

No. 25-6138

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# United States Court of Appeals for the Ninth Circuit

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THE BABYLON BEE, LLC; RUMBLE, INC.; KELLY CHANG RICKERT;  
X CORP.; CHRISTOPHER KOHLS; RUMBLE CANADA, INC.,  
*Plaintiffs-Appellees,*

– v. –

ROB BONTA, in his official capacity as Attorney General of the State of  
California; SHIRLEY WEBER, in her official capacity as  
California Secretary of State,  
*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA, IN CASE NO. 2:24-cv-02527-JAM-CKD,  
THE HONORABLE JOHN A. MENDEZ, JUDGE PRESIDING

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**BRIEF OF ADVANCING AMERICAN FREEDOM, INC.; AMERICAN ASSOCIATION OF  
SENIOR CITIZENS; AMERICANS FOR FAIR TREATMENT; CENTER FOR URBAN  
RENEWAL AND EDUCATION (CURE); EAGLE FORUM; EAGLE FORUM OF  
ALABAMA; FREEDOM FOUNDATION; FRONTIERS OF FREEDOM; CHARLIE GEROW;  
INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; TIM  
JONES, FORMER SPEAKER, MISSOURI HOUSE, FOUNDER, LEADERSHIP FOR  
AMERICA INSTITUTE; JOAN HOLT LINDSEY, PRESIDENT, LINDSEY  
COMMUNICATIONS; JENNY BETH MARTIN, HONORARY CHAIRMAN, TEA PARTY  
PATRIOTS ACTION; CHUCK MUTH, PRESIDENT, CITIZEN OUTREACH  
FOUNDATION; NEW YORK STATE CONSERVATIVE PARTY; KEVIN RIFFE,  
CHAIRMAN, WEST VIRGINIA CENTER RIGHT COALITION; RIO GRANDE  
FOUNDATION; ANN SCHOCKETT, PAST PRESIDENT, NATIONAL FEDERATION OF  
REPUBLICAN WOMEN; 60 PLUS ASSOCIATION; THE COOLIDGE REAGAN  
FOUNDATION; TRADITION, FAMILY, PROPERTY, INC.; UNIFY.US; UPPER MIDWEST  
LAW CENTER; ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS, 2018-2021,  
CHAIR, CENTER FOR AMERICAN SECURITY; AND YOUNG CONSERVATIVES OF  
TEXAS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES**

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## **RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

The amici curiae Advancing American Freedom, Inc.; American Association of Senior Citizens; Americans For Fair Treatment; Center for Urban Renewal and Education (CURE); Eagle Forum; Eagle Forum of Alabama; Freedom Foundation; Frontiers of Freedom; Charlie Gerow; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Former Speaker, Missouri House, Founder, Leadership for America Institute; Joan Holt Lindsey, President, Lindsey Communications; Jenny Beth Martin, Honorary Chairman, Tea Party Patriots Action; Chuck Muth, President, Citizen Outreach Foundation; Chuck Muth, President, Citizen Outreach Foundation; New York State Conservative Party; Kevin Riffe, Chairman, West Virginia Center Right Coalition; Rio Grande Foundation; Ann Schockett, Past President, National Federation of Republican Women; 60 Plus Association; The Coolidge Reagan Foundation; Unify.US; Upper Midwest Law Center; Robert Wilkie, Secretary of Veterans Affairs, 2018-2021, Chair, Center for American Security; and Young Conservatives of Texas are nonprofit corporations. They do not issue stock and are neither owned by nor are they owners of any other corporate entity, in part or in whole. They have no parent companies, subsidiaries, affiliates, or members that have issued shares or debt to the public. The corporations are operated by volunteer boards of directors.

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## STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values including the freedom of parents to raise their children according to their own values.<sup>1</sup> AAF “will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,”<sup>2</sup> and believes American prosperity depends on ordered liberty and self-government.<sup>3</sup> AAF believes that the ability to speak freely without government interference is critical to America’s system of liberty and self-government. AAF files this brief on behalf of its 30,149 members in the Ninth Circuit including 12,373 members in the state of California.

Amici American Association of Senior Citizens; Americans For Fair Treatment; Center for Urban Renewal and Education (CURE); Eagle Forum; Eagle Forum of Alabama; Freedom Foundation; Frontiers of Freedom; Charlie Gerow; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Former

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<sup>1</sup> Plaintiffs-appellees consent to the filing of this amicus brief. Defendants-appellants do not oppose the filing of this amicus brief. No counsel for a party authored this brief in whole or in part. No person other than *Amicus Curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

<sup>2</sup> Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

<sup>3</sup> Independence Index: Measuring Life, Liberty and the Pursuit of Happiness, Advancing American Freedom available at <https://advancingamericanfreedom.com/aaff-independence-index/>.

Speaker, Missouri House, Founder, Leadership for America Institute; Joan Holt Lindsey, President, Lindsey Communications; Jenny Beth Martin, Honorary Chairman, Tea Party Patriots Action; Chuck Muth, President, Citizen Outreach Foundation; New York State Conservative Party; Kevin Riffe, Chairman, West Virginia Center Right Coalition; Rio Grande Foundation; Ann Schockett, Past President, National Federation of Republican Women; 60 Plus Association; The Coolidge Reagan Foundation; Tradition, Family, Property, Inc.; Unify.US; Upper Midwest Law Center; Robert Wilkie, Secretary of Veterans Affairs, 2018-2021, Chair, Center for American Security; and Young Conservatives of Texas believe that the First Amendment-recognized rights to Freedom of Speech and Freedom of the Press, incorporated against the states, prohibit the states from silencing disfavored forms of communication.

