice, nor any judges whatever, are authorized to take notice of writings intended for the press; but are confined to those which are actually printed." Jean DeLolme, *The Constitution of England* 254 (John MacGregor ed. 1853) (1775). The colonies and eventually states of America developed the freedom of speech from this starting point, therefore, the First Amendment

was constructed and ratified as a direct descendant of this common law lineage.

b. The First Amendment's Free Speech Clause

The language of the First Amendment clearly indicates that the right was meant to combat government tyranny. With lingering fear of prior restraints, many proposals for the language of the First Amendment took from state constitutions, which emphasized the right's importance to all freedom. *See e.g.*, Massachusetts Constitution, art. XVI (1780) ("The liberty of the Press is essential to the security of freedom in a State"); New Hampshire Constitution, Part I, art. XXII (1783) ("The Liberty of the press is essential to the security of freedom in a State").

Without the freedom of the press explicitly secured, many opposed the ratification of the Constitution for fear of government overreach. Federalists attempted to assure skeptics by noting that Congress would lack enumerated powers over speech and the press and would thus be incapable of infringing speech. *See The Federalist No. 84* (Alexander Hamilton) at 445 (George W. Carey & James McClellan eds. 2002). However, the Anti-Federalists and states insisted that these rights were too important to be left to implication. It would become clear soon after its ratification that the First Amendment was vital to the preservation of this republic.

II. The Repudiation of the Sedition Act of 1798 is Necessary to Apply the Free Speech Clause as Intended by the Founders.

A mere seven years after the ratification of the First Amendment, the Federalists led by the second president of the United States John Adams passed the Sedition Act of 1798, which criminalized the writing of "any false, scandalous and malicious" statements against the President or Congress with punishment of fines or imprisonment. The Sedition Act of 1798, ch. 74. I Stat. 596 (1798). The Anti-Federalists demands for a written Bill of Rights had proved prescient and necessary. The Sedition Act controversy was a major test for the meaning of the free speech clause, and it is necessary to apply the free speech clause with the repudiation of the Sedition Act in mind.

The Federalists argued that the Sedition Act was constitutional because it was not a literal "prior" restraint on speech; instead, it punished speech after it had been published. The First Chief Justice John Marshall, in reporting on Madison's Virginia Resolutions, even adopted this view, asserting that criminal punishment under the Sedition Act was appropriate. *See* John Marshall. Report of the Minority on the Virginia Resolutions, J. House of Delegates (Va) 6:93-95 (Jan. 22, 1799), reprinted in 5 The Founder's Constitution 136-38 (Philip B. Kurland & Ralph Lerner eds.,

1987). However, the Federalists' arguments were widely condemned, with Madison and Thomas Jefferson anonymously authoring the Virginia and Kentucky resolutions, respectively, in response.

As Madison proclaimed in the Virginia Resolutions, free speech "has been justly deemed the only effectual guardian of every other right" because it allows the people to police the actions of their government. J. Madison, *The Virginia Resolutions* (Dec. 21, 1798), *reprinted in* 5 *The Founder's Constitution*, at 136. Madison explained that the First Amendment was ratified on an understanding that the common law of the freedom of speech had developed further in America than a bar on literal prior restraints.

> This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws.

J. Madison, *The Virginia Report of 1799-1800, Touching the Alien and Sedition Laws*, *reprinted in* 5 *The Founders' Constitution*, at 145.

The Sedition Act expired by its own terms in 1801, two years before the Supreme Court would establish the power of judicial review in *Marbury v. Madison*. The controversy surrounding the meaning of the free speech clause so shortly after ratification showed that there was a more robust understanding of the First Amendment at the Founding. As explained below,

the Supreme Court has now finally acknowledged that the Sedition Act was unconstitutional and points us towards the purpose of the freedom of speech.

III. The Supreme Court's Application of the Free Speech Clause and Prior Restraint Rule.

Throughout the 19th Century, prior to the Supreme Court's incorporation of the free speech clause to the States through the Fourteenth Amendment due process clause, state courts uniformly applied the common law prior restraint rule to protect speech. Meyerson, *The Neglected History*, 34 Ind. L. Rev. at 313-14. In the 1931 case, *Near v. Minnesota ex rel. Olson*, the Supreme Court formally incorporated the free speech clause and rooted its jurisprudence in the well-developed body of case law applying the prior restraint rule. *See* 283 U.S. 697, 719 (Chief Justice Hughes writing for the Court, "it has been generally, if not universally, considered that it is the chief purpose of the guaranty [of liberty of the press and speech] to prevent previous restraints upon publication"). With *Near*, the Supreme Court formally adopted the full wealth of the common law tradition banning prior restraints to its free speech jurisprudence. Meyerson, *The Neglected History*, 34 Ind. L. Rev. at 337.

