Nos. 22-277 & 22-555

In the Supreme Court of the United States

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

Petitioners,

v.

NETCHOICE, LLC, DBA NETCHOICE, ET AL.,

Respondents.

NETCHOICE, LLC, DBA NETCHOICE, ET AL.,

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND ELEVENTH CIRCUITS

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Should the speech claims at issue in these appeals be analyzed differently than claims involving religious speech?

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm that protects the free expression of all religious faiths. Becket has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, including in multiple cases at this Court.

Becket has litigated numerous cases under the Free Speech Clause, as both party and amicus counsel. See, *e.g.*, *Greater Baltimore Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Baltimore*, 879 F.3d 101 (4th Cir.), *cert. denied*, 138 S. Ct. 2710 (2018); *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868 (2020); *Americans for Prosperity Found.* v. *Bonta*, 141 S. Ct. 2373 (2021) (amicus); *Shurtleff* v. *City of Boston*, 596 U.S. 243 (2022) (amicus); *303 Creative* v. *Elenis*, 600 U.S. 570 (2023) (amicus); *Young Israel of Tampa, Inc.* v. *Hillsborough Area Reg'l Transit Auth.*, No. 22-11787 (11th Cir. argued April 19, 2023); *Vitagliano* v. *County of Westchester*, No. 23-74 (docketed July 25, 2023).

Becket has also litigated cases where NetChoice and CCIA members have asked this Court for a narrow interpretation of First Amendment protections for religious speakers. See, *e.g.*, Amicus Br. of 32 Businesses & Orgs. at 3, *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123) (NetChoice and CCIA members AirBnB, Apple, Google, PayPal, and Twitter argued that applying First Amendment protections to

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[1] No counsel for a party authored this brief in whole or in part and no person other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

a Catholic nonprofit would "disrupt *amici*'s business and undermine their core values of diversity and equality").

Becket takes no position on the ultimate outcome of this litigation. Instead, it submits this brief to explain why the Court should distinguish the speech claims at issue in these appeals from Free Speech claims made by sincere religious speakers.

INTRODUCTION

This brief makes one point: religious speech should not be lumped together with the speech claims at issue in these appeals. Proper First Amendment analysis requires nuance, and this case concerns a set of commercial activities that are not religiously motivated. Given the broad scope of NetChoice and CCIA members' businesses, treating all of their actions as deserving the same kinds of protections as sincere religious speakers would weaken Free Speech rights for those the Founders designed them for. The Court should therefore make clear in its decision that—whoever prevails—the kind of speech claims at issue in these appeals are both different-in-kind from and weaker than claims by sincere religious speakers.

ARGUMENT

1. Religious speech is fundamentally different from other forms of speech, for at least two reasons. First, religious speech has the highest level of protection available under the Free Speech Clause. In accordance with the development of speech protections in the Anglo-American legal tradition, this Court has long recognized differences among categories of speech, and has also recognized that those categories enjoy different levels of protection under the Free

Speech Clause.[2] At the center of the Free Speech protection lie "core" forms of speech, such as political and religious speech. *FEC* v. *Cruz*, 596 U.S. 289, 313 (2022) ("core political speech"); *Capitol Square Rev. & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995) ("[A] free-speech clause without religion would be Hamlet without the prince"); *Mahanoy Area Sch. Dist.* v. *B. L. ex rel. Levy*, 141 S. Ct. 2038, 2046 (2021) (government has "heavy burden to justify intervention" with respect to "political or religious speech"). Religious and political speech are accordingly the categories of speech that receive the highest level of protection. See, *e.g.*, *Cruz*, 596 U.S. at 302 (Free Speech Clause has its "fullest and most urgent application" to core political speech); *303 Creative* v. *Elenis*, 600 U.S. 570, 596 (2023) (quoting *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 634 (1943) ("First Amendment does not tolerate" government compelling "an individual to utter what is not in her mind about a question of political and religious significance" (cleaned up)).

Lower in the hierarchy of speech categories is commercial speech. See, *e.g.*, *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 571 (2011) (restrictions on commercial speech undergo a less "strict[] form of judicial scrutiny"). And at the bottom of the hierarchy of speech categories are some forms of obscene, pornographic and threatening speech. See, *e.g.*, *Osborne* v. *Ohio*, 495

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[2] For discussion of the historical development of freedom of speech out of the freedom of religious speech, see, *e.g.*, Jason Peacey, Robert G. Ingram, and Alex W. Barber, "Freedom of speech in England and the anglophone world, 1500-1850," in *Freedom of Speech, 1500-1850* (Ingram, *et al.*, eds.) (2020) ("Early debates about free speech were fundamentally debates about the freedom of *religious* speech.").

U.S. 103, 108 (1990) (child pornography); *Virginia* v. *Black*, 538 U.S. 343, 359 (2003) (cross burning).

Second, religious speech is also different because it possesses additional protections that non-religious speech does not. In *Cantwell* v. *Connecticut*, the case that incorporated the Free Exercise Clause against the states, the Court had before it defenses under both the Free Speech Clause (which had already been incorporated against the states) and the Free Exercise Clause. 310 U.S. 296, 303 (1940). The Court decided the case on Free Exercise grounds. As the Court has since explained, "[w]here the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities." *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) (citing *Widmar* v. *Vincent*, 454 U.S. 263, 269, n.6 (1981); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995)).