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

This case is about whether California can “kill the joke,” *Kohls v. Bonta*, 797 F. Supp. 3d 1177, 1189 (E.D. Cal. 2025) (“Put simply, a mandatory disclaimer for parody or satire would kill the joke.”), when that joke is told using certain forms of artificial intelligence (AI) generated content. As the district court below correctly found, California law AB 2655 is preempted by Section 230 of the Communications Decency Act of 1996. It is also unconstitutional.

As the district court explained, “AB 2655 directly conflicts with, and is preempted by, the immunity afforded by Section 230 of the Communications Decency Act.” Hearing Before the Hon. John A. Mendez, *Kohls v. Bonta*, No. 24-2527 at 30 (E.D. Cal. Aug. 5, 2025). AB2655 imposes three primary (as well as many secondary) burdens on large online speech platforms with regard to what the statute defines as “materially deceptive content.” The platforms must provide a way for Californians to report content that they believe should be labeled as having been “manipulated” or being “not authentic.” Cal. Elec. Code §§ 20515(a), 20514(c).

Platforms must remove “materially deceptive content” if it has been reported, was posted within a certain window of time before an election, and if the platform “knows or acts with reckless disregard for the fact that the content meets the requirements of” the section. § 20513(a). The Content is “materially deceptive” and thus subject to removal if it (1) portrays a candidate “as doing or saying something that the candidate did not do or say and that is reasonably likely to harm the reputation or electoral prospects of a candidate”; (2) portrays an election official “as doing or saying something in connection with the performance of their elections-related duties that the elections official did not do or say and that is reasonably likely to falsely undermine confidence in the outcome of one or more election contests”; or (3) portrays an election official “as doing or saying something that influences an election in California that the elected official did not do or say and that is reasonably

likely to falsely undermine confidence in the outcome of one or more election contests.” § 20513(a)(2).

Finally, platforms must label “materially deceptive content” if the content has been reported, would be subject to removal but is posted outside the election period window or is part of an “advertisement” or “election communication” not subject to the removal provisions, and the platform “knows or acts with reckless disregard for the fact that the materially deceptive content meets the” sections’ other requirements. § 20514(a).

This law is preempted by Section 230, as the district court below correctly found. It also unconstitutionally impedes the ability of Americans to engage in political satire, something they have been doing since before the Founding.

Anonymous speech, including satire, has been an effective political tool in Anglo-American political debate for centuries. The founding generation had a strong belief in the liberty of the press which they ultimately enshrined in the First Amendment. Repeatedly, throughout the colonial, revolutionary, and post-revolutionary period, Americans objected clearly and aggressively to government efforts to stifle speech or reveal the identity of anonymous authors. California’s AB 2839 flaunts this tradition. This Court should affirm the district court’s decision in favor of Plaintiffs-Appellees.

## ARGUMENT

### **I. Anonymity and Pseudonymous Writing are part of the Original Meaning of the Speech and Press Clauses.**

*A. Anonymous and satirical writing were well established in the English tradition by the time of the founding.*

Anonymous writing and satire are deeply rooted in the Anglo-American legal tradition. Anonymous writings date back at least to the persecution of opposition leaders by absolutist Tudor and Stuart monarchs in 16th and 17th century England.<sup>4</sup> John Adams, himself writing anonymously, later took it for granted that “Every body knows how dangerous it was to speak or write in favour of any thing in those days, but the triumphant system of religion and politics.”<sup>5</sup>

In 1644, the poet John Milton criticized laws forbidding any “book be Printed, unlesse the Printers and the Authors name, or at least the Printers be register’d.”<sup>6</sup> Henry St. John, Viscount Bolingbroke, one of the most cited English radicals,<sup>7</sup> defended his use of anonymity in his newspaper, *The Craftsman*. Bolingbroke argued to his critics that the authority of a name was “of no weight”

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<sup>4</sup> The Tudors and Stuarts claim to power rested in the theory of the divine right of kings. The Stuarts had been overthrown in the Glorious Revolution of 1688. The Founding generation associated the Tudors and Stuarts with tyranny in its worst form. See Akhil Reed Amar, *The Words That Made Us: America’s Constitutional Conversation 1760-1840* 31 (2021).

<sup>5</sup> John Adams, *Revolutionary Writings* 30-31 (Liberty Fund, 2000).

<sup>6</sup> John Milton, *Areopagitica and Other Political Writings of John Milton* 50 (Liberty Fund, 1999).

<sup>7</sup> Bernard Bailyn, *The Ideological Origins of the American Revolution* 43 (2017).

and the revealing of anonymous authors “inconsistent with a free government.”<sup>8</sup> Bolingbroke protested he could not “understand how the Cause of Truth can receive any Advantage from a Man's prefixing his Name, or Profession, or Place of Abode to his Writings; which can only serve to prejudice the Reader on one side of the Argument.”<sup>9</sup> The “great Desire of discovering the Author, are seldom seen or heard of, but when the intention is to oppress, because they cannot disprove.”<sup>10</sup>

The radical English Whigs and “Country Party” had a profound influence over the Founding generation, who took them to be the standard bearers of the true British constitution, regardless of the mainstream in England.<sup>11</sup>

George Washington’s favorite playwright, Joseph Addison, wrote that “some of the most celebrated works of piety” came from “anonymous Authors, who have made it their merit to convey to us so great a charity in secret: there are few works of genius that come out at first with the author’s name.”<sup>12</sup> Addison warned that, despite the pretext of suppressing libel and protecting the reputation of the innocent, no one had “ever yet heard of a Ministry, who have inflicted an exemplary

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<sup>8</sup> Henry St. John, Viscount Bolingbroke, 3 *The Craftsman* 230 (R. Francklin, 1731).

