No. 23A243

In the Supreme Court of the United States

VIVEK H. MURTHY, U.S. SURGEON GENERAL, ET AL.,
Applicants,
v.
STATE OF MISSOURI, ET AL., *Respondents.*

On Application for Stay of the Injunction Issued by the
United States District Court for the Western District of Louisiana

RESPONSE TO APPLICANTS' THIRD SUPPLEMENTAL MEMORANDUM REGARDING APPLICATION FOR A STAY OF INJUNCTION

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INTRODUCTION

The Cybersecurity and Infrastructure Security Agency (CISA) meets interminably with social-media platforms to discuss content-moderation policies and censorship, monitors and demands reports on the platforms' content-moderation policies, pushes them to adopt more restrictive policies, relentlessly flags ordinary Americans' core political speech for censorship on the basis of viewpoint, engages in *de facto* fact-checking for the platforms' content-moderation teams, organizes similar censorship efforts by state and local officials, and coordinates efforts by the FBI and other federal law-enforcement and national-security agencies to push platforms to censor disfavored speech. CISA does so, moreover, against the backdrop of "intense pressure" to censor from other federal officials and agencies, including the White House, the FBI, Members of Congress, and senior congressional staffers. Both the district court and the Fifth Circuit's revised opinion ("Slip Op.") correctly held that CISA likely violates the First Amendment. The "Third Supplemental Memorandum Regarding Application For a Stay of Injunction" provides no basis to stay the injunction as to CISA.

STATEMENT OF FACTS

The Cybersecurity and Infrastructure Security Agency is a component of the Department of Homeland Security created in 2018 to protect the nation's computer systems and physical infrastructure from sabotage and cyberattacks. 6 U.S.C. § 652. CISA has an entire team dedicated exclusively to social-media censorship efforts, which it calls the "Mis-, Dis-, and Malinformation Team" or "MDM Team." Pet. App'x 68a.

A. CISA Pushes for Censorship in Endless Recurring Meetings with Platforms.

CISA's involvement in social-media censorship began in 2018, coinciding with the push by the FBI and congressional staffers to pressure platforms to censor election-related speech. *See* Stay Opp. 2-4. "Government officials began publicly threatening social-media companies with adverse legislation as early as 2018. In the wake of COVID-19 and the 2020

election, the threats intensified and became more direct." Pet. App'x 131a. "Around this same time, Defendants"—especially CISA—"began having extensive contact with social-media companies via emails, phone calls, and in-person meetings." Pet. App'x 131a.

Starting in 2018, in conjunction with the FBI's and congressional staffers' pressure campaigns, CISA launched virtually endless series of meetings with social-media companies to discuss the censorship of supposed "misinformation" and "disinformation" on their platforms. Pet. App'x 69a. "CISA, in its interrogatory responses, disclosed five sets of recurring meetings with social-media platforms that involved discussions of misinformation, disinformation, and/or censorship of speech on social media." Pet. App'x 75a; *see also* Resp. Supp. App'x 556a-558a (interrogatory responses). In addition, "CISA also had bilateral meetings between CISA and the social-media companies." Pet. App'x 75a.

In its meetings and communications with platforms, CISA "work[s] in close connection with the FBI." Slip Op. 13. CISA hosts and coordinates the recurring "USG-Industry" or "Industry" meetings, in which the FBI and other national-security and law-enforcement agencies meet with at least seven major social-media platforms to discuss censorship of election-related speech. Pet. App'x 69a. "Government participants in the USG-Industry meetings are CISA, the Department of Justice, ODNI [the Office of Director of National Intelligence], and the Department of Homeland Security." Pet. App'x 69a. "The social-media platforms attending the industry meetings include Facebook, Twitter, Microsoft, Google/YouTube, Reddit, LinkedIn, and sometimes the Wikipedia Foundation." Pet. App'x 70a. CISA's "role is to oversee and facilitate the meetings." Pet. App'x 69a. The FBI is a major participant in these meetings: "On behalf of the FBI, FITF Chief Dehmlow, Chan, and others from different parts of the FBI participate." Pet. App'x 69a.