2. NetChoice and CCIA rely heavily on cases involving religious speakers, including *303 Creative*, *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), *Masterpiece Cakeshop, Ltd.* v. *Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018), *McCullen* v. *Coakley*, 573 U.S. 464 (2014), *NIFLA* v. *Becerra*, 138 S. Ct. 2361 (2018), *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), *Watchtower Bible & Tract Soc'y of N.Y.* v. *Village of Stratton*, 536 U.S. 150 (2002), *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), and *Wooley* v. *Maynard*, 430 U.S. 705 (1977). These are powerful precedents, but their power comes in large part from the fact that the plaintiffs in those cases were *religious* speakers. Conscience, not commerce, determined whether those plaintiffs spoke or

chose not to speak. And conscience is what the Founders sought to protect when they adopted the First Amendment. In fact, the Founders were motivated to include speech and assembly protections in the Bill of Rights based in part on William Penn's celebrated refusal to take off his hat—a speech act motivated by religious conscience. See *Barnette*, 319 U.S. at 633, n.13; *Fulton*, 141 S. Ct. at 1906 (Alito, J., concurring); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1471-1472 & n.320 (1990) (recounting Penn's imprisonment for religious refusal to doff his hat to a court and its relationship to debates over the Bill of Rights).

To be sure, the scope of the protections for speech described in those precedents was not limited to religious speakers. But when drawing analogies in First Amendment cases, "context matters." *303 Creative*, 600 U.S. at 600 n.6. And it is hard to imagine contexts more disparate than a sole proprietor saying or refusing to say something based on her religious conscience and some of the world's largest companies using algorithms and artificial intelligence to make millions of selection and deselection decisions every day without human knowledge, much less human conscience. See No. 22-277, Resp. Br. 15.

This is not to say that NetChoice and CCIA members will necessarily lose under the less-protective standards applicable to speech that is not core religious or political speech. For example, if a particular NetChoice or CCIA member company thoughtfully selects what third party speech it excludes or includes from hosting, then it might be more like a newspaper editor, a museum curator, or even a curator of public

places. See *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) ("choice of material" and "treatment of public issues" "constitute the exercise of editorial control and judgment"); *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 476 n.5 (2009) (museums); *id.* at 473 (city "selected" monuments). Or if, "like a composer," the member company "selects * * * expressive units" from others to "shape its expression," then it would garner Free Speech protection. *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 574 (1995). But if it merely *excludes* dangerous or illicit material from its platform, much as FedEx or UPS won't ship munitions or child pornography, then the member company might have a much harder time making the case that it is sending a "message" of any sort. *Summum*, 555 U.S. at 473-477.

By contrast, a technology company operated on religious principles and large enough (50 million active monthly users) to trigger Texas's law would have more robust First Amendment claims. Cf. *Braunfeld* v. *Brown*, 366 U.S. 599 (1961) (stores operated in accordance with Jewish religious law). A religious technology company's own religious speech on its homepage would be a simple case under the Free Speech Clause. See *303 Creative*, 600 U.S. at 586. And a religious technology company could refuse, on the grounds of the Free Exercise Clause, to participate in transmitting or hosting messages that contradict its faith. *Ibid.*; cf. *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (RFRA's free exercise protections apply "to entities with complicity-based objections") (citing *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014)).

3. Using the right doctrinal framework to decide these appeals is crucial to religious people and institutions. That is because treating all speech as interchangeable and of equal constitutional value would tempt government officials and courts to cut back on protections for all speakers, including religious ones.

For example, in cases involving religious speech, government defendants frequently invoke a parade of horribles that they say would result if the religious speaker were allowed to follow her conscience. See, *e.g.*, Resp. Br. at 28-32, *303 Creative* v. *Elenis*, 600 U.S. 570 (2023) (No. 21-476) ("unworkable"; "no limiting principle"; "breadth and uncertainty"). Indeed, NetChoice and CCIA members themselves have urged this Court to reduce First Amendment protections for religious speakers, claiming that such protections in *Fulton* would "disrupt [their] business and undermine their core values of diversity and equality." Amicus Br. of 32 Businesses & Orgs. at 3, *Fulton*, *supra* (No. 19-123).[3] That sort of hyperbole would be redoubled in religious speech cases if the Court were to treat all forms of speech as equivalent to religious speech.

This Court has rejected the dynamic of hyperbole before. See, *e.g.*, *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006) ("The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions"). But that bureaucratic argument will be

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[3] These claims have, of course, proven false, and searches of subsequent SEC filings by AirBnB, Apple, Google, PayPal, and Twitter reveal no reference to *Fulton* or its impact on their businesses.

more persuasive to lower courts if "everybody" includes everything done by the world's largest technology companies in all circumstances. Put another way, a First Amendment jurisprudence that fails to distinguish between various categories of speech invites government defendants to put even more horribles on parade.

This Court may have little trouble dispatching such claims. But they are common in the lower courts, and this Court is not positioned to correct every lower court error. The Court should therefore avoid throwing religious speech into the same hopper as all other speech. At bottom, treating all forms of speech (or all forms of information on the Internet) as an undifferentiated mass will harm religious speakers by debasing the currency of freedom of speech. Instead of that approach, the Court should distinguish between the claims of conscience and the claims of commerce as they apply to speech.

CONCLUSION

The Court's Free Speech doctrine allows it to make nuanced distinctions. Cf. *NAACP* v. *Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."). And when this Court is called upon to determine how the First Amendment applies to novel regulatory situations, it is particularly important that the Court's response—whatever it is—reflect the important subtleties that distinguish various types of speech, including core religious speech. The Court should therefore distinguish the claims at issue in these appeals from the greater protections available for core religious speech under both the Free Exercise Clause and the Free Speech Clause.

Respectfully submitted.

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