The Supreme Court's rationale in *Near* shows a strong understanding of the historical common law rule against prior restraints as understood by the Framers of the First Amendment and made clear by the aftermath of the

Sedition Act controversy. *Id.* at 337-38. The statute at issue allowed the state to issue a permanent injunction against a newspaper publishing anything "malicious, scandalous, or defamatory" as defined by law. *Near*, 283 U.S. at 712. The Supreme Court struck down the statute on the basis that its object and design was to suppress speech and that the injunction restrained all further publication. *Id.*

Responding to the point that the statute was a subsequent punishment, rather than a literal "prior" restraint, the Court explained the development of the Founders' understanding of the free speech clause to include more than the early English common law. *Id.* at 715-19. The Court reasoned that the Founders understood subsequent punishments by the state to also violate the freedom of speech. *Id.* at 715. The Court noted that common law libel laws afford appropriate remedies for abuses of the freedom of speech that cause injury. *Id.* at 715.

Finally, the Court quoted Madison reflecting on the Sedition Act controversy:

> Had 'Sedition Acts,' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?

Id. at 718 (quoting Report on the Virginia Resolutions, Madison's Works, vol. iv, 544.). As explained above in Part II, the Sedition Act of 1798 was fiercely rejected as a violation of the First Amendment over the Federalists' argument that it was constitutional because it was not a literal prior restraint. The Supreme Court's recognition that an injunction against future speech is a prior restraint analogous to the Federalists' attempt to criminalize statements against the President and Congress displays a strong understanding of the development of the freedom of speech at the Founding to include more than the English understanding.

The Supreme Court has continued to root its understanding of free speech in the Sedition Act controversy, and "the attack upon its validity has carried the day in the court of history." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964). The Sedition Act's object and effect of restraining criticism of government is emblematic of what the First Amendment absolutely bars the government from doing. *Near*, 283 U.S. at 717-719.

IV. Appellees' Actions Are Unconstitutional Prior Restraints Under the Original Intent of the Free Speech Clause.

The case at bar presents an unconstitutional prior restraint under the original intent of the free speech clause because, as alleged by the Appellants, Appellees had the direct aim of restraining what it deemed

misinformation regarding government actions in response to Covid-19. Government actions which threaten to punish publishers for certain speech have the clear object and effect of restraining speech critical of the government. This is the exact lesson from the Sedition Act controversy: the freedom of speech means that the people must have the right to a free discussion of government actions.

Imagine that the Federalists did not control Congress in 1798, so the Sedition Act could not be passed as statute. However, the Federalists were determined that Anti-Federalists were spreading misinformation about the Adams administration and Federalist aims in Congress. President Adams' administration begins to engage in direct communication with independent printers, threatening repercussions if they allow Anti-Federalists to publish certain ideas critical of the administration.

President Adams himself begins to make public statements blaming printmakers for promoting the Anti-Federalists seditious misinformation against the government and admonishing them to prevent this. As a result, many Anti-Federalists are completely barred from any printing services because they refuse to water down their criticisms of the government. When confronted by Madison and Jefferson on the basis of infringing the freedom of speech, President Adams asserts that his administration has done nothing

unlawful because it was the printmakers who had ultimately censored the people, not his government.

Had this hypothetical been a reality, it is probable that the public response would have been even more severe against it than the Sedition Act. The Founding generation would have viewed such actions by a President to restrict speech as actions of someone who thought he was a king. Over 200 years later, the Biden Administration has restricted speech in this exact manner that the First Amendment absolutely bars.

CONCLUSION

This Court should reverse and allow Appellants' well-pleaded claims to go to discovery.

Respectfully submitted,

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December 5th, A.D. 2022

CERTIFICATE OF COMPLIANCE

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I certify that on December 5th, A.D. 2022, a true copy of this document is being filed electronically (via CM/ECF) and will thereby be served on all counsel of record.

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