"The Industry meetings began in 2018 and continue to this day." Pet. App'x 69a. "These meetings increase in frequency as each election nears. In 2022, the Industry meetings

were monthly but increased to biweekly in October 2022." Pet. App'x 69a. "In addition to the Industry meetings, CISA hosts at least two 'planning meetings:' one between CISA and Facebook and an interagency meeting between CISA and other participating federal agencies," including the FBI. Pet. App'x 69-70a. "[O]nline disinformation continues to be discussed between the federal agencies and social-media companies at the USG Industry meetings, and … this will continue through the 2024 election cycle." Pet. App'x 134a.

The purpose of the meetings is to allow federal law-enforcement and national-security officials to monitor and to urge platforms to adopt more restrictive content-moderation policies and to remove election-related speech. Slip Op. 13. "At the Industry meetings, participants discuss concerns about misinformation and disinformation." Pet. App'x 70a. "The federal officials report their concerns over the spread of disinformation. The social-media platforms in turn report to federal officials about disinformation trends, share high-level trend information, and report the actions they are taking." Pet. App'x 70a.

Two examples of the discussion at these meetings highlight their focus on moderation policies and censorship. First, CISA uses the USG-Industry meetings to monitor the platforms' content-moderation policies, obtain regular reports about them, and push them to change those policies to become more restrictive. As the Fifth Circuit held, "CISA—working in close connection with the FBI—held regular industry meetings with the platforms concerning their moderation policies, pushing them to adopt CISA's proposed practices for addressing 'mis-, dis-, and mal-information.'" Slip Op. 13. Likewise, the district court found that CISA "encouraged and pressured social-media companies to change their content-moderation policies and flag disfavored content." Pet. App'x 110a. CISA's "MDM Team review[s] regular reports from social-media platforms about changes to their censorship policies or to their enforcement actions on censorship." Pet. App'x 69a. "Social-media

platforms report to CISA when they update their content-moderation policies to make them more restrictive." Pet. App'x 76a; *see also, e.g.,* Resp. Supp. App'x 21a.

As a specific example, at the USG-Industry meetings, the FBI and CISA jointly pushed platforms to adopt content-moderation policies against so-called "hacked materials," and those policies were then used to silence the speech about the Hunter Biden laptop story—including Plaintiff Jim Hoft's content. CISA officials, according to the FBI's witness, "usually emcee[] the meeting" as the "primary facilitator[s]." Resp. App'x 1288a (quoting Resp. App'x 225a-226a)). CISA, participating in the same meetings with platforms as the FBI, issued the same warnings to platforms about "hack-and-leak" operations as the FBI. Resp. App'x 1292a-1293a ("hack and leak" was raised at "CISA-hosted USG-Industry meetings") (citing Resp. App'x 378a, 380a-381a)). Both Matt Masterson and Brian Scully of CISA echoed the FBI by raising the threat of hack-and-leak operations to the social-media platforms during the "USG-Industry" meetings, leading up to the 2020 election. Resp. App'x 1296a (quoting Resp. App'x 412a). CISA coordinated with the FBI in raising such warnings, because the agendas for the USG-Industry meetings included plans to discuss "hack and leak" operations. *See* 1343a-1344a; *see also, e.g.,* Resp. Supp. App'x 630a (agenda for USG-Industry meeting including, as a "Deep Dive Topic," a 40-minute discussion of "Hack/Leak and USG Attribution Speed/Process"); Resp. Supp. App'x 614a (email from Facebook to CISA stating that, in the USG-Industry meetings, "we specifically discussed … preparing for possible so-called 'hack and leak' operations."). Indeed, "several emails confirm that 'hack and leak' operations were on the agenda for the Industry meeting on September 15, 2020, and July 15, 2020." Pet. App'x 75a.