<sup>9</sup> *Id.* at 233.

<sup>10</sup> *Id.*, 2 *The Craftsman* at 273.

<sup>11</sup> Bailyin, *supra* note 7, at 43.

<sup>12</sup> Joseph Addison, 3 *The Works of the Right Honorable Joseph Addison* 547 (1721).

punishment on an Author that supported *their* cause with falsehood and scandal.”<sup>13</sup> In his essay *Concerning the Press*, Addison defended anonymity as necessary to expose government abuse and corruption.<sup>14</sup> Anonymity shielded individuals dependent on government from giving up their liberty as a result: “there are a great many Writers who have Obligations to particular Persons, and who cannot speak certain Truths without offending them, which they would rather might be lost than venture.”<sup>15</sup> Addison warned his readers that laws against anonymity would be “striking at the Press itself, and ruining a Trade which has been so serviceable to Liberty and the Reformation.”<sup>16</sup>

John Trenchard and Thomas Gordon, the most-read whig polemicists among the Founding generation, whose writings were in such high demand they were reprinted in colonial newspapers mere months after initial publication in England, wrote a series of essays under the pseudonym “the Independent Whig.”<sup>17</sup> In their essay “Of Authority,” Trenchard and Gordon defended free inquiry against the rigid control of ecclesiasts. They started with the proposition that human understanding was “the only Light” God had given to men “by which they can discern Truth from

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<sup>13</sup> *Id.*

<sup>14</sup> Joseph Addison, *Thoughts of a Tory Author, Concerning the Press, with the Opinion of the Ancients and Moderns, about Freedom of Speech and Writing* (1712).

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

<sup>17</sup> Bailyin, *supra* note 7, at 43.

Falsehood.”<sup>18</sup> It followed from this that “human Authority” is “at most only an Opportunity given, or an invitation made, to examine by private Judgment.”<sup>19</sup> Therefore, rigid enforcement of religious orthodoxy by demands that authors identify themselves were disdainful to the natural endowments God had given man to discover the truth. “[A]ll names,” Trenchard and Gordon argued, “ought to be of no Authority with us, any farther than to convince our Understandings by solid Arguments, and self-evident Truths; and a Beggar, or a Cobler, when he can do this, is so far intitled to equal Credit, or, if you will, to equal Authority, with Councils and Fathers.”<sup>20</sup>

In *Cato’s Letters*, Trenchard and Gordon warned that regulations requiring authors to be exposed would destroy press freedom because “subjecting the press to the regulation and inspection of any man whatsoever, can only hinder the publication of such books, as authors are willing to own, and are ready.”<sup>21</sup> Misinformation was no reason to regulate the press because “[m]isrepresentation of publick measures is easily overthrown, by representing publick measures truly.”<sup>22</sup> The press contained the means of its own correction. Trenchard and Gordon made clear they were not

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<sup>18</sup> Thomas Gordon and John Trenchard, *The Independent Whig* (17<sup>th</sup> ed., 1743).

<sup>19</sup> *Id.* at 239-40.

<sup>20</sup> *Id.* at 241-42.

<sup>21</sup> John Trenchard & Thomas Gordon, 3 *Cato’s Letters, or Essays on Liberty, Civil and Religious, and Other Important Subjects* 161 (Ronald Hamoway ed., Liberty Fund) (1995).

<sup>22</sup> *Id.* 1 *Cato’s Letters* at 80.

condoning exaggeration or uncalled for crudeness, only that “it is certainly of much less consequence to mankind, that an innocent man should be now and then aspersed, than that all men should be enslaved.”<sup>23</sup>

In 1774, the American patriot press closely followed the fight of the whigs in the Irish parliament against attempts to outlaw anonymity in pamphlets and enforce a stamp act like the one attempted in America. Newspapers from around the colonies, such as the *Norwich Packet*<sup>24</sup>, the *Pennsylvania Gazette*<sup>25</sup>, *Rivington’s New York Gazette*<sup>26</sup>, and Isiah Thomas’s *Massachusetts Spy*<sup>27</sup> (the most popular patriot newspaper in America and referred to as “Old No. 1” for its influence in spreading the Patriot cause<sup>28</sup>), reprinted the arguments of the Irish whigs in full. It was argued that “[a]nonymous pamphlets had been of the greatest service” in “setting people on their guard”; another parliamentarian argued that, although anonymous writings may be used to “stab[] the character of an individual” he “feared to prevent one evil, we

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<sup>23</sup> 3 *Id.* at 156.

<sup>24</sup> *The Norwich Packet and the Connecticut, Massachusetts, New-Hampshire, and Rhode-Island Weekly Advertiser*, April 14, 1774.

<sup>25</sup> *The Pennsylvania Gazette*, April 6, 1774.

<sup>26</sup> *Rivington’s New-York Gazetteer: Or the Connecticut, Hudson’s River, New-Jersey, and Quebec Weekly Advertiser*, March 31, 1774.

<sup>27</sup> *The Massachusetts Spy, Or Thomas’s Boston Journal*, April 22, 1774.

