

No. 21-51178

**In the United States Court of Appeals
for the Fifth Circuit**

NETCHOICE, LLC D/B/A NETCHOICE, AND COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION D/B/A CCIA,

Plaintiffs-Appellees,

v.

KENNETH PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF
TEXAS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas
Case No. 1:21-cv-00840-RP

**BRIEF OF *AMICUS CURIAE*
STUDENTS AT COLUMBIA AGAINST CENSORSHIP
IN SUPPORT OF APPELLANT**

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to the Federal Rules of Appellate Procedure, the undersigned counsel certifies that, in addition to the persons and entities disclosed in Appellant's opening brief, the following listed persons or entities have an interest in this amicus brief. These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal.

1. Students at Columbia Against Censorship is *Amicus Curiae*.
2. John C. Sullivan, of the lawfirm S|L Law PLLC, serves as counsel to the Students at Columbia Against Censorship.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

Amicus Students at Columbia Against Censorship is a group of students at Columbia University who study the freedom of speech and aspire to enjoy it throughout their academic and professional careers. In defense of this basic freedom, they are committed to resisting censorship from both public and private entities. Relying on the philosophy of John Stuart Mill, they write to explain the significance of open debate and discussion as well as the compelling interest that each state has in protecting the unimpeded exchange of opinions. Many Americans—including students, professors, and administrators on college campuses—are uncomfortable speaking out in favor of freedom of speech. They would certainly be wary of signing a brief such as this. Students at Columbia Against Censorship thus has a duty to speak for them.

Amicus has a direct interest in the outcome of this case because its members use social media to acquire knowledge and communicate. Its members rely on social media platforms to convey their speech and

¹ Pursuant to FRAP 29(a)(4)(E), *amicus* certifies that no counsel for any party authored this brief, in whole or in part, and that no party, party's counsel, or any other person—other than *amicus*, its members, or its counsel—contributed money to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

receive the speech of others. Only by learning the full range of opinion, including the views of persons with whom they thoroughly disagree, can *amicus* members intelligently formulate their own viewpoints.

Students are particularly reliant on social media platforms to understand the ideas of persons outside their immediate circle of friends, classmates, and instructors—to learn views and voices beyond their immediate experience. And *amicus* members’ knowledge—including their understanding of the nation’s diversity—is dramatically reduced when social media platforms suppress dissenting perspectives, even when those opinions may be inartful or offensive. Censorship shrinks their intellectual world.

If online censorship is allowed to curb the exchange of thought—especially in Texas, where several of the *amicus* students plan to reside after graduation—the lives of the students will be indelibly impoverished. It is thus critical that the freedom to share and receive dissident, unorthodox, and even offensive opinions on major social media platforms is preserved in the State.

Students also fear censorship of their own views. In the modern world, an orthodox opinion today can become a “community standards

violation” tomorrow. Yet students depend on major social media platforms as their main forums for discussion about current events as well as political and social controversies. As part of both their education and their socialization, it is critical that students be allowed to participate in these forums without fear of being silenced.

INTRODUCTION

John Stuart Mill was and remains the preeminent philosopher of liberalism. Although his book *On Liberty* is without legal citations, it is the leading exposition of the societal benefits of uninhibited discussion and has been relied upon for its wisdom by this circuit as recently as last year. *See Lefebure v. D’Aquila*, 15 F.4th 670, 674–75 (5th Cir. 2021). This brief summarizes Mill’s arguments to show society’s compelling interest in protecting differing viewpoints against suppression, even when that suppression comes from purportedly private actors. However different, odd, or even offensive opinions may seem, the state has an interest of the highest order in preserving them from censorship.