These warnings and requests—which came from both CISA and the FBI, working together, in the same meetings—provided the "impetus" for platforms to change their policies to censor "hacked materials." Resp. App'x 1293a-1294a (citing Resp. App'x 405a)). These

new CISA-induced policies were then enforced against the speech of Plaintiff Jim Hoft, among many others. Resp. App'x 24a (describing the censorship of *The Gateway Pundit*'s post about Hunter Biden's laptop under Twitter's "hacked materials" policy). CISA also flagged Hoft's specific content directly to induce platforms to remove it. Pet. App'x 75a.

Thus, through the USG-Industry meetings, "CISA was the 'primary facilitator' of the FBI's interactions with the social-media platforms and worked in close coordination with the FBI to push the platforms to change their moderation policies to cover 'hack-and-leak' content." Slip Op. 59. As a result, "the platforms' censorship decisions were made under policies that CISA has pressured them into adopting…." Slip Op. 60.

B. CISA's "Switchboarding" Operations Target Specific Viewpoints.

Also in 2018, CISA launched its "switchboarding" activity, which involves mass-flagging disfavored speakers, viewpoints, and content for censorship on social-media platforms. Like CISA's meetings, CISA's launch of the "switchboarding" program coincided with "intense pressure" from senior federal officials to induce platforms to cooperate with such government requests for the censorship of election-related speech. *See* Stay Opp. 2-3.

"Switchboarding"—a word taken from CISA's website—"is a disinformation-reporting system provided by CISA that allows state and local election officials to identify something on social media they deem to be disinformation aimed at their jurisdiction. The officials would then forward the information to CISA, which would in turn share the information with the social-media companies." Pet. App'x 68a.

During the 2020 election cycle, CISA engaged in "switchboarding" on a large scale. "At least six members of the MDM team, including Scully, 'took shifts' in the 'switchboarding' operation reporting disinformation to social-media platforms." Pet. App'x 74a. "The CISA switchboarding operation ramped up as the election drew near. Those working on the switchboarding operation worked tirelessly on election night." Pet. App'x74a. "They would

also 'monitor their phones' for disinformation reports even during off hours so that they could forward disinformation to the social-media platforms." Pet. App'x 74a.

When "switchboarding," CISA makes no effort to distinguish foreign from domestic speech. "CISA forwards reports of information to social-media platforms without determining whether they originated from foreign or domestic sources." Pet. App'x 73a. CISA admits that the point of targeting foreign information is to restrict domestic speech: "Scully testified that the specific discussion of foreign-originating information is ultimately targeted at preventing domestic actors from engaging in this information." Pet. App'x 70a.

In flagging content for censorship, CISA targets core political speech on the basis of viewpoint. "As an example," one CISA official, "when switchboarding for CISA, forwarded supposed misinformation to CISA's reporting system because the user had claimed 'mail-in voting is insecure' and that 'conspiracy theories about election fraud are hard to discount.'" Pet. App'x 74a. "CISA also flagged for review parody and joke accounts," Pet. App'x 76a—including a Twitter account with 56 followers and the tagline, "hoes be mad, but this is a parody account"; and another with 27 followers and the tagline, "Smoke weed erry day [*sic*]." Resp. Supp. App'x 659a-660a.

Contrary to the Governments' claim, 3d Supp. Br. 6-7, not only did CISA flag disfavored speech, but it also served as a *de facto* fact-checker for the platforms—albeit one tainted by pro-government bias. "Scully admitted that CISA engaged in 'informal fact checking' to determine whether a claim was true or not." Pet. App'x 75a. "CISA would do its own research and relay statements from public officials to help debunk postings for social-media platforms." Pet. App'x 75a. "In debunking information, CISA apparently always assumed the government official was a reliable source; CISA would not do further research to determine whether the private citizen posting the information was correct or not." Pet. App'x 75a. Thus, as the Fifth Circuit held, "CISA's role went beyond mere information

sharing. Like the CDC for COVID-related claims, CISA told the platforms whether certain election-related claims were true or false." Slip Op. 14.