<sup>28</sup> *Isaiah Thomas’s Printing Press*, American Antiquarian Society (last visited Mar. 17, 2026) <https://www.americanantiquarian.org/node/6989>.

might run into another” and the “names being published might subject them to a prosecution for what was even legal liberty of the press.”<sup>29</sup>

Like anonymous speech, the Anglo-American tradition has recognized the importance of satire to political speech since at least the overthrow of the Stuarts. Bolingbroke believed the great use of satire is “to keep Men within the Bounds of Decency and Propriety by the Fear of Shame; which is very true with Relation to Satire, and hath been esteemed by the wisest and best men in all the Ages.”<sup>30</sup> In response to those who claimed satire would only work to allow political enemies to libel the good, Bolingbroke answered “there is no other Defence but the known Tenor of a Life of Probity and Virtue.”<sup>31</sup>

In 1723, Trenchard and Gordon declared “princes might often have learned better lessons of government from the satires made upon them, than from their many panegyrics. Their panegyrics consecrate their worst actions, and never find any thing to be mended; but in satire there is always some truth, and often a great deal.”<sup>32</sup> They warned that allowing the government to judge what was harmless satire and what was libel would end in “subverting all liberty, and subjecting all men to the caprices, to the arbitrary and wild will, of those in power.”<sup>33</sup>

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<sup>29</sup> *The Massachusetts Spy, Or Thomas’s Boston Journal*, April 22, 1774.

<sup>30</sup> Bolingbroke, *supra* note 8, 2 *The Craftsman* at 274-5.

<sup>31</sup> *Id.* at 273.

<sup>32</sup> Trenchard & Gordon, 14 *Cato’s Letters* at 167 (November 9, 1723).

<sup>33</sup> 3 *Id.* at 159.

In 1763, John Wilkes, a radical whig member of Parliament, satirized the King and his administration in his infamous *North Briton No. 45*. Writing anonymously, Wilkes satirized King George III and Lord Bute, Prime Minister, childhood tutor of the King and gossiped lover of the Queen Mother, and charged they had degraded the British state to the same level as prostitution.<sup>34</sup> Outraged, George III and Bute sent crown officers to ransack Wilkes's home where they found proof of his authorship.<sup>35</sup> In the colonies "Wilkes, Liberty, and Number 45" became a rallying cry as universal as "No Taxation Without Representation."<sup>36</sup> The colonists saw the suppression of Wilkes, a critic of interference in colonial self-government, as their brother. Colonial assemblies spontaneously named counties like Wilkes-Barre, Pennsylvania, Wilkes County, North Carolina, and Wilkes County, Georgia after him.<sup>37</sup> Wilkes's constituents for years reelected him to Parliament from jail and exile. When Wilkes was finally allowed to return to England in 1772, colonial American newspapers carried his defiant speech that, unlike the Crown and administration "I have never come whining to the Common-Hall" over anonymous satires because "manly, consistent, disinterested conduct in the public cause, I knew was the best answer I could give."<sup>38</sup>

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<sup>34</sup> John Wilkes, *The North Briton* (Ams Press, 1976) (1763).

<sup>35</sup> Amar, *supra* note 4 at 69-70.

<sup>36</sup> *Id.* at 70.

<sup>37</sup> *Id.* at 71.

<sup>38</sup> *The Pennsylvania Packet*, January 13, 1772.

In 1774, James Burgh published his *Political Disquisitions*, which work has been described as “the key book” of the late colonial generation.<sup>39</sup> In his section on liberty of speech and of the press, Burgh acknowledged that an unrestrained press included the probability that innocent elected officials will be “publicly accused of corruption, embezzlement, and other political crimes, without having it in their power to punish their slanderers.”<sup>40</sup> However, in a free society this was “no hardship at all, but the unavoidable inconvenience attendant upon a high station, which he who dislikes must avoid, and keep himself private.”<sup>41</sup> The best way for a politician to combat misinformation is for the politician himself to pick up the pen “to clear his character, and he appears in a fairer light than before. He must not insist on punishing his accuser: for the public security requires, that there be no danger in accusing those who undertake the administration of national affairs. The punishment of political satyrists gains credit to their writings.”<sup>42</sup>

*B. Americans in the colonial period embraced the English tradition of anonymous and satirical speech.*

As adherents of this British whig literature, the Founding generation on the eve of the Revolution embraced these ideas to the fullest in their dispute with

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<sup>39</sup> Bailyn, *supra* note 7, at 41.

<sup>40</sup> 5 The Founders’ Constitution, Document 5 *James Burgh, Political Disquisitions* 3:246—52 (Phillip b. Kurland & Ralph Lerner eds., 2001).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

Parliament. In 1753, William Livingston, a future signer of the Constitution, under the pseudonym “the Independent Reflector,” extolled anonymity as:

[A]nother Advantage, which an Author had not before the Art of *Printing* was discovered. As long as Power may be perverted, from the original Design of its being lodged with the Magistrate, for protecting the Innocent and punishing the Guilty, so long it will be necessary to conceal the Author who remarks it.<sup>43</sup>

Livingston explained to his readers that this “is the true LIBERTY OF THE PRESS, for which Englishmen ought to contend. Such a Liberty can never be dangerous, either to the Public, or their Ruler; but on the contrary may often be necessary.”<sup>44</sup> In a following essay, Livingston explained the need for the use of satire in politics. Political debate often is too formal to keep a reader’s attention. Attempting to suppress satire only provided evidence it contained truth. He explained: “the intellectual Taste of many Readers, is as incapable of relishing simple Truth, as their corporeal Appetite plain Cookery. They chuse to have it garnished with the Knicknacks of Humour, and rendered more palatable with the Sauce of Wit.”<sup>45</sup>

Benjamin Franklin, the most well-known American printer of his day, wrote an essay in 1731 titled *Apology for the Printers*. Franklin was responding to those

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<sup>43</sup> William Livingston, *The Independent Reflector* 336 (Milton M. Klein ed., 2014) (1753).