The First Amendment and similar state constitutional guarantees normally protect only against government suppression of nonconforming

views.² But any effective suppression of dissent—even if done by private companies—is dangerous. *See generally New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding the First Amendment applies even in a suit between two private parties). As Mill recognized, whether the means are public or private, the result is to deaden inquiry and discussion, to the detriment of the people at large. Indeed, Mill considered private censorship especially worrisome because it marshals social stigma against unpopular ideas. John Stuart Mill, *On Liberty* 58 (2d ed., London: John W. Parker & Son 1859) (“It is that stigma which is really effective, and so effective is it, that the profession of opinions which are under the ban of society is much less common in England, than is, in many other countries, the avowal of those which incur risk of judicial punishment.”)³

Regardless of whether the threat comes from government or from private entities, there is an overwhelming state interest—a compelling

² For an exception, *see Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 889, 910 (Cal. 1979) (holding that the California “free speech” amendment protects speech on private property).

³ A copy of this edition can be found at: <https://babel.hathitrust.org/cgi/pt?id=hvd.32044010355436&view=1up&seq=5&skin=2021>.

state interest—in preserving freedom of discussion from any significant threat. *Cf. Sullivan*, 376 U.S. at 279 (extolling the virtues of “uninhibited, robust, and wide-open” debate). This is not to say that Texas must show a compelling state interest for HB20 to be constitutional. But if the Court decides that a compelling government interest is required, this brief draws upon the arguments of John Stuart Mill to show why Texas satisfies this requirement.

Mill’s arguments are equally applicable to religious, philosophical, political, cultural, and scientific opinion. In each area, nonconforming views are often suppressed (even though recent experience has confirmed that the suppressed view may end up being vindicated in the long run). And in each area, the pursuit of truth and all the human endeavors that rest upon that pursuit inevitably suffer from that censorship.

The harm from suppression, Mill stressed, was not merely to the silenced individual. It was to all humanity:

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer

perception and livelier impression of truth, produced by its collision with error.

Mill, *supra* at 33. This harm to society at large is what the State of Texas has a compelling interest to prevent, and the Court should thus reverse the grant of a preliminary injunction entered here by the district court.

ARGUMENT

Summarizing a tradition that runs back to antiquity, Mill detailed the harm censorship causes. In his book *On Liberty*, Mill offered three arguments against censorship:

- **First**, “if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.” *Id.* at 95.
- **Second**, “even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds.” *Id.*
- **Third**, “though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.” *Id.*

In other words, censorship: (1) risks suppressing true beliefs; (2) enervates the truth; and (3) removes the ability of partial truths to

provide a corrective to arrive at more complete truths. These timeless arguments counsel that, for the sake of government and society, the state must preserve the opportunity to freely exchange opinions. In legal terms, this amounts to a compelling interest.

I. Censorship Risks Suppressing True Beliefs.

An initial danger with censorship—whether by government or private conduits for information—is that the suppressed opinion may be correct. Examples of accurate information being suppressed are painfully familiar: from Galileo and heliocentrism to the heroic Dr. Li Wenliang in the early days of the COVID pandemic. Put another way, when governmental or nongovernmental entities suppress opinion on the ground that it is false, they incorrectly assume their own infallibility. As Mill noted:

Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty.

Id. at 34. Yet any confidence in the truth of a proposition depends on the freedom to dispute it: “Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth

for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.” *Id.* at 37–38.

Mill asked why there is, on the whole, “a preponderance among mankind of rational opinions and rational conduct.” *Id.* at 38. The answer seemed to lie in the ability of an individual to learn from his errors when confronted with alternative views:

He is capable of rectifying his mistakes, by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument: but facts and arguments, to produce any effect on the mind, must be brought before it.

Id. at 38–40. The progress of the mind toward truth thus depends on the freedom of others to challenge what otherwise appears unquestionably true. And if exposure to dissenting views is necessary for even “the wisest of mankind, those who are best entitled to trust their own judgment,” it is all the more necessary for “that miscellaneous collection of a few wise and many foolish individuals, called the public.” *Id.* at 40. Thus, the public, acting through their elected officials, has the utmost interest in ensuring that dissenting views are heard.