CISA's flagging received privileged treatment from the platforms. "Social-media platforms responded swiftly to CISA's reports of misinformation," Pet. App'x 75a—often responding to CISA-flagged content within minutes, even in the middle of the night, and promptly removing content. *See, e.g.,* Resp. Supp. App'x 515a (responding in the evening within two minutes); Resp. Supp. App'x 674a (responding within one minute at 11:21 p.m.).

In addition to its own "switchboarding," CISA also reports disfavored content to platforms through intermediaries like the Center for Internet Security (CIS), a CISA-funded nonprofit. As the district court found, "CISA funds the CIS through a series of grants." Pet. App'x 71a. "CISA also directs state and local officials to the CIS as an alternative route to 'switchboarding.'" Pet. App'x 71a. "CIS worked closely with CISA in reporting misinformation to social-media platforms. CIS would receive the reports directly from election officials and would forward this information to CISA." Pet. App'x 71a. "CISA would then forward the information to the applicable social-media platforms. CIS later began to report the misinformation directly to social-media platforms." Pet. App'x 71a.

"CISA maintained a 'tracking spreadsheet' of its misinformation reports to social-media platforms during the 2020 election cycle." Pet. App'x 74a. This tracking spreadsheet notes that CISA flagged Jim Hoft's content for censorship: "One of these reports was reported to Twitter for censorship because [the CISA-launched Election Integrity Partnership] 'saw an article on the Gateway Pundit' run by Plaintiff Jim Hoft." Pet. App'x 75a.

The Fifth Circuit summarized these activities: "CISA used its frequent interactions with social-media platforms to push them to adopt more restrictive policies on censoring election-related speech. And CISA officials affirmatively *told* the platforms whether the content they had 'switchboarded' was true or false." Slip Op. 59. "Thus, when the platforms

acted to censor CISA-switchboarded content, they did not do so independently. Rather, the platforms' censorship decisions were made under policies that CISA has pressured them into adopting and based on CISA's determination of the veracity of the flagged information." Slip Op. 59-60. "CISA's actions apparently led to moderation policies being altered and content being removed or demoted by the recipient platforms." Slip Op. 14.

C. CISA's Censorship Activity Is Ongoing and Expanding.

CISA's censorship activities are ongoing and expanding. To this day, "CISA regularly meets with social-media platforms in several types of standing meetings." Pet. App'x 68a. "The Industry meetings began in 2018 and continue to this day." Pet. App'x 69a.

CISA has made public statements expressing its strong commitment to continuing and expanding its role in social-media censorship. "CISA publicly stated that it is expanding its efforts to fight disinformation … in the 2024 election cycle." Pet. App'x 76a. "CISA candidly reported to be 'beefing up its efforts to fight falsehoods' in preparation for the 2024 election cycle." Pet. App'x 134a (square brackets omitted). CISA "wants to ensure that it is set up to extract lessons learned from 2022 and apply them to the agency's work in 2024." Pet. App'x 134a n.676. "On November 21, 2021, CISA Director Easterly reported that CISA is 'beefing up its misinformation and disinformation team in wake of a diverse presidential election and a proliferation of misleading information online.' Easterly stated she was going to 'grow and strengthen' CISA's misinformation and disinformation team." Pet. App'x 77a.

CISA's internal documents reveal its plans to expand its censorship activity beyond election-related speech to a whole host of new, politically charged topics. "A draft copy of the DHS's 'Quadrennial Homeland Security Review,' which outlines the department's strategy and priorities in upcoming years, states that the department plans to target 'inaccurate information' on a wide range of topics, including the origins of the COVID-19 pandemic, the efficacy of COVID-19 vaccines, racial justice, the United States' withdrawal from

Afghanistan, and the nature of the United States' support of Ukraine." Pet. App'x 76a. "Scully also testified that CISA engages with the CDC and DHS to help them in their efforts to stop the spread of disinformation. The examples given were about the origins of the COVID-19 pandemic and Russia's invasion of Ukraine." Pet. App'x 77a.