<sup>44</sup> *Id.* at 340.

<sup>45</sup> *Id.* at 345.

who charged him with libeling clergymen by publishing an advertisement that satirized the ordained of the Church of England.<sup>46</sup> Franklin explained the impossibility of there being both freedom of the press and a clear ban on whatever may harm an individual's conception of their own reputation: "an End would thereby be put to Free Writing."<sup>47</sup> Franklin lectured his critics that "if all Printers were determin'd not to print any thing till they were sure it would offend no body, there would be very little printed."<sup>48</sup>

John Adams, too, wrote in defense of unrestrained expression during the 1765 Stamp Act crisis. Nothing, said Adams, "have been cherished with more tenderness and care by the settlers of the America, than the Press."<sup>49</sup> Adams lauded American printers' firmness against the "stale, impudent insinuations of slander and sedition" which the "jaws of power" always hurled "to destroy the freedom of thinking, speaking, and writing."<sup>50</sup> Adams encouraged his readers not to "suffer yourselves to be wheedled out of your liberty, by any pretences of politeness, delicacy, or decency. These as they are often used are but three different names for hypocrisy, chicanery

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<sup>46</sup>Benjamin Franklin, *Apology for Printers* (June 10, 1731) *Founders Online*, National Archives (last visited Mar. 17, 2026) <https://founders.archives.gov/documents/Franklin/01-01-02-0061>.

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup> Adams, *supra* note 5, at 28-29.

<sup>50</sup> *Id.* at 30.

and cowardice.”<sup>51</sup> Fear of offending in the assertion of rights, was the cause for “nine tenths of the species” then “groaning and grasping in misery and servitude.”<sup>52</sup>

In 1774 Jefferson wrote a pamphlet titled *A Summary View of the Rights of British America*. It was only by the freedom to write anonymously that Thomas Jefferson was able to address the King of England as an equal and employ use language thought “too strong” to affix his name to.<sup>53</sup> Shielded by anonymity, Jefferson proudly boasted to the King he was using “that freedom of language and sentiment which becomes a free people claiming their rights, as derived from the laws of nature, and not from the gift of their chief magistrate: Let those who fear flatter, it is not an American art.”<sup>54</sup> Leading up to the Declaration of Independence, out of all the literary strategies employed the “most commonly attempted was the satire associated with pseudonymous authorship.”<sup>55</sup>

## **II. Anonymity and Satire Were Protected During and Following the American Revolution.**

There was a remarkable concern for freedom of the press and protection of anonymity even during the American Revolution. For example, in October 1779

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 30-31.

<sup>53</sup> Letter of Thomas Jefferson to John W. Campbell (Sept. 3, 1809) *Founders Online*, National Archives, (last visited Mar. 17, 2026) <https://founders.archives.gov/documents/Jefferson/03-01-02-0390>.

<sup>54</sup> Thomas Jefferson, *Writings* 120-21 (Merrill D. Peterson ed., 1984).

<sup>55</sup> Bailyin, *supra* note 7, at 11.

when the New Jersey legislature demanded the patriot printer, Isaac Collins, reveal the name of an anonymous satirists who criticized the governor and legislature's efforts, Collins defied the request, explaining if he were "to comply with the requisition contained in this resolution, without the permission of the author of the piece alluded to, I conceive I should betray the trust reposed in me, and be far from acting as a faithful guardian of the Liberty of the Press."<sup>56</sup>

Criticism of Congress by anonymous authors was defended as essential to preserving the freedom of the press. In 1779, Continental Congressman Benjamin Rush, a signer of the Declaration of Independence, anonymously attacked what he saw as congressional corruption. A motion was made to force John Dunlap, Rush's publisher and the man who printed the Declaration of Independence, to reveal Rush's identity.<sup>57</sup> In response, Merriweather Smith, a member from Virginia, leaped to the defense of anonymity, warning that if the government could unmask anonymous writers, "take my word for it, the liberties of the people will be at an end."<sup>58</sup> Thomas Burke of South Carolina argued it would be "lowering and disgracing the dignity of Congress" for them to react harshly to anonymous criticism.<sup>59</sup> John Penn, a signer of the Declaration of Independence, said the "liberty

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<sup>56</sup> Richard F. Hexson, *The Press in Revolutionary New Jersey* 15 (1975).

<sup>57</sup> *Henry Lauren's Notes of Debates, 13 Letters of Delegates to Congress 1774-1789* at 139 (Paul H. Smith, Gerard W. Gawalt, & Ronald M. Gephart eds., 1986)

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

of the press ought not to be restrained” and compared the motion to force disclosure of anonymous writings to that taken by George III against John Wilkes.<sup>60</sup>

In 1782, when delegate to Congress Samuel Chase attacked anonymous investigations into alleged self-dealing while he was in Congress, a writer in the *Maryland Journal* defended publication of anonymous writings in an unrestrained press. This anonymous author argued there would be no American Revolution without anonymity: by these “publications, in news-papers, we were informed of the dangerous attempts made by Great-Britain against the liberties of America; by *them* we were convinced that resistance was necessary; by *them* were we taught to believe, that our existence, as a free people, depended on the declaration of independence.”<sup>61</sup>

The years leading up to the ratification of the Constitution and the Bill of Rights demonstrate that a strong tradition of anonymity and satire constituted a key part of the customary understanding of freedom of the press. In 1784, New Jersey Governor William Livingston defended anonymous publication under the pseudonym “Scipio” after Samuel Tucker, a leader in the legislature, demanded that the identity of the author that accused him of embezzling money be unmasked. Livingston, himself the author, gave several practical reasons for a right to anonymity. First, a writer could be “totally discouraged from having to reveal their