In Mill's day, Newtonian physics reigned supreme. It would be almost 60 years until Einstein would usher in the quantum mechanics revolution. But while Mill took the Newtonian view to be nearly unquestionable, he pointed out that it seemed so true precisely *because* it could be questioned:

If even the Newtonian philosophy were not permitted to be questioned, mankind could not feel as complete assurance of its truth as they now do. The beliefs which we have most warrant for, have no safeguard to rest on, but a standing invitation to the whole world to prove them unfounded. If the challenge is not accepted, or is accepted and the attempt fails, we are far enough from certainty still; but we have done the best that the existing state of human reason admits of[.]

Id. at 40–41. Dispute is the path toward certainty.

Accordingly, it was “strange” that “men should admit the validity of the arguments for free discussion, but object to their being ‘pushed to an extreme.’” *Id.* at 41. Such persons failed to see, among other things, that they were assuming a sort of superhuman infallibility in declaring topics off-limits for dispute. Mill exposed the irony of that approach:

Strange that they should imagine that they are not assuming infallibility, when they acknowledge that there should be free discussion on all subjects which can possibly be *doubtful*, but think that some particular principle or doctrine should be forbidden to be questioned because it is *so certain*, that is, because *they are certain* that it is certain.

Id. at 41–42. The idea that freedom must be sacrificed for truth is thus a dangerous illusion, no matter how well-educated and well-intentioned our censors are. Any hope that our society as a whole will move toward the truth depends on the freedom to say what may seem false. Only then, can any truth claim be tested for its verity.

This truth about the truth is as evident today as in the past. Whether in medicine, environmental assessments, physics, policy decisions, or literary studies, there can be no confidence in what cannot be questioned. That necessarily means that the state has a profound interest in preserving open dialogue and thus the possibility of uncovering the truth. This interest reaches far beyond the individual interests of citizens who want the freedom to express themselves; it is the communal interest in advancing science, politics, religion, and technology through the search for truth.

In contrast, censorship of all kinds stifles the questioning that leads toward truth. This is especially a problem, says Mill, when powerful private forces discourage dissent. Such censorship “induces men to disguise [their opinions], or to abstain from any active effort for their discussion.” *Id.* at 32. Even setting aside the danger that government is

privileging private forces to censor dissent—for example, under 47 U.S.C. § 230(c)(3)—it is perilous for a society to allow any powerful entity to decide for others “what shall be orthodox.” *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943). Whatever the source of the threat, states have a deep interest in protecting expression that now seems false, even dangerously false, but may turn out to be true.

II. Censorship Enervates The Truth.

Mill’s second point was that even if a received opinion is true, “it will be held as a dead dogma, not a living truth,” if it is “not fully, frequently, and fearlessly discussed.” Mill, *supra*, at 64. In other words, censorship undermines the value of what is actually true. As he explained:

[O]n every subject on which difference of opinion is possible, the truth depends on a balance to be struck between two sets of conflicting reasons. Even in natural philosophy, there is always some other explanation possible of the same facts; some geocentric theory instead of heliocentric, some phlogiston instead of oxygen; and it has to be shown why that other theory cannot be the true one: and until this is shown, and until we know how it is shown, we do not understand the grounds of our opinion. But when we turn to subjects infinitely more complicated, to morals, religion, politics, social relations, and the business of life, three-fourths of the arguments for every disputed opinion consist in dispelling the appearances which favor some opinion different from it.

Id. at 66. It therefore is essential to hear the other side of any case because “[h]e who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion.” *Id.* at 67.

Indeed, Mill pointed out that it is essential to hear the other side’s viewpoint *from its advocates*—from those who actually believe the dissenting view and present it vigorously:

Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them.

Id. at 67. So in contrast to the public or private suppression of any opinion, Mill urged that dissent be welcomed: “If there are any persons who contest a received opinion, or who will do so if law or opinion will let them, let us thank them for it, open our minds to listen to them, and rejoice” *Id.* at 82.