To be sure, CISA contends it decided around "early May 2022 not to perform switchboarding in 2022." Pet. App'x 68a. This decision coincided with the filing of this lawsuit challenging CISA's switchboarding practices on May 5, 2022. *See Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013). Moreover, CISA kept switchboarding through other channels throughout the 2022 election cycle and fully intends to continue. As noted above, CISA steers reports of disinformation to platforms through the CISA-funded Center for Internet Security, and "[t]he Center for Internet Security continued to report misinformation to social-media platforms during the 2022 election cycle." Pet. App'x 76a. Further, when CISA supposedly stopped switchboarding, CISA official Lauren Protentis badgered platforms to provide state and local officials with an alternative channel to report the content that CISA had been switchboarding. "In the spring and summer of 2022, CISA's Protentis requested that social-media platforms prepare a 'one-page' document that sets forth their content-moderation rules that could then be shared with election officials—and which also included 'steps for flagging or escalating MDM content' and how to report misinformation." Pet. App'x 76a. Further, "[a]t oral arguments Defendants were not able to state that the 'switchboarding' and other election activities of the CISA Defendants … would not resume prior to the upcoming 2024 election." Pet. App'x 142a.

CISA's leadership is profoundly committed to its censorship enterprise. CISA Director Easterly believes that the "infrastructure" that CISA is charged with defending includes our "cognitive infrastructure," stating: "[W]e're in the business of protecting critical infrastructure, and the most critical is our 'cognitive infrastructure.'" Pet. App'x 77a. CISA's

advisory committees embrace this theory of CISA's mission: "On June 22, 2022, CISA's Cybersecurity Advisory Committee issued a Draft Report to the Director, which broadened 'infrastructure' to include 'the spread of false and misleading information because it poses a significant risk to critical function, like elections, public health, financial services and emergency responses.'" Pet. App'x 77a. On Easterly's view, defending our "cognitive infrastructure" includes having the federal government "pick … facts" for the American people: "[Easterly] further stated, 'We live in a world where people talk about alternative facts, post-truth, which I think is really, really dangerous if people get to pick their own facts.'" Pet. App'x 77a. The district court aptly responded: "The Free Speech Clause was enacted to prohibit just what Director Easterly is wanting to do: allow the government to pick what is true and what is false." Pet. App'x 113a.

ARGUMENT

Based on the foregoing facts, CISA violated the First Amendment by becoming deeply entangled in social-media platforms' specific content-moderation decisions, to the point of dictating policies and inducing platforms to remove specific speakers, content, and viewpoints. *See* Slip Op. 59-60. CISA's conduct involved a five-year course of meetings, pressure, ceaseless flagging, fact-checking, coordination with other officials, oversight, and reporting. *See* Statement of Facts, *supra*. When it comes to censorship, CISA "refuses to take 'no' for an answer and pesters [each platform] until it succumbs." Slip Op. 41.

The Government's "Third Supplemental Memorandum Regarding Emergency Application for a Stay" provides no convincing argument for staying the injunction as to CISA or any other entity. First, the Government argues that the Fifth Circuit erred in holding "that 'coercion' can be established absent any threat (implicit or explicit) of adverse action." 3d Supp. Br. 5. To be sure, the Fifth Circuit held that CISA is engaged in "significant encouragement," not coercion. Slip Op. 60. In any event, the Fifth Circuit's test for coercion—

formulated after an extensive discussion of case law, Slip Op. 34-40—centers on the threat of "some form of punishment," whether implicit or explicit: "For coercion, we ask if the government compelled the decision by, through threats or otherwise, intimating that some form of punishment will follow a failure to comply." Slip Op. 40.