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<sup>60</sup> *Id.*

<sup>61</sup> *Maryland Journal* (Sept. 24, 1782).

name” because he “may mistrust his capacity for correct composition; and dread the ridicule of ill-natured criticks. He may fear to draw upon himself the personal animosity of those whose conduct he holds up to publick view” or “be too much above, or too much below, the level of those whose conduct he criminales, to enter with them, on equal terms, into personal altercations.”<sup>62</sup>

When Tucker, in a subsequent post in the newspaper, derided anonymity as licentiousness of the press rather than liberty of the press, Livingston mocked him: “Where then could he have picked up this baneful, this pestilent tenet? I fancy he must have learned it during his peregrinations with the British army: Heterodox school for teaching American liberty!”<sup>63</sup> Tucker subsequently challenged “Scipio” to come forward so he could dissect him with his arguments. Livingston turned this argument against Tucker to prove the need for anonymity. ““*But come forth Scipio, and I will dissect you.*’ Pretty encouragement truly for a man to *comeforth*, when his *forthcoming* is to be attended with such tragical and sanguinary effect!”<sup>64</sup> Livingston playfully asked “pray may not a man, in a free country, convey thro' the press his sentiments on publick grievances, and shew to what his fellow-citizens are entitled by law, without being obliged to send a certified copy of the *baptismal register*[?]”<sup>65</sup>

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<sup>62</sup> William Livingston, 5 *The Papers of William Livingston* at 107 (Carl E. Prince, Mary Lou Lustig, David William Vorhees, & Robert J. Weiss eds., 1988)

<sup>63</sup> *Id.* at 113.

<sup>64</sup> *Id.* at 118.

<sup>65</sup> *Id.* at 125.

A 1786 editorial in the *New York Packet* candidly admitted that American freedom of the press, with its protection for satire and anonymity, “produces much silly advice, and malignant censors without number” yet “it likewise opens the door to some of a different character, who give useful hints, which would have been lost without the freedom of anonymous publications.”<sup>66</sup> Those who complained of anonymity and satire would be corrected of their error if they could but “observe the nature of those evils which spring up in absolute governments.”<sup>67</sup>

Thomas Jefferson best synthesized the majority understanding. During Shays’ Rebellion, some complained that the unrestrained nature of the press encouraged disorder and subversion. In a 1787 letter to Edward Carrington, Jefferson refuted these claims. “The people are the only censors of their governors,” he reminded his doubting countrymen, “and even their errors will tend to keep these to the true principles of their institution.”<sup>68</sup> In America the “basis of our government” is “the opinion of the people.”<sup>69</sup> Jefferson bluntly confessed “were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.”<sup>70</sup> If government

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<sup>66</sup> *New York Packet*, November 21, 1786.

<sup>67</sup> *Id.*

<sup>68</sup> Jefferson, *supra* note 54, at 880.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

could devour those who espoused what it saw as errors, “governors shall become wolves.”<sup>71</sup>

The widespread acceptance of a right to anonymity in writing is illustrated by the public debate during the ratification of the Constitution. Anonymous writing was the default. One analysis of a random sampling of sixty-one pamphlets and news articles written during the ratification debates found sixty of the sixty-one essays were anonymous.<sup>72</sup> Alexander Hamilton, James Madison, and John Jay tellingly chose to remain anonymous behind the mask of “Publius.” In *Federalist* No. 1, Hamilton hinted at some of the incentives for anonymity: The struggle would be polarizing, ugly, and often vicious because the momentous effects of a wrong choice.<sup>73</sup> “Publius” (Hamilton) was candid in his introduction that his “motives must remain in the depository of my own breast: my arguments will be open to all, and may be judged of by all.”<sup>74</sup> Clearly, Hamilton meant that if his and Madison’s (both members of the Convention) and Jay’s identity were revealed then people may immediately discount their arguments as ingenuine. Madison gave a similar explanation over thirty years later in 1818. Madison, being a Virginian, explained

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<sup>71</sup> *Id.* at 881.

<sup>72</sup> Robert G. Natelson, *Does “The Freedom of the Press” Include A Right to Anonymity? The Original Meaning*, 9 N.Y. J. L. & Liberty 160, 178 (2015).

<sup>73</sup> The *Federalist* Nos. 2-3 (Gideon ed., Liberty Fund 2001) (1818).

<sup>74</sup> *Id.*

that his arguments would be discounted in New York unless all three agreed to use a pseudonym for their joint essays.<sup>75</sup>

Both federalists and anti-federalists disguised their identities, often using Greek and Roman heroes as pseudonyms suggesting continuity between the new American republic and the ancient tradition of Western Civilization.<sup>76</sup> Hiding behind the name “Publius,” “Cato,” or “Brutus,” heroes of ancient republicanism, loaned authoritative weight to the argument of persons too low on the social ladder to be taken at face value.<sup>77</sup>

### **III. The Nation’s Response to the Sedition Act Confirmed that the Right to Anonymity and Satire Were Protected by the First Amendment.**

When Congress drafted and passed the Bill of Rights to be ratified, it was attempting to encapsulate the customary understanding of individual rights through the language of the text.<sup>78</sup> The years before and immediately after the drafting and ratification of the First Amendment demonstrate that anonymity and satire were a

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<sup>75</sup> “James Madison to James K. Paulding, 23 July 1818,” *Founders Online*, National Archives, <https://founders.archives.gov/documents/Madison/04-01-02-0273>.