This is not the familiar constitutional argument that individuals should have a right to speak freely, even if the speech is mistaken or hurtful. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989). Rather, the point here is that the community has an interest in hearing speech—even false speech—because it helps those with truthful beliefs understand the power of their views. Disagreement is an opportunity to test competing conceptions of truth and thereby to understand the strength and vitality of true beliefs. The state thus has an interest—indeed, a compelling interest—in promoting the robust discussion of even false ideas.

In short, the state should protect the freedom to dissent either because it may be right or because it may be wrong. Truthful dissent is essential for correcting one's *errors*; erroneous dissent is essential for refining and fully understanding one's *truths*. In the words of Mill, “the received opinion may be false” or, even if the view is true, “a conflict with the opposite error is essential to a clear apprehension and deep feeling of its truth.” *Id.* at 83. In both ways, the freedom to dissent is the foundation of all political, scientific, and other progress. It is bedrock of our polity, our culture, and our personal development.

III. Censorship Prevents The Finding Of Complete Truth Through Helpful Partial Truths.

But in addition to his first two arguments, Mill offered a third, more common situation to counsel against censorship. It is “when the conflicting doctrines, instead of being one true and the other false, share the truth between them; and the nonconforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part.” *Id.* Going further, Mill noted:

Popular opinions, on subjects not palpable to sense, are often true, but seldom or never the whole truth. They are a part of the truth; sometimes a greater, sometimes a smaller part, but exaggerated, distorted, and disjoined from the truths by which they ought to be accompanied and limited. Heretical opinions, on the other hand, are generally some of these suppressed and neglected truths, bursting the bonds which kept them down, and either seeking reconciliation with the truth contained in the common opinion, or fronting it as enemies, and setting themselves up, with similar exclusiveness, as the whole truth. The latter case is hitherto the most frequent, as, in the human mind, one-sidedness has always been the rule, and many-sidedness the exception.

Id. at 83–84. This tendency of popular opinions to embody only elements of the truth means that one should hear all viewpoints to get closer to the complete truth. In Mill’s words:

Such being the partial character of prevailing opinions, even when resting on a true foundation; every opinion which

embodies somewhat of the portion of truth which the common opinion omits, ought to be considered precious, with whatever amount of error and confusion that truth may be blended. . . . [S]o long as popular truth is one-sided, it is more desirable than otherwise that unpopular truth should have one-sided asserters too; such being usually the most energetic, and the most likely to compel reluctant attention to the fragment of wisdom which they proclaim as if it were the whole.

Id. at 84. Divergent viewpoints are thus necessary to understanding the whole. And to approach accuracy, even if not completely attainable, beliefs must be allowed to be contested. After all:

Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites, that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners.

Id. at 86.

Mill recognized that clashing opinions might exacerbate narrow and exaggerated views among those susceptible to heated engagement: “I acknowledge that the tendency of all opinions to become sectarian is not cured by the freest discussion, but is often heightened and exacerbated thereby; the truth which ought to have been, but was not, seen, being rejected all the more violently because proclaimed by persons regarded as opponents.” *Id.* at 93–94. Yet among sober third-parties,

who do not participate in inflamed debate but nonetheless observe it, the contest among half-truths has other consequences. “[I]t is not on the impassioned partisan, it is on the calmer and more disinterested bystander, that this collision of opinions works its salutary effect. . . . [T]here is always hope when people are forced to listen to both sides.” *Id.* at 94.

This simple wisdom—that individuals need to be able to hear both sides of an issue—is of profound importance. That is because many viewpoints that are censored are not outright falsehoods, but half-truths. Even the most outlandish opinions usually contain bits of truth. And these fractional insights are valuable as correctives because so much of what is upheld through censorship also consists of partial-truths. By hearing the partial-truths from both sides, and learning from those with whom we disagree, society can move toward a more complete truth. And to preserve this path forward, government must be able to protect the free exchange of opinion.

CONCLUSION

The district court should be reversed.

March 9, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a) because it contains 3,538 words, excluding portions exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word.

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface in 14-point font.

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CERTIFICATE OF SERVICE

I certify that on March 9, 2022, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users.

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