Next, the Government disputes the Fifth Circuit's holding that "'significant encouragement' can be established by … 'entanglement.'" 3d Supp. Br. 5. On the contrary, case law provides overwhelming support for the Fifth Circuit's holding that government "entanglement" in private decisionmaking constitutes state action. *See, e.g., Dennis* v. *Sparks*, 449 U.S. 24, 27 (1980) (state action when a private party is "a willful participant in joint action with the State or its agents"); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) ("[I]t is enough that he is a willful participant in joint activity with the State or its agents"); *Rawson* v. *Recovery Innovations, Inc.*, 975 F.3d 742, 753 (9th Cir. 2020) (state action when "the state significantly involves itself in the private parties' actions and decisionmaking at issue," or "the state has … deeply insinuated itself into" the private decisionmaking "process"); *Gallagher* v. *Neil Young Freedom Concert*, 49 F.3d 1442, 1454 (10th Cir. 1995) ("'a substantial degree of cooperative action' between state and private officials" or "'overt and significant state participation'" in private conduct); *Hoai* v. *Vo*, 935 F.2d 308, 313 (D.C. Cir. 1991) ("overt and significant state participation in the challenged action"); *Collins* v. *Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989) (a "substantial degree of cooperative action" between government and private actors); *Jackson* v. *Pantazes*, 810 F.2d 426, 429 (4th Cir. 1987) (the private party "has acted together with or has obtained significant aid from state officials"); *Frazier* v. *Bd. of Trustees of Nw. Miss. Reg'l Med. Ctr.*, 765 F.2d 1278, 1288 (5th Cir. 1985) (state "plays some meaningful role in the mechanism leading to the disputed act").

All these formulations are closely akin to the Fifth Circuit's "entanglement in private decisionmaking" standard. And CISA is engaged in state action under all of them. CISA deeply insinuated itself into the platforms' content-moderation decisions, became entangled in them, became a willful participant in joint action with the platforms, engaged in overt and significant state participation in content-moderation decisions, displayed a substantial degree of cooperative action in them, and played a meaningful role in those decisions. *See supra*, Statement of Facts. CISA's conduct is unconstitutional under every formulation of the test, including the Fifth Circuit's. Slip Op. 59-60.

The Government contends that "the [Fifth Circuit's] rationale with respect to the FBI was that any communication from the FBI is inherently coercive because the FBI is a powerful law-enforcement agency." 3d Supp. Br. 6. This plainly mischaracterizes the Fifth Circuit's opinion. Consistent with the Second and Ninth Circuit's approaches, the Fifth Circuit treated the FBI's law-enforcement status as a significant but non-dispositive factor, to be weighed along with the other factors. Slip Op. 55-56. Similarly, CISA is a component of the Department of Homeland Security, the nation's "lead … domestic security agency," *id.*, so this factor favors a finding of state action as to CISA as well.

The Government disputes the Fifth Circuit's holding that CISA "affirmatively told the platforms whether the content they had 'switchboarded' was true or false," 3d Supp. Br. 6 (quoting Slip Op. 59), contending that there is not "anything in the record to support that assertion." 3d Supp. Br. 6-7. That is wrong. In his deposition, Scully admitted that CISA commonly engages in such informal fact-checking for the platforms: "[I]f social media platforms needed additional information from an election official we would try to support that. … [G]enerally speaking, we would do what we did here, which is … if the jurisdiction made a public statement or if there was additional information the jurisdiction could provide, and the platforms asked for it, that we would try to facilitate getting the information they

asked for." Resp. Supp. App'x 220a. CISA does its own research as well as relaying statements from public officials to help debunk posts for social-media platforms. Resp. Supp. App'x 221a ("If it was a public statement, I'm sure we pulled it ourselves. If there was not a public statement, I would imagine we would go back to the election official."); Resp. Supp. App'x 221a-222a. For example, regarding a report about election security in Pennsylvania, Facebook asked Scully if he could please "confirm" two factual aspects of the report, and Scully responded with an explanation of why the government believed that the report violated Facebook's terms of service. Resp. Supp. App'x 218a-219a; 481a-483a; *see also* Resp. Supp. App'x 222a-224a; 491a-493a (Scully engaging in his own research to debunk an election-integrity claim on Twitter, which relied on Scully's research to censor the Tweet).[1]