<sup>76</sup> Eran Shalev, *Ancient Masks, American Fathers: Classical Pseudonyms During the American Revolution and Early Republic*, 23 *J. of the Early Republic* 151, 152 (2003).

<sup>77</sup> *Id.* at 158-159.

<sup>78</sup> See generally J. Joel Alicea, *Bruen and the Founding-Era Conception of Rights*, 101 *Notre Dame L. Rev.* (forthcoming 2026) available at SSRN: <https://ssrn.com/abstract=5368953> or <http://dx.doi.org/10.2139/ssrn.5368953>.

part of the customary understanding of freedom of the press. In 1790, a writer in the *New Jersey Journal* declared that for every one virtuous person unjustly arraigned by “the Lash of Satire, through the Press, Ninety and Nine Evil-doers are as righteously arraigned for their crimes.”<sup>79</sup> To this writer, any abuse of liberty contained the means of redress: “what Standard can they repair to so free as ‘the Liberty of the Pres’” to vindicate themselves?<sup>80</sup> Defending anonymity and satire in New Hampshire, “A State Physician” in 1792 wrote that to abolish anonymity would “open a door for the spreading of ignorance and exercise of tyranny among the people” since no man would run the risk “to be his own accuser.”<sup>81</sup>

In 1793, when High Federalists threatened New York newsman Thomas Greenleaf, pressuring him to reveal the identity of an anonymous man who satirized George Washington, a massive rally took place. The crowd drew up resolutions in support of a right to anonymity and satire, even though they personally reprobated the attack on Washington. These resolutions were republished across the country from New York<sup>82</sup>, Pennsylvania<sup>83</sup>, and Maryland<sup>84</sup>, to Virginia<sup>85</sup> and South

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<sup>79</sup> *New Jersey Journal* (Mar. 31, 1790).

<sup>80</sup> *Id.*

<sup>81</sup> *Concord Herald* (Nov. 29, 1792).

<sup>82</sup> *Columbian Gazetteer* (Dec. 26, 1793); *American Minerva* (Dec. 26, 1793).

<sup>83</sup> *Federal Gazette* (Dec. 26, 1793).

<sup>84</sup> *Maryland Journal* (Jan. 3, 1794).

<sup>85</sup> *General Advertiser* (Dec. 26, 1793).

Carolina.<sup>86</sup> The resolutions affirmed that attacks against satirizing political leaders, and demands to name anonymous writers, were too similar to the British belief that “the King can do no wrong” and hence “too absurd and extravagant to be admitted in the political creed of a genuine republican.”<sup>87</sup>

Throughout the 1790s America became increasingly polarized under the pressure of self-government. As a result, debates in the press became more combative and the press itself began to change as professional party writers emerged.<sup>88</sup> Worried about increasingly bloody revolutionary France and years in power, the incumbent Federalist Party passed the Sedition Act of 1798, a part of a group of bills known as the Alien and Sedition Acts. The Sedition Act made it a criminal offense to “write, print, utter, or publish” anything “false, scandalous, and malicious” against the federal government or the President, or anything that would “bring [them] into contempt or disrepute.”<sup>89</sup>

Madison and Jefferson led the nationwide resistance to the act. Madison drafted the Virginia Resolution of 1798, which protested any law which “is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the

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<sup>86</sup> *South Carolina State-Gazette* (Jan. 13, 1794); *City Gazette* (Jan. 14, 1794).

<sup>87</sup> *Daily Advertiser* (Dec. 24, 1793).

<sup>88</sup> Amar, *supra* note 4 at 431, 437.

<sup>89</sup> An Act in addition to the Act, entitled “An act for the punishment of certain crimes against the United States,” ch. 74, 2 Stat. 596 (1798).

only effectual guardian of every other right” was a “dangerous, palpable, and deliberate” exercise of power.<sup>90</sup>

In shepherding the resolution through the state legislature, John Taylor of Caroline maintained government had no power to proscribe truth or falsehood.<sup>91</sup> Taylor predicted “if a government can by law garble, suppress, and advance political opinion, public information, this great end, upon which public liberty depends, will be completely destroyed.”<sup>92</sup> Jefferson’s Kentucky Resolutions were categorical. The People’s ratification of the First Amendment “manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use.”<sup>93</sup> Madison, Taylor, and Jefferson were clear that government had no power to define what was true or false in political matters.

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<sup>90</sup> *The American Republic: Primary Sources* 398-400 (Bruce Frohen ed., Liberty Fund 2002).

<sup>91</sup> *The Virginia Report of 1799-1800, touching the Alien and Sedition Laws; together with the Virginia Resolutions of December 21, 1798, the Debate and Proceeding thereon in the House of Delegates of Virginia and several other documents illustrative The Report and Resolutions* 26 (Statement of Mr. Taylor: “Men find no difficulty in pronouncing opinions to be both false and licentious, which differ from their own”) (J. W. Randolph, 1850))

<sup>92</sup> *Id.* at 119.

<sup>93</sup> *Supra* note 90, *The American Republic* at 400.

The State resolutions Madison and Jefferson drafted were mass printed in national newspapers and bolstered by accompanying Democratic-Republican authors in the North and South, thereby flooding the newspapers with denunciations of the Act.<sup>94</sup> The Democratic-Republicans' appeals to the people that government could never define truth in politics were unanimous in both the North and South. A free government trusted the people to discern truth by themselves, and that was the core of the First Amendment.

In the South, St. George Tucker of Virginia, a Revolutionary War veteran and professor of law at the College of William and Mary, writing under the pseudonym "Columbus," said that a government which did not fear losing the confidence of the people would easily "set the shafts of calumny, and of satire, at defiance, and triumph of the licentiousness of the press."<sup>95</sup> It is impossible to cabin "licentiousness" in the press against the government.<sup>96</sup> For Tucker, only a government which planned on maintaining power by force instead of as a trust of the people would attempt to control public opinion.

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<sup>94</sup> Amar, *supra* note 4 at 454.

<sup>95</sup> St. George Tucker, *A Letter to a Member of congress Respecting the Alien and Sedition Laws* 34 (1799).

<sup>96</sup> *Id.* at 35 ("This word, *licentiousness*, as applied against the PRESS, and to writings against *the government*, is a word of the most indefinite signification in the English language").

George Hay of Virginia, under the pseudonym “Hortensius,” declared that the freedom of the press in America “means the total exemption of the press from any kind of legislative control.”<sup>97</sup> Under the Constitution “measures of government were subjects of general discussion, and were stated sometimes truly, sometimes falsely, at the discretion of the writer. Nothing that was said, however false, however scandalous, could be noticed by the government.”<sup>98</sup>

Northern Democratic-Republican writers were in lock-step with their southern colleagues. James Callendar in his immensely popular *The Prospect Before Us* – in which he satirized President Adams resulting in his imprisonment under the Sedition Act<sup>99</sup> – analogized the press to the Sun which “often scorches, and the torrent often overwhelms.”<sup>100</sup> Likewise, the press, he wrote “produces numerous evils. But its advantages transcend them by the proportion of ten thousand fold.”<sup>101</sup> The platform put forward to the people by Democratic-Republican writers was clear: government had no power to determine what was true or false in political discussions. If America was to have freedom of elections, the press must be totally

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<sup>97</sup> George Hay, *An Essay on the Liberty of the Press Respectfully Inscribed to the Republican Printers throughout the United States* 29 (1803) (1799).

<sup>98</sup> *Id.*

<sup>99</sup> Amar, *supra* note 4, at 446-48.

<sup>100</sup> James Callendar, *The Prospect Before Us* 151 (1800).

<sup>101</sup> *Id.*

unrestrained from publishing opinion, satire, and hyperbole because only the people could be trusted to determine for themselves what was true.<sup>102</sup>

Americans feared that the Sedition Act, in the words of Madison’s Virginia Resolution, was part of a larger conspiracy “to transform the present republican system of the United States into an absolute, or at best, a mixed monarchy.”<sup>103</sup> Only months after the passing of the Sedition Act, American newspapers in Massachusetts<sup>104</sup>, Connecticut<sup>105</sup>, New York<sup>106</sup>, Pennsylvania<sup>107</sup>, Virginia<sup>108</sup>, Maryland<sup>109</sup>, and even the federal frontier territory of Ohio<sup>110</sup> reported on the banning of anonymous speech and satire in Denmark. Remarkably, every single report described it as “an edict to destroy the liberty of the press.” In the end, the

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<sup>102</sup> *Id.* at 83.

<sup>103</sup> *Supra* note 90, *The American Republic* at 399.

<sup>104</sup> *The Independent Chronicle and Universal Advertiser*, December 23, 1799; *The Constitutional Telegraph*, December 25, 1799; *Greenfield Gazette*, January 4, 1800; *Columbian Courier*, January 10, 1800.

<sup>105</sup> *Connecticut Gazette*, December 25, 1799.

<sup>106</sup> *Commercial Advertiser*, December 16, 1799; *The New York Gazette and General Advertiser*, December 16, 1799; *Greenleaf’s New Daily Advertiser*, December 17, 1799; *Mercantile Advertiser*, December 17, 1799; *The Spectator*, December 18, 1799.

<sup>107</sup> *The Philadelphia Gazette and Universal Daily Advertiser*, December 17, 1799; *Claypool’s American Daily Advertiser*, December 18, 1799; *Gazette of the United States and Philadelphia Daily Advertiser*, December 18, 1799; *The Universal Gazette*, December 19, 1799; *The Constitutional Diary and Philadelphia Evening Advertiser*, December 20, 1799.

<sup>108</sup> *The Times; and District of Columbia Advertiser*, December 23, 1799.

<sup>109</sup> *Federal Gazette & Baltimore Daily Advertiser*, December 19, 1799.

<sup>110</sup> *The Western Spy, and Hamilton Gazette*, January 7, 1800.

American people loudly chose Jefferson and his Democratic-Republican Party’s free press platform over the incumbent Adams. The constitutional significance was not lost on Jefferson, who described it as the “the Revolution of 1800.” In his triumphant 1801 inaugural address, Jefferson confirmed what the true, fixed meaning of the First Amendment was: “a monument where error of opinion may be tolerated where reason is left free to combat it.”<sup>111</sup> In 1840, Congress affirmed this understanding by passing a law giving damages to those who had been jailed under the Sedition Act.<sup>112</sup> An accompanying committee report concluded that no controversy over the meaning of the liberty of the press was ever so definitely settled as it was by the election of 1800.<sup>113</sup>

Early Americans, drawing on their British heritage, objected strenuously to limitations on anonymous speech and satire, an understanding which ultimately informed the First Amendment. This Court should affirm the district court’s decision and protect the speech of plaintiffs-appellees.

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<sup>111</sup> Jefferson, *supra* note 54 at 493.

<sup>112</sup> Amar, *supra* note 4, at 459.

<sup>113</sup> *Id.*

## CONCLUSION

This Court should rule for Plaintiffs-Appellees.

Respectfully submitted,

*/s/ J. Marc Wheat*

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