The Government argues that "government officials are entitled to express their own views of what is 'true or false' in the marketplace of ideas." 3d Supp. Br. 7. But CISA did not just express its own views. It engaged in a relentless campaign, involving hundreds of meetings and thousands of communications, to pressure platforms to silence *other peoples'* views. In the process, it exercised *de facto* control over platforms' content-moderation policies and became directly involved in hundreds of individual content-moderation decisions involving specific speakers, content, and viewpoints. Where, as here, a federal national-security agency "significantly involves itself" in deciding which posts are to be removed from

[1] In presenting such "debunking" information to platforms to urge them to remove content, CISA always assumed—without any independent research—that the *government* was the reliable source, and that the social-media user was unreliable, even for first-hand accounts: "if there was a public statement that was put out by the jurisdiction, we would … defer to that." Resp. Supp. App'x 221a. CISA would not "take any steps to find out" if the private citizen's account might actually be truthful, and CISA would not "do further research to figure out who was telling the truth," but would simply "relay … the official statement from the jurisdiction" to the platforms to justify censorship. Resp. Supp. App'x 221a.

social-media, and "deeply insinuate[s]itself" in the platforms' content-moderation decisions, it violates the First Amendment. *Rawson*, 975 F.3d at 753; Slip Op. 59-60.

On the Government's view, relentless mass-flagging operations by government officials—undertaken for the whole purpose of silencing Americans' speech on the basis of viewpoint—are perfectly acceptable because they merely constitute "attempt[s] to convince," not coerce. 3d Supp. Br. 7 n.2. This conception of state action is too narrow. Suppose an institutional landlord controlled most of the apartments in a city and refused to rent to Muslims. Would it be constitutional for the Department of Homeland Security to set up a "Muslim Response Team" to identify which tenants were Muslim and "flag" hundreds of them to the landlord in an "attempt to convince" the landlord to evict them on the basis of religion? When CISA and other federal agencies "flag" Americans' speech to social-media platforms to urge them to take it down, they induce platforms to take action against private speech that the platforms otherwise would not take.[2] And "it is … axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood* v. *Harrison*, 413 U.S. 455, 465 (1973). It should be "axiomatic" that CISA's conduct, too, is unconstitutional. "What cannot be done directly cannot be done indirectly." *Students for Fair Admissions, Inc.* v. *Pres. and Fellows of Harvard College*, 600 U.S. 181, 230 (2023) (citation omitted)

Finally, the Government argues that "a proper view of the state-action doctrine" requires a showing of effective coercion, *i.e.*, "the type of positive incentives that *overwhelm a party's independent judgment*." 3d Supp. Br. 8 (emphasis added). This Court has long, and soundly, rejected that theory of state action: "The fact that the Government has not compelled

[2] CISA admits that its "switchboarding" *causes* social-media platforms to censor speech that they otherwise would not censor: "[I]f it hadn't been brought to their attention then they obviously wouldn't have moderated it." Resp. Supp. App'x 17a-18a.

a private party … does not, by itself, establish that the [action] is a private one," because state action may be found where "the Government did more than adopt a passive position toward the underlying private conduct." *Skinner* v. *Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 615 (1989). Here, CISA "did more than adopt a passive position toward" stifling disfavored viewpoints on social media. *Id.* CISA met incessantly with platforms to push them to censor disfavored speech, induced them to adopt more restrictive content-moderation policies, flagged specific viewpoints and content for removal, engaged in fact-checking to convince platforms to remove content, monitored and received reports from platforms about their policies and enforcement actions on content, coordinated other state and federal government agencies to engage in the same conduct, and otherwise became deeply "entangled in the platforms' decision-making process." Slip Op. 57.

CONCLUSION

The Government's application for stay of injunction should be denied. In the alternative, the Government asks the Court to treat its stay application as a petition for writ of certiorari and grant it. If the Court grants certiorari at this time, it should add Respondents' proposed Questions Presented: (1) Whether the Fifth Circuit erred in vacating the provision of the district court's preliminary injunction that prevents federal officials from collaborating with the Election Integrity Partnership, the Virality Project, and similar government/private consortia to censor Americans' speech on social media; and (2) Whether the Fifth Circuit's formulation of the standards for government action provide sufficient protection for fundamental First Amendment interests.

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